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THE LAW OF INFANTS' MARRIAGES

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I. INFANCY DEFINED

Just as the law requires, for ordinary contracts, that a party thereto must have reached an age sufficient to give him reasonable discretion,[1] so, in connection with the contract of marriage, the law has required that the parties be not too immature. It must be remembered, however, that the word "infant" is not one of fixed meaning: when used with reference to ordinary contracts, and without further qualification, it usually means a person under twenty-one years of age;[2] but in the field of criminal law the dividing line between "infancy" and "adult" responsibility is fixed at a lesser age (14 at common law).[3] In the present connection, also, the law, recognizing that physical attributes and various social pressures may be as important as chronological experience,[4] has commonly fixed at less than twenty-one years the age at which completely valid marriages could be contracted.

At common law,[5] where either party was under the age of seven years a purported marriage was treated as totally without effect; between seven and fourteen years for males, and between seven and twelve years for females, the parties could contract a relationship of imperfect status, the exact nature of which will be discussed in the following sections. Where no statutory change has occurred, these ages are the limits of "infancy" in this connection in the American states.[6]

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1. 3 PAGE, CONTRACTS 2714 (2d ed. 1920).
2. 3 PAGE, CONTRACTS 2715-16 (2d ed. 1920); 1 WILLISTON, CONTRACTS 671-72 (rev. ed. 1936).
3. BISHOP, CRIMINAL LAW 259-60 (9th ed. 1923); 1 WHARTON, CRIMINAL LAW 126-28 (12th ed. 1932).
4. For a discussion of the sociological and political factors influencing the law on age for marriage, see Swindlehurst, *Some Phases of the Law of Marriage*, 30 HARV. L. REV. 124 (1916).
5. 1 BLACKSTONE, COMMENTARIES *436.
6. Hunter v. Milam, 5 Cal. Unrep. 107, 41 Pac. 332 (1895); Green v. Green, 77 Fla. 101, 80 So. 739 (1919); Smith v. Smith, 84 Ga. 440, 11 S.E. 496 (1890); Browning v. Browning, 89 Kan. 98, 130 Pac. 852 (1913); Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949); Parton v. Hervey, 67 Mass. (1 Gray) 119 (1854); Bennett v. Smith, 21 Barb. 439 (N.Y. 1856); State v. Ward, 204

However, in most states, modern statutes have made two types of modification with reference to these age groups: (1) there has been a marked tendency to increase the age at which completely valid marriages can be contracted;[7] and (2) there has been a tendency to create an intermediate age classification, within which consent of parents or guardians, or of some judicial officer, is required.[8] While a few cases have suggested otherwise,[9] the weight of authority is that statutes of the first type—those raising the "age of consent"—repeal the common-law rules, making a purported marriage open to attack in proper manner if contracted by a person under the statutory age, even though such person was over the common-law age.[10] The attitude toward the second type of statute—requiring parental or judicial consent—has, however, been different; courts have there held that the requirement for such consent was merely directory and that absence of such consent did not invalidate a marriage or make it open to disaffirm-

S.C. 210, 28 S.E.2d 785 (1944); Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316 (1893).

7. The statutes are listed and classified in 1 VERNIER, AMERICAN FAMILY LAWS 115-19 (1931).

8. The statutes are listed and classified in 1 VERNIER, AMERICAN FAMILY LAWS 119-28 (1931); and see 37 MARQ. L. REV. 237 (1954).

9. See Goodwin v. Thompson, 2 Greene 329 (Iowa 1849); Tisdale v. Tisdale, 121 Wash. 138, 209 Pac. 8 (1922).

10. Vaughan v. Gideon, 56 Cal. App. 2d 158, 132 P.2d 529 (1942); Morgan v. Morgan, 148 Ga. 625, 97 S.E. 675 (1918); Crapps v. Smith, 9 Ga. App. 400, 71 S.E. 501 (1911); Matthes v. Matthes, 198 Ill. App. 515 (1916); People v. Slack, 15 Mich. 193 (1867); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1899); Fitzpatrick v. Fitzpatrick, 6 Nev. 63 (1870); Shafher v. State, 20 Ohio 1 (1851); Carlton v. Carlton, 76 Ohio App. 338, 64 N.E.2d 428 (1945); Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943); Swenson v. Swenson, 179 Wis. 536, 192 N.W. 70 (1923); Eliot v. Eliot, 77 Wis. 634, 46 N.W. 806 (1890); see Koonce v. Wallace, 52 N.C. 194, 196 (1859).

Care must be taken to distinguish between statutes raising the age of consent, as such, and statutes merely requiring that the parties be of a certain age (or have parental consent) in order to secure a license. In jurisdictions recognizing the common-law marriage and treating the requirements of the licensing statutes as purely directory, the result necessarily will be to disregard any violations of the licensing statutes. *Cf.* State v. Ward, 204 S.C. 210, 28 S.E.2d 785 (1944). And even in states requiring ceremonial marriage, not all of the provisions of the licensing statutes are mandatory. To the extent that the nonage amounted only to an evasion of directory portions of such statutes, no problem will arise; on the other hand, if nonage results in a violation of a mandatory requirement of the licensing statute, the problem still is not one of "infancy" but of noncompliance with formal requisites, and it will be decided in accordance with the general rules on that problem. For some light on these distinctions, see Vaughn v. Vaughn, 62 Cal. App. 2d 260, 144 P.2d 658 (1944); Hiram v. Pierce, 45 Me. 367 (1858); Parton v. Hervey, 67 Mass. (1 Gray) 119 (1854); Teague v. Allred, 119 Mont. 193, 173 P.2d 117 (1946); Cross v. Cross, 110 Mont. 300, 102 P.2d 829 (1940); Greenberg v. Greenberg, 97 Misc. 153, 160 N.Y. Supp. 1026 (Sup. Ct. 1916); Gillespie, *"Child Marriages" in Kentucky*, 37 KY. L.J. 282 (1949).

