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Comment

STATUTORY PROHIBITIONS AGAINST INTERRACIAL MARRIAGE

INTRODUCTION

California like many other states has many intricate problems which have grown out of the fact that people of different races are living side by side.¹ One major problem is miscegenation, which in its broad meaning is racial admixture and in its more restricted sense is interracial marriage; for the purposes of this article, miscegenation will be used in its specific meaning, interracial marriage. In trying to formulate a solution to this problem, California has by statute declared that such attempts at marriage are illegal and void. The purpose of this article is to survey the present state of California's miscegenation law and to examine generally like interracial marriage statutes in other states of the Union.

In viewing the existing law, it is well to note that at common law there was no ban on interracial marriage.² However, early in history

¹ In Comment (1942) 30 CALIF. L. REV. 563, the writer discusses other phases of California statutory enactments coping with the problems growing out of race relations, particularly Civ. CODE §§51-54.

² "At common law, persons are not incapacitated to intermarry by reason of a disparity in race or color. Hence, in the absence of statutory prohibition, a white person and a negro may contract a valid marriage, as may a white and an Indian." 38 C. J. 1290-1291. *Semble*: 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION (5th ed. 1873) 308; Hart v. Hoss (1874) 26 La. Ann. 90; and, Follanslee v. Wilbur (1896) 14 Wash. 242, 44 Pac. 262. There was no rule at common law in England nor has any statute been passed in England banning interracial marriages, RINTON AND PHILLIMORE, THE COMPARATIVE LAW OF MARRIAGE AND DIVORCE (1910) 142.

of the colonies, in 1661, the first definite legislative prohibition was passed in the Colony of Maryland.³ Before the American Revolution, at least five states had established legislative bans and penalties against interracial marriage and/or cohabitation.⁴ Since the Revolutionary War, this prohibition has been extended fairly steadily by state legislation. This is true up to the present time. However, in recent years a few states have repealed previously enacted miscegenation laws,⁵ and a few state legislatures have refused to adopt such legislation when it was proposed.⁶ Nevertheless, thirty states have statutes which prohibit the intermarriage of specified racial groups.⁷

Although originally the statutes were directed wholly against Negro-Caucasian unions, the scope of the legislation now extends to interdictions against marriage between white men and Mongolians, Malayans, mulatto, or even American Indians. The ban on marriages between negroes and whites is still the most common one: the unions are banned throughout the South, the Southeast, and the West except for Washington and New Mexico; the interdictions are non-existent in New England, and the Middle Atlantic States outside of Delaware, and in the North Central States except Indiana; and, in the "great farm belt," typical is the situation of states like Nebraska and Iowa living side by side one with a miscegenation statute, and one without.⁸ Mongolian-Caucasian marriages are prohibited in fourteen states,

³ The original statute in Maryland passed in 1661 prohibited the internarriage of white women and negro slaves under the penalty of slavery to the white woman and all her issue. In 1715 and 1717, the penalties were made more severe as the Legislature of Maryland made cohabitation between any white person and a negro illegal. In 1728, it was made illegal for any free-born person, white or mulatto, man or woman, to cohabit with a negro or negress. Further, mulattoes were forbidden from intercourse with whites. For the full text of the statute, see REUTER, *RACE MIXTURE—STUDIES IN INTERMARRIAGE AND MISCEGENATION* (1931) 80.

⁴ According to REUTER, *op. cit. supra* note 3, at 81, Maryland passed legislation, 1661-1728; Massachusetts in 1705; North Carolina in 1715; Pennsylvania in 1725; and Virginia in 1691.

⁵ *Ibid.* at 98, lists Maine, Massachusetts, Michigan, Ohio and Pennsylvania.

⁶ *Ibid.* at 103. Several states have refused to pass such statutes in recent years. Massachusetts, Connecticut, and Kansas in 1928 and 1929. Wisconsin in 1930; other states which have declined to pass such legislation since 1920 are Illinois, Iowa, Michigan, Minnesota, New York, Ohio, Pennsylvania and Washington. The District of Columbia has no such legislation because of the refusal of Congress.

⁷ After checking the present state of legislation throughout the country, the writer can recommend the following as adequate and comprehensive statements of existing statutory law of miscegenation: ASHLEY-MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (1942) 187; RADIN, *PHRONISTRY, KEEPING OUR BLOOD PURE* (1933) 91-95; REUTER, *op. cit. supra* note 3, at 82-98; VERNIER, *AMERICAN FAMILY LAWS* (1931) 544; and, Comment (1927) 36 *YALE L. J.* 858.

