LAWS

OF THE

TERRITORY OF IOWA,

ENACTED AT THE SESSION OF THE LEGISLATURE COMMENCING ON THE FIRST MONDAY OF NOVEMBER, A. D. 1839.

PUBLISHED BY AUTHORITY.

BURLINGTON:
PRINTED BY J. H. M'KENNY.
1840.

REPRINTED BY THE
HISTORICAL DEPARTMENT OF IOWA
1902.

Or be committed.

Jury.

Mother a witness.

SEC. 4. When such accused person shall plead not guilty to such charge before the court to which he is recognized, the court shall order the issue to be tried by a jury, and at the trial of such issue, the examination of such accused person before the justice shall be given in evidence, and the mother of such child shall be admitted as a competent witness and her credibility left with the jury: *Provided*, On the trial of the issue the jury shall, in behalf of the man accused take into consideration any want of credibility in the mother of the child, also any variation in her testimony before the justice and that before the jury, and also any other confession of her at any time, which does not agree with her testimony on any other plea or process made in behalf of such accused person.

Order for maintenance.

SEC. 5. In case the jury find the defendant guilty, or such accused person, before the trial, shall confess in court that the accusation is true, he shall stand charged with the maintenance of such child, in such sum or sums as the court may order and direct, with judgment of costs of prosecution, and moreover be liable to the suit of the complainant for damages, and the court shall require such person to give security to perform the aforesaid order. And in case the reputed father shall refuse or neglect to give security as aforesaid, and pay the costs of prosecution, he shall be committed to the jail of the proper county, there to remain until he shall comply with the order of the court, or until such court shall, on sufficient cause shown, direct him to be discharged.

To give security.

Or be committed.

Recognizance to be renewed.

SEC. 6. If it shall happen, at the time of holding such court, that the woman be unable to attend, the court shall order the renewal of the bonds of recognizance that the accused person shall be forthcoming at the next court, at which the mother of the said child shall be able to attend, and the continuance of said bonds shall be entered by order of said court, unless the security shall object thereto, and shall have the same force and effect as a recognizance taken in court for that purpose.

Accused not appearing, scire facias to issue.

SEC. 7. Whenever any recognizance which shall have been entered into by any person charged with being the father of an illegitimate child, as provided for by this act, shall be forfeited, by reason of the person not appearing to answer to said charge, it shall be the duty of the court to order a scire facias to

issue against the sureties in said recognizance, commanding them to show cause at the next term of the court why judgment shall not go against them for the amount of said recognizance.

When judgment against sureties.

SEC. 8. If, upon the return of said scire facias served, or two returns if not found, the said sureties shall fail to show cause why the same shall not be done, the court shall enter judgment against said securities, in the same way and manner as they would have done against the principal had he appeared and confessed himself to be the father of said child: *Provided*, That they shall in no case be made liable to pay more for the support of the said child than the amount of the penalty of said recognizance.

Order to be recorded.

SEC. 9. In all cases where the defendant shall be adjudged to be the father of the child, the order for its maintenance shall be entered, in the nature of judgment, upon the record, the different instalments becoming due at the time the court may direct. And whenever any of the instalments shall become due, and shall not be immediately paid, the same shall be collected by execution against the principal and securities as in other cases.

Execution.

Approved January 4, 1840.

[Chap. 25.]

AN ACT regulating marriages.

Who may be joined.

SECTION 1. *Be it enacted by the Council and House of Representatives of the Territory of Iowa*, That male persons of the age of eighteen years, female persons of the age of fourteen years, not nearer of kin than first cousins, and not having a husband or wife living, may be joined in marriage: *Provided always*, That male persons under twenty-one years, female persons under the age of eighteen years, shall first obtain the consent of their fathers respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians.

By whom.

SEC. 2. That it shall be lawful for any ordained minister of the gospel of any religious society or congregation within this territory, who has or may hereafter obtain a license for that purpose as hereinafter provided, or for any justice of the peace in his county, or for the several religious societies agreeably to the rules and regulations of their respective churches, to join together all persons as husband and wife not prohibited by this act.

Minister to be licensed.

SEC. 3. That any minister of the gospel, upon producing to the clerk of the district court of any county in this territory, in which he officiates, credentials of his being a regular ordained minister of any religious society or congregation, shall be entitled to receive from said clerk, a license authorizing him to solemnize marriages within this territory, so long as he shall continue a regular minister in such society or congregation.