In Caplan v. Caplan, 164 Misc. 379, 300 N.Y. Supp. 43 (Sup. Ct. 1937), and in De Martino v. De Martino, 46 N.Y.S.2d 620 (Sup. Ct. 1944), it was held that, under N.Y. DOM. REL. LAW § 11(5), limiting the officials who may celebrate a marriage of a minor, a marriage celebrated by a person not there listed was void for noncompliance with the formal requisites. But see Andrews v. Andrews, 166 Misc. 297, 1 N.Y.S.2d 760 (Sup. Ct. 1937).

ance[11] except where the terms of the statute involved expressly made such consent an essential condition precedent to a valid marriage.[12]

11. Castor v. United States, 78 F. Supp. 750 (W.D. Mo. 1948), *aff'd*, 174 F.2d 481 (8th Cir. 1949); Robertson v. Robertson, 77 So. 2d 372 (Ala. 1955); Smith v. Smith, 205 Ala. 502, 88 So. 577 (1921); Witherington v. Witherington, 200 Ark. 802, 141 S.W.2d 30 (1940) (but see note 12 *infra*); Hunter v. Milam, 5 Cal. Unrep. 107, 41 Pac. 332 (1895); Johnson v. Alexander, 39 Cal. App. 177, 178 Pac. 297 (1918), 7 CALIF. L. REV. 279 (1919); *In re* Ambrose, 170 Cal. 160, 149 Pac. 43 (1914), 3 CALIF. L. REV. 500 (1915) (the statute involved in these three California cases has since been changed, see note 12 *infra*); Vaughn v. Vaughn, 62 Cal. App. 2d 260, 144 P.2d 658 (1944) (construing an Arizona statute); Gibbs v. Brown, 68 Ga. 803 (1882); Reifschneider v. Reifschneider, 241 Ill. 92, 89 N.E. 255 (1909); People *ex rel.* Mitts v. Ham, 206 Ill. App. 543 (1917); Buszzin v. McKibbin, 254 Ill. App. 519 (1929) [*but cf.* Lyndon v. Lyndon, 69 Ill. 43 (1873)]; Christlieb v. Christlieb, 71 Ind. App. 682, 125 N.E. 486 (1919); Browning v. Browning, 89 Kan. 98, 130 Pac. 852 (1913); Damon's Case, 6 Me. 148 (1829); Hiram v. Pierce, 45 Me. 367 (1858); Commonwealth v. Graham, 157 Mass. 73, 31 N.E. 706 (1892); Radford v. Radford, 214 Mich. 545, 183 N.W. 182 (1921); Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941) [*but cf.* People v. Schoonmaker, 119 Mich. 242, 77 N.W. 934 (1899)]; Hargroves v. Thompson, 31 Miss. 211 (1856); Holland v. Beard, 59 Miss. 161 (1881); State v. Bittick, 103 Mo. 183, 15 S.W. 325 (1891); Teague v. Allred, 119 Mont. 193, 173 P.2d 117 (1946); Melcher v. Melcher, 102 Neb. 790, 169 N.W. 720 (1918); Fitzpatrick v. Fitzpatrick, 6 Nev. 63 (1870); Greenberg v. Greenberg, 97 Misc. 153, 160 N.Y. Supp. 1026 (Sup. Ct. 1916); Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929), 15 ST. LOUIS L. REV. 102; *see* Little v. Holmes, 181 N.C. 413, 107 S.E. 577 (1921); Berry v. Winistorfer, 55 N.D. 310, 213 N.W. 26 (1927); Vernon v. Vernon, 9 Ohio Dec. Reprint 365; Holtz v. Dick, 42 Ohio St. 23 (1884) [*but see* Moser v. Long, 8 Ohio App. 10 (1916)]; Abbott v. Industrial Comm'n, 80 Ohio App. 7, 74 N.E.2d 625 (1946) (construing the Pennsylvania statute); Governor *ex rel.* Smith v. Rector, 29 Tenn. 56 (1849); Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S.W. 66 (1907); Williams v. White, 263 S.W.2d 666 (Tex. Civ. App. 1953); *see* Robertson v. Cole, 12 Tex. 356 (1854) [*but see* Western Union Tel. Co. v. Proctor, 6 Tex. Civ. App. 300, 25 S.W. 811 (1894)]; State v. Stewart, 57 Utah 224, 193 Pac. 855 (1920); Needam v. Needam, 183 Va. 681, 33 S.E.2d 288 (1945); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909); Cushman v. Cushman, 80 Wash. 615, 142 Pac. 26 (1914); see Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908).

In Louisiana, by express statute, lack of parental consent does not affect validity. Delpit v. Young, 51 La. Ann. 923, 25 So. 547 (1899); State v. Dole, 20 La. Ann. 378 (1868); State v. Golden, 210 La. 347, 26 So. 2d 837 (1946), 7 LA. L. REV. 217, 442 (1947); See Kupperman, *The Validity of Child Marriages in Louisiana*, 14 TUL. L. REV. 106 (1939); Note, 4 LOYOLA L. REV. 150 (1948); *cf.* Note, 22 CHI.-KENT L. REV. 41 (1943).

12. *E.g.*, CAL. CIV. CODE § 82(1) (Deering 1949), West v. West, 62 Cal. App. 541, 217 Pac. 567 (1923). In construing a similar statute, the Montana court held that the consent required to validate the marriage was merely a factual consent, the statutory requirement in the licensing statute for written consent applying only as a directory provision guiding the clerk. Cross v. Cross, 110 Mont. 300, 102 P.2d 829 (1940).