⁸ RADIN, *op. cit. supra* note 7, at 92, reports: "Negroes may not be married by white men or women in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North and South Dakota, North and South Carolina, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. In

mostly in the West but a few in the South.⁹ Some five western states prohibit Malay-white marriages.¹⁰ South Dakota especially names Koreans in its miscegenation statute.¹¹ Five states, scattered throughout the South and West, place Indian-white marriages in their prohibited classes.¹² In all the states which have miscegenation statutes, except California, these marriages are not only void¹³ but are subject to criminal penalties. The penalties fall upon all persons, white and "colored" alike, either for attempting such a marriage¹⁴ or, as the attempted marriage is void, for engaging in illegal extramarital relations.¹⁵

Alabama, in the Carolinas, and in Tennessee (as well as Florida and Mississippi), the Constitution forbids forever the legislature to sanction miscegenation."

⁹ The fourteen states which ban interracial marriages of Caucasians and Mongolians are Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming. See *supra* note 7 for information sources.

¹⁰ The five states banning Malay-Caucasian marriages are California, Nevada, Oregon, South Dakota and Wyoming. See *supra* note 7 for information sources.

¹¹ See, S. D. REV. CODE (1919) §128.

¹² The American Redman is prohibited from intermixture with Caucasians in Arizona, Nevada, North Carolina, South Carolina, and Virginia; see *supra* note 7 for information sources. "In California, the Supreme Court once decided that a Mongolian was an Indian for the purpose of disability as a witness. It may be that a court will decide that an Indian is a Mongolian for purposes of miscegenation," RADIN, *op. cit. supra* note 7, at 94.

¹³ "Again in many of these states—with notable exceptions—all these consequences flow, if such unmixable people cohabit as man and wife—even though married in backward states like New York or Wisconsin or Pennsylvania where the marriage was legal. And, once more, it is not geography which determines this fact. California will wink at miscegenation if accomplished legally under some other and looser sovereignty. So will Florida and Louisiana. But, Tennessee and Virginia will not, and, for the most part, neither will Montana." RADIN, *op. cit. supra* note 7, at 93.

¹⁴ "If any white person and Negro shall knowingly intermarry with each other within this state, or having so intermarried, in or out of the state, shall continue to live together as man and wife within this state, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years", TEX. PEN. CODE Art. 492. Like statutes: ALA. CODE ANN. (Michie, 1928), §5001; COLO. STAT. ANN. (1935) 107 §3; DEL. REV. CODE (1935) c. 85, §1; FLA. STAT. (1941) c. 741, §12; GA. CODE (1933) §53-9903; IND. ANN. STAT. (Burns, 1928) §2879; KY. REV. STAT. (1942) §402.990; LA. PEN. CODE §79; MD. ANN. CODE (Flack, 1939) art. 27, §445; MISS. CODE ANN. (1930) §2361; MO. REV. STAT. (1939) §4651; NEV. COMP. STAT. (Hillyer, 1929) §10198; N. C. CODE ANN. (Michie, 1935) §4340; N. D. COMP. STAT. ANN. (1913) §9582; OKLA. STAT. (1941) tit. 43, §13; ORE. COMP. LAWS ANN. (1940) §23-1011; S. C. CODE (1942) §1438; TENN. CODE (Michie, 1938) §8410; UTAH REV. STAT. (1933), tit. 40, c. 1, §2 and tit. 103, c. 1, §14; VA. CODE ANN. (Michie, 1936) §4546; W. VA. CODE (1931) tit. 48, c. 1, §19; and WYO. REV. STAT. ANN. (1939) c. 68, §119.

¹⁵ Five states have such laws: ARIZ. CODE ANN. (1939) c. 43, §402; ARK. DIG. STAT. (Pope, 1937) §3288; IDAHO CODE ANN. (1932) §17-1806; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) §11006; and NEB. COMP. STAT. (1929) §28-902. At least eleven states which make an attempt at interracial marriage a crime also make it a punishable offense to live together in an unmarried state: Alabama, Florida, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming.

I.