License to be produced and noted.

SEC. 4. That it shall be the duty of every minister who is now or shall hereafter be licensed to solemnize marriages as aforesaid, to produce to the clerk of the district court, in every county in which he shall solemnize any marriages, his license so obtained, and the said clerk shall thereupon enter the name of such minister upon record, as a minister of the gospel, duly authorized to solemnize marriages within this territory, and shall note the county from which said license issued, for which services no charge shall be made by such clerk.

Record to be evidence.

SEC. 5. That when the name of any such minister is so entered upon the record by the clerk aforesaid, such record, or the certificate thereof by the said clerk, under the seal of his office, shall be good evidence that the said minister was duly authorized to solemnize marriages.

Parties to obtain license.

SEC. 6. That previous to persons being joined in marriage, a license for the purpose, shall be obtained from the clerk of the district court, in the county where such female resides, agreeably to the provisions of this act: *Provided*, That the society called friends or quakers, may solemnize marriages in their public meetings without the production of such license.

Evidence of legality.

SEC. 7. That the clerk of the district court as aforesaid, may inquire of the party applying for marriage license as aforesaid, upon oath or affirmation relative to the legality of such contemplated marriage, and if the clerk shall be satisfied that there is no legal impediment thereto, then he shall grant such marriage license, and if any of the persons

And of consent of parties.

intending to marry shall be under age, the consent of the parents or guardian shall be personally given before the clerk, or certified under the hand of such parent or guardians, attested by two witnesses, one of which shall appear before the clerk and make

oath or affirmation that he saw the parent or guardian whose name is annexed to such certificate subscribe, or heard him or her acknowledge the same, and the clerk is hereby authorized to issue and sign such license, and affix thereto his seal of office. The clerk shall be entitled to receive, as his fee for administering the oath or affirmation aforesaid, and granting license, recording the certificate of marriage and filing all the necessary papers, the sum of one dollar and twenty-five cents; and if any clerk shall, in any other manner, issue or sign any marriage license, he shall forfeit and pay a sum not exceeding five hundred dollars, to and for the use of the party aggrieved. Fee.

Certificate of marriage to be recorded.

SEC. 8. That a certificate of every marriage hereafter solemnized, under the hand of the justice, minister, or the clerk or keeper of the records of the societies mentioned in this act, specifying,

First. The christian names and surnames, ages, and places of residence of the parties married;

Second. The time and place of such marriage shall be transmitted to the clerk of the district court of the county where such marriage was solemnized, within three months thereafter, and be recorded by such clerk in a book to be kept by him for that purpose.

Penalties.

SEC. 9. Every justice, minister, or clerk, or keeper of records, in section eight mentioned, failing to transmit such certificate to the clerk of the district court of the county in due time, shall forfeit and pay fifty dollars, to and for the use of the county; and if such clerk shall neglect to record the same, he shall forfeit and pay fifty dollars, to and for the use of the county.

Record to be presumptive evidence.

SEC. 10. That the record of a marriage made and kept as before prescribed by the clerk of the district court, or a copy thereof duly certified, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

Penalty for solemnizing marriage contrary to this act.

SEC. 11. That if any justice or minister by this act authorized to join persons in marriage, shall solemnize the same contrary to the true intent and meaning of this act, the person so offending shall, upon conviction thereof, forfeit and pay any sum not exceeding five hundred dollars, to and for the use of the county where such offence was committed, and if any person not legally authorized shall attempt to solemnize the marriage contract, such person

shall, upon conviction thereof, forfeit and pay five hundred dollars, to and for the use of the county where such offence was committed.

Forfeitures, how recovered.

SEC. 12. That any fine or forfeiture arising under the provisions of this act to the county, in consequence of any breach of this act, shall be recovered by action of debt, or by indictment, with costs of suit, in any court of record having cognizance of the same.

Marriage of white and negro void.

SEC. 13. All marriages of white persons with negroes or mulattoes are declared to be illegal and void.

Repeal.

SEC. 14. That all laws now in force in this territory, not embraced in the statutes of Iowa on the subject of marriages, be and the same are hereby repealed. This act to take effect and be in force from and after the first day of March next.

When to take effect.

Approved January 6, 1840.

[Chap. 26.]

AN ACT for the limitations of suits on penal statutes and criminal prosecutions.