MD. ANN. CODE art 62, § 9(a) (1951), states that "it shall be unlawful" for any female under 16 or male under 18 to marry unless the girl is pregnant, or for any female under 18 or male under 21 to marry without parental consent. For a good discussion of whether this section, incorporating the changes effected by the 1939 amendment, considered against the previous Maryland statutes, makes such marriages void, or voidable, or merely imposes criminal liabilities, see Note, 3 MD. L. REV. 340 (1939). For a discussion of the Maryland rules prior to 1939, see Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment*, 2 MD. L. REV. 211, 233-35 (1938).

The parental consent, to be effective, must precede the ceremony; there is no provision for ratification. West v. West, 62 Cal App. 541, 217 Pac. 567 (1923).

Following the decision in Witherington v. Witherington, 200 Ark. 802, 141

II. EFFECT OF NONAGE

A. "Void" and "Voidable" Marriages

1. In General: In discussing marriages contracted by parties under the age of consent, courts and writers frequently have resorted to the terms "void" and "voidable." Such terminology is confusing. The marriage of an infant is a status of peculiar character; whether or not it shall be recognized at all, or, if recognized, how much effect shall be given to it, depends on the nature of the proceeding in which the status is questioned. Hence, it seems best to classify the cases according to the way in which the issue has arisen. Principally, these issues have been: (1) may an infant's marriage be attacked collaterally; (2) may it be attacked, even in a direct proceeding, by anyone except a party; (3) is an infant's marriage one which is valid unless disaffirmed by act of at least one party, or must it receive affirmative approval from both parties after they are of the age fixed by law for contracting marriage?

2. Ratification:[13] Except, perhaps, for the marriages of persons under seven (which probably are totally void in all senses of that term),[14] the cases admit that a nonage marriage is capable of ratification by affirmative act after the parties reach full marriageable age; and that, once so ratified, the marriage becomes a completely valid and binding marriage.[15] While, in states recognizing common-law marriages, it

S.W.2d 30 (1940), the Arkansas statute was amended to provide that where requisite parental consent was not obtained, "such marriage *may* be set aside and annulled upon the application of the parent or parents or guardian." In Mitchell v. Mitchell, 219 Ark. 69, 239 S.W.2d 748 (1951), the court held (over a vigorous dissent) that annullment in such cases was at the discretion of the chancellor and not a matter of right. For a discussion of this case, see 8 ARK. L. REV. 113 (1954).

13. See Note, 24 KY. L.J. 75 (1935).

14. See note 5 *supra*.

15. The "affirmative act" usually consists of cohabitation. Morgan v. Morgan, 148 Ga. 625, 97 S.E. 675 (1918); Americus Gas & Elec. Co. v. Coleman, 16 Ga. App. 17, 84 S.E. 493 (1915); Crapps v. Smith, 9 Ga. App. 400, 71 S.E. 501 (1911); May v. Meade, 236 Mich. 109, 210 N.W. 305 (1926); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1899); Jimenez v. Jimenez, 93 N.J. Eq. 257, 116 Atl. 788 (Ch. 1922); Long v. Baxter, 77 Misc. 630, 138 N.Y. Supp. 505 (Sup. Ct. 1912); Parks v. Parks, 218 N.C. 245, 10 S.E.2d 807 (1940); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); *In re* Zemmick's Estate, 76 N.E.2d 902 (Ohio App. 1946); Vernon v. Vernon, 9 Ohio Dec. Reprint 365; Warwick v. Cooper, 37 Tenn. 659 (1858); Robertson v. Cole, 12 Tex. 356 (1854); see Kibler v. Kibler, 180 Ark. 1152, 23 S.W.2d 867 (1930).

"If the plaintiff and the defendant had continued to live together until the plaintiff was 17 years of age [the local statutory age], and had then expressly ratified the marriage, there would have been a valid contract of marriage; or if they had continued to cohabit and live together as man and wife, there would have been an implied ratification of the marriage, giving validity to the marriage contract." Morgan v. Morgan, 148 Ga. 625, 626-27, 97 S.E. 675, 675-76 (1918).

"I presume that cohabiting with him for the shortest possible time after attaining the age of consent, and indulgence in sexual intercourse, would confirm the marriage." Jimenez v. Jimenez, 93 N.J. Eq. 257, 260, 116 Atl. 788, 789 (Ch. 1922).

would be possible to explain this result by presuming a common-law marriage at the time the age of consent was reached,[16] the courts have not so limited the effect, but have held such marriages to be good even in states where common-law marriages are not permitted[17] and, further, have indicated that the ratification relates back and validates the status from its inception.[18]

To this extent, then, an infant's marriage is not void;[19] if it were, there could be no marriage without satisfaction, after age of consent, of all the formalities of a new marriage, and the status would exist only from the time of a new ceremony.[20]

The marriage may, however, be ratified by acts other than cohabitation. In Holtz v. Dick, 42 Ohio St. 23 (1884), the court suggested that letters to the husband, written after the wife reached marriageable age, amounted to a ratification. In Terrky v. Terrky, 96 Misc. 594, 160 N.Y. Supp. 1016 (Sup. Ct. 1916), ratification was found from obtaining judgment in a suit for separate maintenance after the infant reached the age of consent. See also Hood v. Hood, 206 Ark. 1057, 178 S.W.2d 670 (1944).

To the effect that the burden of proving ratification is on the one who would sustain the nonage marriage, see Mims v. Hardware Mut. Cas. Co., 82 Ga. App. 210, 60 S.E.2d 501 (1950).