To repeat, thirty states have statutes banning interracial marriage. As already noted, California is one of those states. Although the original miscegenation statute was enacted by the California legislature in 1850,¹⁶ it is not the basis of the present law. That basis was created in 1872 when the California Civil Code was adopted. Section 60 of the Civil Code has been amended twice since 1872¹⁷ so that now the clear words of the statute read: "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." The prohibitions thus stated are explicit.¹⁸

However explicit statutory language may be, some questions of

¹⁶ "An Act Regulating Marriages:

"53. All marriages of white persons with negroes or mulattoes are declared to be illegal and void.

"54. Whoever shall contract marriage in fact, contrary to the prohibitions in the two preceding sections, and whoever shall solemnize any such marriage shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine or imprisonment, or both, at the discretion of the jury which shall try the case; . . . the fine to be not less than \$100 nor more than \$10,000 and imprisonment to be not less than 3 months nor more than 10 years." Cal. Stats. 1850, p. 424.

¹⁷ The statute was amended in 1901 to add "Mongolian" to the prohibited classes, Cal. Stats. 1901, p. 335; however, because of a procedural defect, this amendment like many other changes in both the Civil Code and the Code of Civil Procedure were declared unconstitutional, *Lewis v. Dunne* (1901) 134 Cal. 291, 66 Pac. 478. Then, the legislature reenacted the exact prohibition in 1905, Cal. Stats. 1905, p. 554. The second distinct change came in 1933 when the word "Malay" was added to the prohibited class, Cal. Stats. 1933, p. 561.

¹⁸ As an ancillary to this section, the legislature has enacted Civil Code Section 69 which provides: "All persons about to be joined in marriage must obtain a license therefrom from the county clerk of the county in which the marriage is to be celebrated, which license must show: . . . 4. Whether white, Mongolian, Negro, Malay, or mulatto . . . And no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race . . ." Yet, it may be doubted whether the issuance or refusal to issue a license would determine the validity or invalidity of the marriage. In *Norman v. Norman* (1898) 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, and in *Estate of Shipp* (1914) 168 Cal. 640, 144 Pac. 143, the court specifically refused to settle the issue. However, many authorities have claimed that *People v. McIntyre* (1931) 213 Cal. 50, 1 P. (2d) 443, by implication settled the issue; see, Note (1931) 20 CALIF. L. REV. 90. The result in this case must be viewed in terms of the facts at hand and not as a general statement of policy. The defendant in a manslaughter action which arose out of a lit and run automobile killing attempted to deprive the state of the testimony of a material witness by claiming a highly questionable, if not a fraudulent, marriage. The court obviously refused to allow the defendant the opportunity to profit from his own highly questionable tactics. The court did not mention the possibility that the license requirement was mandatory, but confined itself to the facts before it. Thus, it is probable that the question is still open in California. However, since the majority rule in other jurisdictions is that the provisions for a license are not mandatory, only directory (See, 20 CALIF. L. REV., *supra* in this note, at 91), it is possible that the California courts will hold the provision to be only directory.

construction usually arise. Under the miscegenation statute, these usual questions have arisen. Four basic questions of interpretation and implication have arisen thereunder:

First, despite the clear and unequivocal language used in the code section, that all such marriages are "illegal and void," it was questioned in an 1894 case whether these words meant that the marriage was void *ab initio* or merely voidable. The court replied in consonance with the words of the statute, "It is in proof that the appellant is a coloured woman of the African race and that the decedent was a white man of the European race, and consequently they were incapable of contracting marriage according to the laws of California."¹⁹ Any attempted interracial marriage is wholly void and creates no status.²⁰

Whether the party seeking to invalidate a marriage on miscegenetic grounds has the burden of disproving the validity of the marriage is the second major question of construction which has arisen under the statute. In the only court utterance to date on this point, a District Court of Appeals said, "There is no evidence that Catherine has less than one-eighth Negro blood; they [the appellants] must fail because the burden was on them to prove that she was not in the prohibited class."²¹ However, this opinion is a questionable one. It is not only contrary to the established rules of evidence that, since a marriage is presumed to be valid, the burden is placed on the party seeking to challenge the relationship²² but also in the teeth of a California code section which enunciates this rule of evidence.²³ Well may it be doubted that this is the final expression by the California courts on this question.