Actions by informers to be commenced in one year.

SECTION 1. *Be it enacted by the Council and House of Representatives of the Territory of Iowa*, That all actions, suits, bills or informations which shall hereafter be had, sued, or commenced for any forfeiture on any penal statute made or to be made, the benefit whereof is or shall be by the said statute in whole or in part to the person who shall inform and prosecute in his behalf, shall be had, brought, sued or commenced by any person who may lawfully pursue the same as aforesaid, within one year from the commission of the offences, and not afterwards, and in default of such pursuit, then the same shall be had, brought, or prosecuted by the territory at any time within two years from the commission of all such offences, and not afterwards, and any indictment, complaint, or information for any offence against such statute aforesaid, shall hereafter be made and prosecuted within two years limited as aforesaid, and not afterwards.

Or by territory in two years.

Criminal prosecutions to be within two years, except.

SEC. 2. That all prosecutions for offences except treason, murder, arson, burglary, kidnapping, horse-stealing, and forgery, shall be instituted within two years next after the offence charged may have been committed and not after. *Provided*, That if the per-

son charged, or against whom such prosecution may be instituted, shall not have been an inhabitant or usually a res.dent of this territory, within and during the said term of two years, said prosecution may be instituted any time within two years next after such person may have become an inhabitant or usually resident of this territory: *And further provided*, That all prosecutions that shall be hereafter commenced for offences, except treason, murder, arson, burglary, kidnapping, horse-stealing, and forgery, committed before the organization of this territory, to wit: before the fourth day of July, in the year eighteen hundred and thirty-eight, shall fail and be utterly null and void.

Approved January 7, 1840.

[Chap. 27.]

AN ACT to encourage the destruction of wolves.

Reward.

SECTION 1. *Be it enacted by the Council and House of Representatives of the Territory of Iowa*, That the board of commissioners of the several counties in this territory, be and they are hereby authorized and empowered, at their discretion, to offer a reward of not less than twenty-five cents nor over one dollar, to any person who shall kill any wolf within their respective counties, not exceeding six months old; and the sum of not less than fifty cents nor more than three dollars for every wolf over that age. And the commissioners aforesaid may renew or withdraw the offer of the above bounties from time to time, as in their discretion they may deem expedient, by publishing notices thereof in at least three public places within their respective counties.

To produce scalp.

SEC 2. Any person claiming the benefit of this act, shall produce before some justice of the peace for the county where such wolf was killed, the scalp, with the ears thereon, and the justice shall administer to such person the following oath, to wit:

Oath.

"You do solemnly swear that the scalp now produced by you was taken from a wolf killed by you in this county; that you did not bring the same into this county from any other place, and that you believe that said wolf was more (or less as the case may be) than six months old, and that said wolf was killed on or about" (here state the time when.)

Justice to grant certificate.

Said justice shall thereupon grant to said person a

THE

CODE OF IOWA,

PASSED AT THE SESSION OF THE

General Assembly of 1850-1,

AND APPROVED 5TH FEBRUARY, 1851.

PUBLISHED BY VIRTUE OF AN ACT OF THE GENERAL ASSEMBLY,
Approved 5th February, 1851.

IOWA CITY:
PALMER & PAUL, STATE PRINTERS.
1851.

CHAPTER 85.

MARRIAGE.

A contract.

1463. Marriage is a civil contract requiring the consent of parties capable of entering into other contracts, except as herein otherwise declared.

When valid.

1464. A marriage between a male person of sixteen and a female of fourteen years of age is valid, but if either party has not attained the age thus fixed the marriage is a nullity or not at the option of such party made known at any time before he or she is six months older than the age thus fixed.

License.

1465. Previous to any marriage within this state, a license for that purpose must be obtained from the judge of the county court of the county wherein the marrige is to be solemnized, agreeable to the provisions of this chapter.

Same.

1466. Such license must not in any case be granted where either party is under the age necessary to render the marriage absolutely valid, nor shall it be granted where either party is a minor without the previous consent of the parent or guardian of such minor, nor where the condition of either party is such as to disqualify him for making any other civil contract.

Proof.

1467. Unless the judge of the county court is acquainted with the age and condition of the parties for the marriage of whom the license is applied for, he must take the testimony of competent and disinterested witnesses on the subject.

Entry of record.