16. Such a theory is suggested in Smith v. Smith, 84 Ga. 440, 11 S.E. 496 (1890). In Georgia the statute, in terms, declared infant marriages to be void; the court, referring to the fact that the state recognized common-law marriages, held that the marriage was valid at least from the date of reaching the age of consent; it expressly reserved the question of whether or not, under the Georgia statute, the ratification would relate back. But in Crapps v. Smith, 9 Ga. App. 400, 71 S.E. 501 (1911), a habeas corpus proceeding between the father and husband of an infant, the court, after saying that the marriage was void for nonage, declared that the girl could return to her husband upon reaching the age of consent and that, if she did so, the marriage would be ratified. See also, Jones v. Jones, 200 Ga. 571, 37 S.E.2d 711 (1946); Eskew v. Eskew, 199 Ga. 513, 34 S.E.2d 697 (1945); Powers v. Powers, 138 Ga. 65, 74 S.E. 759 (1912).

In Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945), the relation back doctrine seems necessarily to be involved, though the court does not mention it by name. In that case, the girl, under age by both Tennessee and Georgia law, went to Georgia to be married; cohabitation, apparently in other states, continued after she had reached the statutory age in Georgia. Though she had not yet reached the Tennessee age, the court held that her Georgia marriage had been ratified by this cohabitation.

17. As will appear from the cases cited in note 15 *supra*, the doctrine of ratification has been recognized in all states; similar recognition is given in the statutory codifications of the rules on infant's marriages. See the collection of statutes in 1 VERNIER, AMERICAN FAMILY LAWS §§ 29-30 (1931).

18. May v. Meade, 236 Mich. 109, 210 N.W. 305 (1926); Koonce v. Wallace, 52 N.C. 194 (1859); Holtz v. Dick, 42 Ohio St. 23 (1884); see Jones v. Jones, 36 Md. 447, 11 Am. Rep. 505 (1872).

For the Georgia situation see note 16 *supra*.

19. Luke v. Hill, 137 Ga. 159, 161, 73 S.E. 345, 346 (1911): "Such marriages partake more of the nature of voidable than void marriages. They are imperfect marriages, which the party may affirm or disaffirm after reaching the age of consent. Hence, upon reason, a decree in a nullity suit because of the non-age of one of the parties should be treated as a decree of dissolution of a voidable marriage, so far as it affects strangers." *But cf.* Eskew v. Eskew, 199 Ga. 513, 34 S.E.2d 697 (1945); Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949).

20. In Blunt v. Blunt, 198 Okla. 138, 176 P.2d 471 (1947), the court held that, assuming the parents could sue to annul the marriage of a minor son, they were estopped to do so where, with knowledge of the marriage, they had acknowledged its existence until after the birth of a child.

3. Affirmance Versus Disaffirmance: While, as has been seen, all jurisdictions recognize the effectiveness of an affirmance of the infant's marriage by recognition thereof after reaching the age of consent, the more difficult problem is whether or not such a ratification is necessary in order to keep the marriage in force after that date. The weight of authority would seem to be that it is not, that, unless there is appropriate disaffirmance, and until such disaffirmance, the infant's marriage is binding on him and on the world.[21] Hence, not only is a second marriage, prior to disaffirmance of the first, bigamous,[22] but all of the incidents of marriage—co-habitation,[23] right to marital inter-

21. Taylor v. Taylor, 249 Ala. 419, 31 So. 2d 579 (1947); Beggs v. State, 55 Ala. 108 (1876); Garner v. State, 9 Ala. App. 60, 64 So. 183 (1913); Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Territory v. Howard, 15 N.M. 424, 110 Pac. 556 (1910); Hunt v. Hunt, 23 Okla. 490, 100 Pac. 541 (1909); State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926), 7 B.U.L. REV. 207 (1927), 40 HARV. L. REV. 654 (1927), 5 N.C.L. REV. 180 (1927), 12 ST. LOUIS L. REV. 149 (1927), 36 YALE L.J. 426 (1927); State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893); see State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

The principal case to the contrary is Shafher v. State, 20 Ohio 1 (1851). In this case, the court squarely held that the infant marriage had no effect unless there was a positive act of affirmance after the age of consent was reached; but the case is weakened by the fact that the court also said that there had been a disaffirmance by leaving the wife and marrying another. See also Carlton v. Carlton, 76 Ohio App. 338, 64 N.E.2d 428 (1945).

In Ragan v. Cox, 210 Ark. 152, 194 S.W.2d 681 (1946), the court, construing a 1941 amendment which had declared nonage marriages to be "absolutely void," held that this was to be taken literally and that an attempted marriage to a 12-year-old girl "resulted in a transaction which could not be dignified by the term 'marriage,' and that following a ceremony . . . the relationship was exactly what it had been before . . . ." For discussion of the Arkansas law before 1941, see Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930); Walls v. State, 32 Ark. 565 (1878); see also the first appeal in the *Ragan* case, Ragan v. Cox, 208 Ark. 809, 187 S.W.2d 874 (1945).

While the Michigan cases are not too clear, it is thought that they stand for the majority rule. Although some of the language in People v. Schoonmaker, 119 Mich. 242, 77 N.W. 934 (1899), might be urged in support of the minority view, the real rationale of that case would seem to be that, both before and after reaching the age of consent, the minor had "disaffirmed" by voluntarily continuing a separation. At least, the court expressly refused to overrule People v. Slack, 15 Mich. 193 (1867), where a marriage had been held to continue, after age of consent was reached, where the infant had not consented to a continuance of separation (*i.e.*, where the infant had not disaffirmed). The present problem was not involved in People v. Bennett, 39 Mich. 208 (1878), since there the minor had disaffirmed.

But in Georgia, where the infant's marriage is declared "void," the failure to ratify a marriage by cohabitation after reaching age of consent rendered the marriage ineffective to invalidate a second marriage. Hayes v. Hay, 88 S.E.2d 306 (Ga. App. 1955); Mims v. Hardware Mut. Cas. Co., 82 Ga. App. 210, 60 S.E.2d 501 (1950).