A third question which has been raised concerns the degree of "colored" blood which is necessary to bring one within the purview of the statute. This question with regard to who was a mulatto was raised in 1941. A District Court of Appeals interpreted the present statute in the light of its antecedent, the enactment of 1850²⁴ which forbade Negro or mulatto marriages with white men, and further conditioned the 1850 statute as follows: "While this (miscegenation)

¹⁹ Estate of MacKay (1894) 3 Coffee's Prob. Dec. (Cal.) 318, 320.

²⁰ That such attempted marriages are void and uncontractable has been reiterated often. Estate of Shipp, *supra* note 18; Estate of Lee (1926) 200 Cal. 310, 253 Pac. 145; Estate of Randolph (1931) 211 Cal. 440, 295 Pac. 824; People v. Spitzer (1922) 57 Cal. App. 595, 208 Pac. 181; People v. Wilkerson (1929) 99 Cal. App. 123, 278 Pac. 466; Borg v. Borg (1938) 25 Cal. App. (2d) 25, 76 P. (2d) 218, and Estate of Karau (1938) 26 Cal. App. (2d) 606, 80 P. (2d) 108. See also 16 CAL. JUR. 92; 15 MCK. DIG.—Marr. 19.

²¹ Estate of Stark (1941) 48 Cal. App. (2d) 209, 219; 119 P. (2d) 961, 965.

²² 9 WIGMORE, EVIDENCE (1923) §2505.

²³ CAL. CODE CIV. PROC. §1963, §30.

²⁴ See *supra* note 16.

statute did not define a mulatto, two other statutes were enacted at the same time which prohibited a 'black' or a 'mulatto' from testifying for or against a white person, or in a case where a white person was a party, defined a 'mulatto' as a person having 'one-eighth part or more of negro blood'. (Statutes of California 1849-1850, Ch. 99, Sec. 14; Ch. 142, Sec. 306.) These are statutes in *pari materia*, to be read and considered together."²⁵

Having determined that the two statutes should be read together, the appellate court then said, "so read and construed it is plain that under the statute a marriage between a white and a mulatto having one-eighth or more of Negro blood was illegal and void. Whether as has been held (*Daniel v. Guy*, 19 Ark. 121; *State v. Hayes*, 1 Bailey (S.C.) 275; cf. *People v. Hall*, 4 Cal. 399), a marriage between a white person and a person with less than one-eighth of negro blood may be classed as illegal and void on the theory that such a person is a 'mulatto' within the meaning of the statute (now Civil Code, Sec. 60), we are not in view of the facts of the case required to decide."²⁶ This decision is unwarranted not only because there is no reason for interpreting the miscegenation statute in terms of an 1850 statute on a totally different, unrelated subject but also because the definition of mulatto is not in harmony with the generally accepted view of what a mulatto is. As popularly understood, a mulatto is one who has a preponderance of Negroid blood and features—whatever that might be.²⁷ Nor is the view expressed by the court consistent with the law dictionary definition that a mulatto is one with an equal percentage of both Negro and Caucasian blood.²⁸

The conclusion reached above raises a final question which relates to the degree of "white blood" necessary to bring a person within the prohibition of the statute. There have been no cases in California on this point. The view of the court could be either that only "pure-

²⁵ *Estate of Stark*, *supra* note 21.

²⁶ *Ibid.* at 214. "Even in miscegenation statutes where the extreme social standard can be expected, the common practice is a statutory rule of degree, one-fourth (Alabama, Maryland, North Carolina, Oregon, Tennessee, West Virginia); one-eighth (Florida, Indiana, Mississippi, Nebraska, and North Dakota); or, one-sixteenth (Virginia). In thirteen other states, the statute fixes no standard but leaves the word 'negro', 'white', or 'coloured person' to judicial interpretation. In nineteen states, according to the commentator I am following, in none of which coloured persons exceed 5 per cent of the population, there are no miscegenation statutes." MCGOVNEY, *NATURALIZATION OF MIXED BLOODS—A DICTUM* (1934) 22 CALIF. L. REV. 377, 387.

²⁷ The popular definition of a mulatto is exemplified by that expressed in 1 *NEW CENTURY DICTIONARY* (1936) 1105: "The offspring of parents of whom one is white and the other is negro." *Semble*: FUNK & WAGNALLS' *DICTIONARY* and WEBSTER'S *DICTIONARY*.