22. Beggs v. State, 55 Ala. 108 (1876); Garner v. State, 9 Ala. App. 60, 64 So. 183 (1913), 18 LAW NOTES 14 (1914); Walls v. State, 32 Ark. 565 (1878); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926); State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893). *Contra,* Shafher v. State, 20 Ohio 1 (1851).

23. People *ex rel.* Mitts v. Ham, 206 Ill. App. 543 (1917); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1899); Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909).

In Raske v. Raske, 92 F. Supp. 348 (D. Minn. 1950), the wife obtained a judgment against the husband's mother for alienation of affections. Thereafter the marriage was annulled, for the husband's nonage, at the suit of the

course,[24] and obligations of support[25]—continue until disaffirmance becomes effective.

B. When May Disaffirmance Take Place?

Of course, in those jurisdictions that say that an infant's marriage is without effect unless affirmed after coming of age, only acts at or after that date are significant. But, in the majority states, where disaffirmance is necessary, there arises the subsidiary problem: may the infant disaffirm before reaching the age of consent? At first blush, it would seem that he could not; the whole theory behind the law of infants' marriages is the idea that, under a certain age, the infant can not intelligently select a spouse; if he is incapable of making a wise selection, it would seem to follow that he was equally incapable of making a wise rejection of one already acquired.[26] However, where the marriage is not totally void for all purposes (and the problem can arise only in such a state), the status, until disaffirmed, carries with it all of the incidents—both rights and liabilities—of any marriage.[27] If these are to continue until the age of consent is reached, both the infant and the public may be seriously affected: an infant husband may be subjected to economic burdens of support such as to handicap his education; the infant may be exposed to unsatisfactory social conditions created by a spouse of poor character; and cohabitation may result in issue whose welfare will later be affected by a termination of the marriage. Hence, it is probably good policy to permit an infant to disaffirm his marriage at as early a date as he desires. Occasionally an infant may use this rule as a device to achieve a series of trial marriages; but the risk of this undoubtedly is less than the almost inevitable losses produced by any other rule. Accordingly, while a few cases have held to the strictly logical rule,[28] the majority have per-

parent. The court allowed the judgment to stand.

The rule here is, of course, different where the parent may collaterally attack the marriage. See the cases cited in note 39 *infra*.

24. People v. Souleotes, 26 Cal. App. 309, 146 Pac. 903 (1915); People v. Pizzura, 211 Mich. 71, 178 N.W. 235 (1920); Peefer v. State, 42 Ohio St. 276, 182 N.E. 117 (1931). *But see* Hardy v. State, 37 Tex. Crim. 55, 38 S.W. 615 (1897).

25. Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (N.Y. Dom. Rel. Ct. 1941); Hunt v. Hunt, 23 Okla. 490, 100 Pac. 541 (1909); Stone v. Stone, 193 Okla. 458, 145 P.2d 212 (1944); Eliot v. Eliot, 77 Wis. 634, 46 N.W. 806 (1890); *cf.* Eskew v. Eskew, 199 Ga. 513, 34 S.E.2d 697 (1945).

26. The problem is similar to that involved in the power of an infant, during minority, to disaffirm ordinary contracts. The majority rule is that such power exists. See Note, 23 GEO. L.J. 330 (1935).

27. See notes 23-25 *supra*.

28. Palmer v. Palmer, 79 N.J. Eq. 496, 82 Atl. 358 (Ch. 1911); Jordan v. Manning, 2 Tenn. Civ. App. 130 (1911); see Beggs v. State, 55 Ala. 108 (1876). *But see*, disapproving the *Palmer* case, *In re* Anonymous, 108 A.2d 882 (N.J. 1954).

In Aymar v. Roff, 3 Johns. Ch. 49 (N.Y. 1817), the infant had disaffirmed and left her husband before reaching the age of consent; however, on the very day she reached that age, she renewed her disaffirmance in formal

mitted disaffirmance before the age of consent was reached.[29]

C. "Clean Hands."

In connection with ordinary contracts, it is the general rule that an infant is not estopped to rely on his infancy by having fraudulently misrepresented himself to be of age.[30] In only a few cases has the issue of such misrepresentation, or other lack of "clean hands," been urged as a bar to disaffirmance by the infant of a nonage marriage. This lack of authority is, itself, indicative that counsel generally have not thought that such an estoppel existed. In the few cases in which the point has been raised, all except one have said that the infant's power to disaffirm was absolute.[31] However, in *Gibbs v. Gibbs*,[32] the New Jersey court held that, where the infant was the husband, he could not annul after having fraudulently misrepresented his age. The court's reasoning would seem to restrict its holding to attempted disaffirmance by an infant husband;[33] and the court itself expressly limits the rule to cases where the wife could show that she knew of the rules of law relative to nonage marriages and that her reason for being interested in the husband's age was simply to avoid the risk of her marriage later being disaffirmed by him.[34]

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fashion. The subsequent litigation seems to be based on the latter disaffirmance.

29. Owen v. Coffey, 201 Ala. 531, 78 So. 885 (1918); Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930); Canale v. People, 177 Ill. 219, 52 N.E. 310 (1898); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1899); Eliot v. Eliot, 77 Wis. 634, 46 N.W. 806 (1890); see People v. Bennett, 39 Mich. 208 (1878). *But cf.* People v. Schoonmaker, 119 Mich. 242, 77 N.W. 934 (1899); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 384 (1923).

While the actual decision in Shafher v. State, 20 Ohio 1 (1851), was placed on another ground, the court, as an alternative basis of its decision, suggested that there had been an effective disaffirmance while the party was still under the age of consent. The same point of view is urged in the dissent in State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926).

Where annulment must be by judicial proceeding, or where a statutory proceeding for annulment is resorted to, the question of the power to avoid during minority is one of construction of the statute relied on. Ordinarily, such statutes provide for annulment during nonage. See 1 VERNIER, AMERICAN FAMILY LAWS 239-60 (1931).

30. See 14 R.C.L., *Infants* 241-42 (1929).

31. Hood v. Hood. 206 Ark. 1057, 178 S.W.2d 670 (1944); Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930); Quigg v. Quigg, 42 Misc. 48, 85 N.Y. Supp. 550 (Sup. Ct. 1903); Swenson v. Swenson, 179 Wis. 536, 192 N.W. 70 (1923).

32. 92 N.J. Eq. 542, 113 Atl. 704 (Ch. 1921).

33. The court recites, at some length, the social loss to a woman whose marriage has been annulled; it lays particular stress on the possibility of annulment leaving the wife with a child to rear; in practice, none of the evils thus envisaged by the court would fall upon an adult husband whose marriage had been annulled by his wife.

34. "Suppose, for example, in the trial of the instant case, the proofs should fully establish all the allegations of defendant, but that it should further appear that defendant was a woman of 23 or 24 (her age does not appear in the pleadings), and that she in fact knew nothing whatever as to the existence of the statutory provision in question [permitting annulment for nonage]; that she, indeed, would not have married him had she known he was only 17 instead of 21, not, however, because of this statutory provision of which she

On principle, it would seem that the majority rule is the sounder. Whatever may be the justification for finding an estoppel against the infant in ordinary contracts,[35] society itself has such an interest in preventing the ill-considered marriages of the young that no act of the infant himself should be allowed to give effect to a marriage which that policy has said should be open to attack.[36]

D. Who May Attack?

Although a few cases have held otherwise,[37] the overwhelming weight of authority is that, apart from statutes expressly authorizing a parent or guardian to sue,[38] no one except a party to the marriage may question its validity, either collaterally[39] or by direct attack.[40]

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did not know, but because she would not wish to be deemed (to use the vernacular) a 'cradle robber.' The misrepresentation of the essential fact, the reliance upon it, the marriage which but for the deceit would not have been contracted, are all present, but I incline very strongly to the belief that the husband's decree would not be withheld." Gibbs v. Gibbs, 92 N.J. Eq. 542, 552, 113 Atl. 704, 708 (Ch. 1921).

35. See the authorities cited in note 30 *supra.*

36. The problem here is, of course, as was pointed out in Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930), quite different from that presented where the adult seeks to annul the marriage because the infant has fraudulently misrepresented his age, the infant resisting annulment. On the latter question, see Fodor v. Kunie, 92 N.J. Eq. 301, 112 Atl. 598 (Ch. 1920); Robertson v. Cole, 12 Tex. 356 (1854); Kingsley, *Fraud as a Ground for Annulment of Marriage,* 18 So. CALIF. L. REV. 213 (1945).

37. Americus Gas and Elec. Co. v. Coleman, 16 Ga. App. 17, 84 S.E. 493 (1915) (nonage raised as a defense to an action for wrongful death brought by wife of infant); Crapps v. Smith, 9 Ga. App. 400, 71 S.E. 501 (1911) (habeas corpus proceedings by infant's father); Hardy v. State, 37 Tex. Crim. 55, 38 S.W. 615 (1897) (state allowed to attack marriage in a prosecution for statutory rape).

38. See, for example, Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923); 1 VERNIER, AMERICAN FAMILY LAWS 250-60 (1931).

Although the New York statute allows the parent to sue, still, so personal is the matter involved that the child must be joined as a party, either plaintiff or defendant. Feldman v. Intrator, 175 Misc. 632, 24 N.Y.S.2d 665 (Sup. Ct. 1941). and see note 40 *infra.*

On the necessity of a guardian ad litem, see Mills, *Minor Parties in Annulment Cases,* 9 OKLA. ST. BAR J. 132 (1938); Annot., 150 A.L.R. 609 (1944).

39. People v. Souleotes, 26 Cal. App. 309, 146 Pac. 903 (1915) (state attempted to question validity of marriage in a statutory rape case); State v. Volpe, 113 Conn. 288, 155 Atl. 223 (1931) (infant wife not a compellable witness against the husband); People *ex rel.* Mitts v. Ham, 206 Ill. App. 543 (1917); (habeas corpus proceedings between husband and parents of infant); People v. Pizzura, 211 Mich. 71, 178 N.W. 235 (1920) (state attempted to question validity of marriage in a statutory rape case); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1899) (habeas corpus proceedings); Territory v. Harwood, 15 N.M. 424, 110 Pac. 556 (1910) (prosecution for celebrating void marriage); Peefer v. State, 42 Ohio St. 276, 182 N.E. 117 (1931) (state attempted to question validity of marriage in prosecution for contributing to delinquency of a minor); *Ex parte* Nolte, 269 S.W. 906 (Tex. Civ. App. 1925) (habeas corpus proceedings by a parent against husband); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909) (habeas corpus proceedings between husband and parents).

40. Niland v. Niland, 96 N.J. Eq. 438, 126 Atl. 530 (Ch. 1924); Wood v. Baker, 43 Misc. 310, 88 N.Y. Supp. 854 (Sup. Ct. 1904); Klinebell v. Hilton, 25 Ohio N.P. (n.s.) 167 (1924); Fink v. Fink, 17 N.W.2d 717 (S.D. 1945); Williams v. White, 263 S.W.2d 666 (Tex. Civ. App. 1953); Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909).

It is the general rule concerning infant's contracts that only the infant may question his power to contract.[41] Similarly, in the case of infant's marriages, only the infant may set aside the marriage,[42] and the full-age party has no power to question its validity.[43]

E. How May Attack Be Made?[44]

At common law, no judicial proceeding was necessary in order to set aside a marriage for nonage; the party, by his own act, could so treat it.[45] However, there is a public policy in favor of having a public record of a fact of such importance; hence, when statutes begin to recognize judicial proceedings for annulment on this ground, the courts began to insist that such proceedings constituted the exclusive mode of disaffirmance.[46] Sometimes such decisions were supported by lan-

Contra, Owen v. Coffey, 201 Ala. 531, 78 So. 885 (1918).

In Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930), the court held that where the infant participated in the trial, as a witness for the plaintiff, suit could properly be brought in the name of the parent as best friend.

Under the New York statute, at least as it existed prior to 1922, so strictly did the court adhere to the theory that the right to vacate a marriage for nonage was personal, that it held that a right to annul existed even where the marriage was celebrated under a license issued with full parental consent. See Kruger v. Kruger, 137 App. Div. 289, 122 N.Y. Supp. 23 (1st Dep't 1910); Wander v. Wander, 111 App. Div. 189, 97 N.Y. Supp. 586 (1st Dep't 1906); Earl v. Earl, 96 App. Div. 639, 89 N.Y. Supp. 1103 (4th Dep't 1904); Conte v. Conte, 82 App. Div. 335, 81 N.Y. Supp. 923 (1st Dep't 1903); Mundell v. Coster, 80 Misc. 337, 142 N.Y. Supp. 142 (Sup. Ct. 1913). See Note, 26 YALE L.J. 622 (1917).

41. 3 PAGE, CONTRACTS 2773 (2d ed. 1920); 1 WILLISTON, CONTRACTS 690 (rev. ed. 1936).

42. Campbell v. Campbell, 78 Cal. App. 745, 248 Pac. 762 (1926) (decision rested partly on statute); Fodor v. Kunie, 92 N.J. Eq. 301, 112 Atl. 598 (Ch. 1920).

The early Michigan law was in accord: People v. Slack, 15 Mich. 193 (1867); People v. Bennett, 39 Mich. 208 (1878); People v. Schoonmaker, 119 Mich. 242, 77 N.W. 934 (1899); Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941). But the latest decision, construing a current statute which, in terms, declares the marriage of a girl under 16 to be "void," holds that the adult husband was entitled to a decree to this effect. Evans v. Ross, 309 Mich. 149, 14 N.W.2d 815 (1944).

43. There is nothing in Shafher v. State, 20 Ohio 1 (1851), to the contrary; the attack there was by the person who was an infant when the marriage in question was contracted; the only problem was whether his attack had been made in proper fashion and at the proper time.

In jurisdictions permitting attack by a third party (see note 37 *supra*), a fortiori the adult spouse could attack validity.

44. Of course, where a nonage marriage is subject to collateral attack, no judicial proceeding for annulment is necessary. So, also, in those states that require a positive affirmance on reaching the age of consent. The discussion here is, thus, limited to those states which (a) restrict avoidance to a direct attack, and (b) require disaffirmance in order to effect an avoidance.

45. Canale v. People, 117 Ill. 219, 52 N.E. 310 (1898) (dicta); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 384 (1923); People v. Schoonmaker, 119 Mich. 242, 77 N.W. 934 (1899); People v. Bennett, 39 Mich. 208 (1878); see Shafher v. State, 20 Ohio 1 (1851).

46. Taylor v. Taylor, 249 Ala. 419, 31 So. 2d 579 (1947); Garner v. State, 9 Ala. App. 60, 64 So. 183 (1913); Walls v. State, 32 Ark. 565 (1878); State *ex rel.* Scott v. Lowell, 78 Minn. 166, 80 N.W. 877 (1890); Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906); Territory v. Harwood, 15 N.M. 424, 110 Pac.

guage in the statute that an infant's marriage would be "void" from the time so declared by decree, or by similar language;[47] but, even without such indication in the statute, the courts now usually insist on judicial proceedings in order to terminate the effectiveness of nonage marriages.[48]

III. What Law Governs?

There exists in the authorities some dispute as to whether any state, other than that where a marriage was contracted, has jurisdiction to annul a marriage.[49] If jurisdiction to annul is thus limited, then, of

556 (1910); Mitchell v. Mitchell, 63 Misc. 580, 117 N.Y. Supp. 671 (Sup. Ct. 1909); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); Berry v. Winistorfer, 55 N.D. 310, 213 N.W. 26 (1927); Hunt v. Hunt, 23 Okla. 490, 100 Pac. 541 (1909); State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926), 36 YALE L.J. 426 (1927); State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893).

Johnson v. Alexander, 39 Cal. App. 177, 178 Pac. 297 (1918), 7 CALIF. L. REV. 279 (1919), implies as much, since it holds that there could be no attack on an infant marriage for lack of parental consent where such lack was not specified as a ground for annulment in the statute. Of similar nature are Niland v. Niland, 96 N.J. Eq. 438, 126 Atl. 530 (Ch. 1924); Berry v. Winistorfer, 55 N.D. 310, 213 N.W. 26 (1927).

47. See, *e.g.*, Walls v. State, 32 Ark. 565 (1878); Territory v. Harwood, 15 N.M. 424, 110 Pac. 556 (1910); State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893).

The New York statute was amended in 1922 by chapter 313 to make annulment for nonage discretionary. N.Y. DOM. REL. § 7(1). For discussion of the situations in which such discretion is exercised, see Quinzi v. Quinzi, 261 App. Div. 929, 25 N.Y.S.2d 435 (2d Dep't 1941); Keegan v. Keegan, 209 App. Div. 74, 204 N.Y. Supp. 405 (1st Dep't 1924); Kellogg v. Kellogg, 122 Misc. 734, 203 N.Y. Supp. 757 (Sup. Ct. 1924). Under this statute, necessarily, there can be no termination of the nonage marriage by any means other than the statutory annulment action. Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (N.Y. Dom. Rel. Ct. 1941).

48. The cases cited in note 46 *supra*, other than those re-cited in note 47 *supra*, all appear to have been decided without the aid of specific statutory language.