²⁸ In *BLACK'S LAW DICTIONARY* (3d ed. 1933) 1210, a mulatto is defined as "one having white and Negro blood in equal or nearly equal proportions; loosely, anyone having white and Negro blood." *Semble*: 2 *BOUVIER'S DICTIONARY* (8th ed. 1914) 2221.

blooded" white men are within the meaning of the statute²⁹ or that all persons held not to be a mulatto or of the other specified races will be a Caucasian or that anyone with a greater percentage of "white" blood than non-Caucasian blood is a white man.³⁰ Thus, who is to be considered a Caucasian within the statute is an open question in California.

Likewise, the California court has not determined a corollary problem: does the white race extend to include all Aryan-descended peoples or only those of so-called European extraction? As an example of this question, will Asiatic Indians be classified as members of the white race where they are classed anthropologically³¹ or in the brown or Malay race where they have been legally placed³² in some jurisdictions? Since the California court has been careful not to take liberties in racial cataloguing, the court's decision will probably follow the more scientific classification.³³

Thus, it is clear that, despite the explicit language of the statute, there are many problems of construction. Few questions have arisen and been settled; many intricate problems remain unsettled, legal enigmas in California. These difficulties are magnified as the statute does not define its terms clearly nor indicate the breadth of interpretation desired.

II.

Most of the problems which have arisen under the miscegenation statute deal not with the interpretation of the language of the law but with the rights of the parties held to be within the purview of the

²⁹ The Georgia Code, §55-312, states: "The term 'white person' shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No persons, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a coloured person or a person of colour, shall be deemed to be a white person."

³⁰ White persons include persons with mixtures of African blood but having a preponderance of white blood, or being more white than black, *Anderson v. Millikin* (1858) 9 Ohio St. 568, 570.

³¹ Anthropologists and ethnologists are generally agreed that East Indians are Caucasian: See GUILFRIDE-RUGGERI, *FIRST OUTLINES OF A SEPTEMATIC ANTHROPOLOGY OF ASIA* (1921) 53 ff.; J. A. ROGERS, *SEX AND RACE* (1940) 62-66; and, ELIOT SMITH, *HUMAN HISTORY* (1934) 136-145.

³² In *United States v. Bhagat Singh Third* (1923) 261 U. S. 214-215, 67 L. ed. 616, 620, Justice Sutherland said, in declaring a high caste Hindu of full Indian blood not to be a free white person so far as naturalization was concerned: "What we now hold is that the words 'free white persons' are words of common speech to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that is popularly understood. As so understood and used, whatever may be the speculation of the ethnologist, it does not include the body of the people to whom the appellee belongs."

statute. These problems are the very human ones of applying the statutory provisions to the men, women, and children whose lives have become enmeshed in the miscegenation statute.

The first of these problems is the effect of the statute upon the persons who attempt to contract the marriage within the jurisdictional limits of California. It is clear from a reading of Civil Code section 60³⁴ that the marriage itself is void; no marriage is created nor could any have been created.³⁵ However, no penal sanctions attach to the attempted marriage; for, as has already been stated, California unlike other states prohibiting interracial marriage does not make either miscegenation or interracial cohabitation without marriage a crime.³⁶ Moreover, it is quite probable that a spouse who in good faith enters an interracial marriage without knowledge either of the illegality of the marriage or of the facts constituting miscegenation will be allowed a property settlement. This view is based on the allowance of a property settlement to such a putative mate in an incestuous³⁷ or a bigamous³⁸ marriage. Since incestuous and polygamous unions are less favorably viewed by the courts than miscegenetic marriages, it would seem plausible that the innocent mate in an interracial marriage will be afforded such property rights.

While it is true that no marital status can be created by an attempted marriage of a white and a "colored" person within the juris-

³³ In *Roldan v. Los Angeles* (1933) 129 Cal. App. 267, 18 P. (2d) 706, the court held that a Filipino was not to be considered a Mongolian within the meaning of the miscegenation statute. When, at its next session—1933—the Legislature amended the Civil Code Section 60 to specifically include Malays in general and Filipinos specially, it in no wise affected the result of the decision which scientifically classified racial groups.

³⁴ See, the text to notes 17 and 18, *supra*.

³⁵ While it is true that no marital status can be created by an attempted interracial marriage within the jurisdictional limits of California, it was held in *Estate of Lee*, *supra* note 20, that a decree of divorce would be conclusive evidence of a valid pre-existing marriage even though the union had been forbidden on statutory grounds as illegal and void. The result of this case is that a divorce granted would establish a prior marital status. For the implications of this peculiar decision, see Comment (1927) 16 CALIF. L. REV. 146.

³⁶ See *supra* notes 14 and 15. See, also, RADIN, *op. cit. supra* note 7, at 92; and REUTER, *op. cit. supra* note 3, at 82-98.

³⁷ *Figoni v. Figoni* (1931) 211 Cal. 254, 295 Pac. 339.

³⁸ "While strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains made by the joint efforts of a man and a married woman living together under a void marriage entered into in good faith by the woman under the belief that her prior marriage had been dissolved, apply by analogy the rule which would obtain when a valid marriage is dissolved." *Schneider v. Schneider* (1920) 183 Cal. 335, 341; 191 Pac. 533; 11 A. L. R. 1386. See, also, for similar decisions: *Flanaghan v. Capital National Bank* (1931) 213 Cal. 664, 3 P. (2d) 307; *Feig v. Bank of America Association* (1936) 5 Cal. (2d) 267, 54 P. (2d) 3; *Anderson v. Anderson* (1936) 7 Cal. (2d) 265, 60 P. (2d) 845, 111 A. L. R. 342; and, *Vallera v. Vallera* (1943) 21 Cal. (2d) 681, 134 P. (2d) 761. This same rule has been applied to voidable marriages, *Coats v. Coats* (1912) 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 88.

diction of California, it is quite another question as to whether such a marriage contracted in a jurisdiction where interracial marriages are allowed is valid in California. The answer is found in Civil Code section 63, which adopts the general conflicts of law principle that: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid by the laws of this state." This principle in 1875 was given application by the California Supreme Court to miscegenetic marriage situations.³⁹ Thus, it is possible by persons of different races to attain a marital status in California. Does this not mean that the miscegenation statute applies only to those who either have an inadequate knowledge of the law and/or cannot afford the train fare to a state where the attempted marriage would be valid?

The effect upon children who are conceived while their parents are living in a miscegenetic union is the third question which deals with the statute's effect upon individuals within the purview of the statute. The answer is apparently given in section 84 of the Civil Code: "The issue of a marriage which is void or annulled or dissolved by divorce is legitimate." Despite the literal meaning of the statute, the Supreme Court of California by way of dictum has cast doubt upon the scope of the statute: "There may be some question whether the enactment applies to offspring of marriages which are

³⁹ Pearson v. Pearson (1875) 51 Cal. 120. In Estate of Wood (1902) 137 Cal. 729, 69 Pac. 900, the Supreme Court said, "In California, the results of these statutes are particularly obnoxious. California Courts early recognized the validity of a marriage with a prohibited race if the jurisdiction where the marriage was performed recognized it as valid, (Pearson v. Pearson (1875) 51 Cal. 120; Estate of MacKay (1894) 3 Coffee's Prob. Dec. (Cal.) 318, 321) and sister-states' marriages are recognized even though the parties left California to evade the prohibitions of her statute." See, also, People v. Wilkerson, *supra* note 20, as to the effect of such a marriage when a minor's parents object.

At present, at least ten states will not recognize the validity of interracial marriages contracted in other states: Delaware, Georgia, Louisiana, Maryland, Mississippi, Montana, South Carolina, Virginia, and West Virginia. The effect upon these states and their policy of the recent United States Supreme Court decision in Williams v. South Carolina (1942) 317 U. S. 287, 63 Sup. Ct. Rep. 207, is one which merits investigation. Although the Supreme Court had a divorce case before it, its language was broad enough to include marriages validly contracted in the state where created. The court held that under the full faith and credit clause of the United States Constitution (Art. IV, §1) each state must recognize a divorce granted in another state if bona fide residence of the divorcing party is established. The reasons advanced by Mr. Justice Douglas speaking for the court were common to both marriage and divorce law: "The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus, it is plain that each state, by virtue of his command over its domiciliaries and its large interest in the institutions of marriage, can alter within its borders the marriage status of the spouse domiciled there, even though the other spouse is absent" (at 298). Well may we query as to the effect that the broad base of this decision may have on future determinations in the marriage field.

declared by the code to be 'illegal and void' or 'void from the beginning,' such as incestuous marriages (sec. 59), marriages of whites with negroes (sec. 60), or (under certain conditions) marriages between persons one of whom is already married (sec. 61)."⁴⁰ As a result, there may well be doubt as to whether the issue of such an attempted marriage can be legitimate when born. Nonetheless, statutes provide the means of legitimation of the children if the parents so desire. The children may be legitimated either by subsequent marriage of the parents in a state which permits such marriages⁴¹ or through adoption by the father.⁴² Thus, statutory provisions make it possible for the parents to protect children of miscegenetic unions from the scourge of illegitimacy.⁴³

Thus, have the rights of the parties to and the issue from interracial marriages been defined by the courts of California. Although there are still problems unsettled, the rights of both the "spouses" and their issue can be stated with a certain degree of certainty.