It should be again noted that, if only statutory actions for annulment may be utilized, the problems with regard to time of disaffirmance and who may attack become simply matters of interpreting the statutory grant of power to sue.

49. The leading argument for this view will be found in: Goodrich, *Jurisdiction to Avoid a Marriage*, 32 HARV. L. REV. 806 (1919); 1 BEALE, CONFLICT OF LAWS 509-13 (1935). The views of Mr. Beale were carried forward into the *Restatement*. RESTATEMENT, CONFLICT OF LAWS § 115 (1934). See also Bell v. Bell, 122 W. Va. 223, 8 S.E.2d 183 (1940).

The decision in Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1913), sometimes cited for this view, does not support it. The Massachusetts court construed the law of New Hampshire (the state of celebration) as making the marriage in question avoidable only in the discretion of the court; to say that the Massachusetts court would not attempt to exercise a discretionary power of a foreign court is not the same as saying that it would not pass on the question of status where avoidance was a matter of right. In a later decision, Levy v. Levy, 309 Mass. 230, 34 N.E.2d 650 (1941), a suit to annul for fraud a marriage contracted in New York, the Massachusetts court held that it did have jurisdiction to act, the parties being domiciled in Massachusetts, but that the applicable substantive law would be that of New York. In Sirois v. Sirois, 94 N.H. 225, 50 A.2d 88 (1946), the court sustained the jurisdiction of New Hampshire to annul a marriage contracted in Massachusetts,

course, only the law of the place of contracting will be applied. However, it would appear that most courts have been willing to assume jurisdiction of such suits, at least where the parties are, at the time of suit, domiciled in the forum, and possibly if the defendant may be found there. Where such a view as to jurisdiction prevails, the problem then arises as to whether the law of the forum, or the law of the place of contracting should be applied. It is stated to be the general rule that the validity of a marriage is to be determined by the law of the place where it was celebrated; all other jurisdictions are supposed to defer to such law except where recognition of the status would do extreme violence to the settled public policy of the forum.[50]

With but occasional dissent,[51] the courts have treated the general rule, and not its exception, as applicable to the case of infants' marriages, saying that, while the policy of the forum preferred the wisdom of greater age before assuming the duties of marriage, still the locality would not be so shocked by the spectacle of married infants as to justify denial of legitimacy to a status validly created elsewhere.[52] Even where the state of domicile has a "marriage evasion" statute, refusing recognition to marriages between its citizens contracted outside its boundaries in order to avoid the law of their home, still the courts have followed the general doctrine and sustained the nonage marriage if it was valid where celebrated.[53]

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the party being under the age of consent by the law of either state.

While it was held in Roop v. Roop, 91 N.H. 47, 13 A.2d 474 (1940), 14 So. CALIF. L. REV. 70, that the state of celebration had no jurisdiction to annul for nonage, where the parties had simply come to New Hampshire to be married and had always resided outside the state, yet the general rule seems to be that the state of celebration has at least a concurrent power to annul. Sawyer v. Slack, 196 N.C. 697, 146 S.E. 867 (1929), 7 N.C.L. REV. 458. The real problem is whether or not the power of the state of celebration is exclusive.

50. RESTATEMENT, CONFLICT OF LAWS §§ 121, 129, 133, 134 (1934).

51. Jimenez v. Jimenez, 93 N.J. Eq. 257, 116 Atl. 788 (Ch. 1922); Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912), 26 HARV. L. REV. 253 (1913); Mitchell v. Mitchell, 63 Misc. 580, 117 N.Y. Supp. 671 (Sup. Ct. 1909); Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923), 23 COLUM. L. REV. 782; *cf.* Cruickshank v. Cruickshank, 82 N.Y.S.2d 522 (Sup. Ct. 1948), 49 COLUM. L. REV. 693 (1949).

It is not clear whether the court in Sirois v. Sirois, 94 N.H. 225, 50 A.2d 88 (1946), intended to apply the Massachusetts or New Hampshire substantive law; the marriage was voidable under either; but the court cites with approval authorities tending toward the application of the law of the domicile rather than the law of the place of celebration.

See also, Bays v. Bays, 105 Misc. 492, 174 N.Y. Supp. 212 (Sup. Ct. 1918), 4 CORNELL L.Q. 200 (1919).

52. MacDonald v. MacDonald, 6 Cal. 2d 457, 48 P.2d 163 (1936), 10 So. CALIF. L. REV. 200 (1937); Vaughn v. Vaughn, 62 Cal. App. 2d 260, 144 P.2d 658 (1944); Payne v. Payne, 121 Colo. 212, 214 P.2d 495 (1950); Reifschneider v. Reifschneider, 241 Ill. 92, 89 N.E. 255 (1919); Sokel v. People, 212 Ill. 238, 72 N.E. 382 (1904); Schwartz v. Schwartz, 236 Ill. App. 336 (1925); Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949); Commonwealth v. Graham, 157 Mass. 73, 31 N.E. 706 (1892); Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941); Von Felden v. Von Felden, 212 Minn. 54, 2 N.W.2d 426 (1942); Cross v.

Cross, 110 Mont. 300, 102 P.2d 829 (1940); Courtwright v. Courtwright, 11 Ohio Dec. Reprint 413; *Ex parte* Chace, 26 R.I. 351, 58 Atl. 778 (1904); see Note, 31 VA. L. REV. 210 (1944).

53. Schwartz v. Schwartz, 236 Ill. App. 336 (1925); Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1913); see also Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949).

The rationale given is that the marriage evasion statutes deny recognition to a foreign marriage only where the marriage is "void" under the law of the domicile; and that, in the sense there used, infant marriages are not "void." But see Bell v. Bell, 122 W. Va. 223, 8 S.E.2d 183 (1940), construing W. VA. CODE ANN. §§ 4695, 4701 (1955).