CONCLUSION

With this survey of the miscegenation statute in California—the construction of its language and the rights of the parties thereunder—some of the more important questions arising under it have been examined. There is, however, one further phase of the miscegenation statute which requires passing mention, namely, its constitutionality. This appears to be unquestioned as within the general powers of the

⁴⁰ Estate of Shipp, *supra* note 18, at 641-642. Some further dictum which was set forth in Estate of Stark, *supra* note 21, at 216, follows this view: "The statute . . . did not at or prior to the death of Robert Stark embrace children of an illegal and void marriage, such as a marriage between a white and Negro or mulatto." The wisdom of these decisions can be questioned in view of the language of the statute and of the general legislative purpose to secure legitimacy to children whenever possible.

⁴¹ CAL. CIV. CODE §215 provides for legitimation by a valid marriage by the parents. See note 39, *supra*.

⁴² CAL. CIV. CODE §230: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all respects legitimate from the time of his birth."

⁴³ Despite the plain wording of the statute and the unambiguous meaning of the words, a district court of appeals said in Estate of Stark, *supra* note 21, at 216: "We would not seem to give effect to that policy if we were to hold that under Chapter 385, Section 9, Statutes of California, 1869-1870 (now Civil Code Section 230), a white person could by public acknowledgment legitimate his or her own natural child by a negro or mulatto; however, we are not required to decide that point . . ." Despite the fact that the learned judge has overlooked the radical changes between the two cited statutes, the judge has ignored the broad State policy behind the statute, namely, to protect innocent children whenever possible and to afford every possible means to legitimate them. Could this dictum be more than another undesirable obstacle placed in the path of attaining the legislative goal?

state to legislate for the welfare and happiness of the people.⁴⁴ While there have been no cases under the California Constitution, the miscegenation statute has been expressly declared to be constitutional under two clauses of the Constitution of the United States: the obligations of contracts clause⁴⁵ and the "equal protection of laws" clause of the Fourteenth Amendment.⁴⁶ The constitutionality of the miscegenation statute is apparently well-settled.

While all these phases of the statute are significant and important, no one nor the whole group provides a means of determining whether or not the statute is effective in accomplishing its purpose: to discourage interracial marital relations.⁴⁷ The number of interracial marriages is small, but the reason for this is not readily ascertainable. To what extent statutory prohibitions, individual preferences, or public opinion⁴⁸ is responsible for this is a matter of conjecture. The fact that in those states which do not ban interracial marriages there is an almost insignificant number⁴⁹ of such unions clearly points to the effectiveness of control by public pressure and individual preferences. Whether control by social pressure would be preferable to statutory prohibitions is not within the scope of this discussion; it is enough to question whether the statute accomplishes anything more than public opinion and individual preferences without it do.

Irving G. Tragen.

⁴⁴ The State's vital interest in the institution of marriage has often been reiterated. *Barber v. Barber* (1853) 21 How. (U.S.) 582; *Sharon v. Sharon* (1888) 75 Cal. 1, 16 Pac. 345; *Mott v. Mott* (1889) 81 Cal. 418, 22 Pac. 1140; *Barnes v. Barnes* (1895) 110 Cal. 418, 42 Pac. 904; *Millar v. Millar* (1917) 175 Cal. 797, 167 Pac. 175; and *Jenny v. Jenny* (1918) 178 Cal. 604, 174 Pac. 652. These cases reiterate the State's right to regulate the conditions and obligations of marriage by the State.

⁴⁵ U. S. CONST., Art. I, §10: "No state shall . . . pass any . . . law impairing the obligation of contract." The conclusion of Judge Erskine (*In re Hobbs* (1871) 1 Wood 537, 12 Fed. Cas. No. 6,550) that the marriage contract is not contemplated by the prohibition of the Constitution of the United States against the impairment of contracts by state legislation, has been, subsequently to the rendition of the decision above quoted, fully sustained by two decisions of the Supreme Court of the United States (*Maynard v. Hill* (1887) 125 U.S. 190, 31 L. ed. 654; *Hunt v. Hunt* (1879) 131 U.S. Appendix CLXV, 24 L. ed. 1109)." *State v. Luttj* (1890) 41 Fed. 753, 757, 7 L. R. A. 50.

⁴⁶ The Fourteenth Amendment passed in 1868 reads in part: "Section 1. . . . No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."

"A statute prohibiting marriage between white persons and persons of African descent in no way impairs their legal rights or denies to them equal protection of the laws." 11 C. J. 799. The reasoning used by the court to justify its conclusion is, "What the law declares to be a punishable offense is marriage between a white person and a negro. And, it no more tolerates it in one of the parties than in the other—in a white person than in a negro or mulatto; and, each of them is punishable for the same offense, prohibited precisely in the same manner and to the same extent. There is no discrimination made in favour of the white person, either in the capacity to enter into such a relation or in the penalty." *Green v. State* (1882) 58 Ala. 190, 29 Am. Rep. 739. Although the Supreme Court of the United States has never directly reviewed a miscegenation statute, it has approved the reasoning of the court above in a like case; in *Pace v. Alabama* (1882) 106

U. S. 583, 26 L. ed. 207, the Supreme Court held constitutional a statute which made it a criminal offense for a negro and a white person, prohibited from intermarrying, to engage in illicit extramarital relations, even though the penalty was more severe than for a similar offense between members of the same race. Whether this interpretation of the "equal protection" clause was that intended by its framers may be seriously doubted, see *Ex parte Francois* (1879) 3 Woods 367, 9 Fed. Cas. No. 5,047.

⁴⁷ "It is estimated that one-third to three-fourths of the Negroes in America already show signs of intermixture; that the mulatto population has increased 500% between 1850 and 1910, and that intermarriage is only playing a negligible part in racial amalgamation," Comment (1927) 13 VA. L. REG. (N. S.) 311, 314. See, also, REUTER, *THE AMERICAN RACE PROBLEM* (1927) 58-60, 126-133.

Thus, if the purpose is to prevent interracial marriages, the statute probably has an argument in its favor. If the purpose is to prevent any sort of racial admixture, the statute probably is a failure. The question presented here shows the highly debatable nature of the results under the statute.

⁴⁸ "A remarkable and hardly-expected peculiarity of this American doctrine, expounded so directly in biological and racial terms, is that it is applied with a real discretion depending upon the purely social and legal circumstances under which miscegenation takes place. As far as lawful marriages are concerned, the racial doctrine is laden with emotion. Even in the Northern States where, for the most part, intermarriage is not banned by the force of law, the social sanctions blocking its way are serious. Mixed couples are punished by nearly complete ostracism. On the other hand, in many regions, especially in the South where the prohibitions against interracial marriage and the general reprehension against miscegenation have the strongest moorings, illicit marital relations have been widespread and occasionally allowed to acquire a nearly conventional character . . ." 1 MYRDALS, *THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944) 53.

REUTER, *op. cit. supra* note 3, at 101, shows that "The public opposition to racial intermarriage is a fairly effective control even in the absence of formal restrictive legislation. One high public official in Massachusetts writes that 'Intermarriages are very few because of the violent opposition of the public toward such marriages'."

⁴⁹ "Even in states where intermarriage is legal, there is little mating between white and black. The New York figures indicate that in 1929, 2.7% of the Negro grooms and .8% of the Negro brides married white consorts. Statistics in this state running back to 1916 indicate little trend in this respect," T. J. WOOFER, JR., *RACES AND ETHNIC GROUPS IN AMERICAN LIFE* (1933) 187. In the State of New York, 2 REPORTS OF THE DEPARTMENT OF PUBLIC HEALTH, DIVISION OF VITAL STATISTICS (1915 and biannually to 1941) 228-234, the same small number of marriages is shown. However, these results are illusory: they make no attempt to determine the number of mulatto-white, mulatto-Negro, Eurasian-white, and Eurasian-Negro marriages. It is probably true that these figures present a composite picture of Negro-white marriages. But, this is not the entire miscegenation picture even under the statutes. Nonetheless, accounting for these discrepancies, the figures are probably indicative of a small rate of interracial marriages in comparison with that of intraracial marriages. What is the cause?