1468. He must cause due entry of the application for the issuing of the license to be made on the records of the county court, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such facts was made to him by one or more witnesses (stating their names).

Consent, &c.

1469. If either party is a minor the consent of the parent or guardian must be filed in the county office, after being admitted by the said parent or guardian or proved to be genuine, and a memorandum of such facts must be also entered on the records of the county court.

License.
Penalty.

1470. If the judge of the county court grants a license contrary to the provisions of the preceding sections he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor.

Fee.

1471. The license shall not be issued until the amount

of one dollar has been paid into the county treasury and the receipt therefor filed with the judge of the county court.

By whom.

1472. Marriages must be solemnized either:

FIRST—By a justice of the peace, or judge of the county court of the county, or the mayor of the city, wherein the marriage takes place;

SECOND—By some judge of the supreme or district court of this state;

THIRD—By some officiating minister of the gospel, ordained or licensed according to the usages of his denomination.

Certificate.

1473. After the marriage has been solemnized, the officiating minister or magistrate shall on request give each of the parties a certificate thereof.

Penalty.

1474. Marriages solemnized (with the consent of parties) in any other manner than is herein prescribed are valid, but the parties themselves and all other persons aiding or abetting shall forfeit to the school fund the sum of fifty dollars each.

Same. Return.

1475. The person solemnizing marriage shall forfeit a like amount unless within ninety days after the ceremony he make return thereof to the county court.

Register.

1476. The clerk of the county court shall keep a register containing the names of the parties, the date of the marriage, and the name of the person by whom the marriage was solemnized, which (or a certified transcript therefrom) is receivable in all courts and places as evidence of the marriage and the date thereof.

Exception.

1477. The preceding provisions, so far as they relate to the manner of solemnizing marriages, are not applicable to marriages among the members of any particular denomination having, as such, any peculiar mode of performing that ceremony.

Return.

1478. But where any mode is thus pursued which dispenses with the services of a clergyman or magistrate, the husband is responsible for the return directed to be made to the county court and is liable to the above named penalty if the return is not made.

Illegitimates.

1479. Illegitimate children become legitimate by the subsequent marriage of their parents.

58 Yale L.J. 472

Yale Law Journal
February, 1949

Note

*472 CONSTITUTIONALITY OF ANTI-MISCEGENATION STATUTES [FNa1]

BELIEF in non-Caucasian inferiority is a comforting rationale for discrimination in a purportedly equalitarian society. [FN1] Legislative prohibitions against racial intermarriage in twenty-nine states are a logical consequence of this caste order. [FN2] Heretofore, courts have uniformly upheld these statutes without carefully considering whether scientific evidence revealed material race inferiorities. [FN3] But in *Perez v. Lippold* [FN4] the Supreme Court of California, ***473** in a four to three decision, examined such evidence and declared the California anti-miscegenation [FN5] statute unconstitutional, ordering issuance of a marriage license to a white woman and a Negro.

Interestingly enough, the court did not rely on the ground primarily asserted by the petitioning couple, that marriage is a religious rite protected by the First Amendment as incorporated in the Fourteenth. [FN6] Indeed, this contention seems unconvincing, since marriage, while recommended by most major religions, is required by none. [FN7] But the court found strong ground for its decision in the "equal protection" clause of the Fourteenth Amendment. [FN8] Agreeing with the Supreme Court of the United States that legislation stratifying people by race warrants not a presumption of validity but rather the closest scrutiny, [FN9] the California court found no evidence ***474** of Negro inferiority which justified infringement of "equal protection." [FN10]

Evidence educed in support of these statutes consists largely of biological reports of Negro mental and physical inferiority, [FN11] and the allegedly disastrous results of miscegenation. [FN12] The California decision recognizes that this material is now largely outdated, [FN13] lacks sufficient investigative bases, [FN14] ***475** and fails to allow for environmental factors. [FN15]

Contentions of Negro mental inferiority are based primarily on the fact that American Negroes have scored lower than whites from the same geographical area in most intelligence tests given by race. But there is reason to believe that this disparity is the product of environment rather than of innate inferiority. [FN16] The Army's famed Alpha Test of World War I, for example, found the median score of Northern Negroes substantially above that of Southern Caucasians. [FN17] A series of comparative tests in four cities showed similar results. While the performance of Nashville Negroes was substantially below that of their white neighbors, the disparity was smaller in Chicago and non-existent in New York City. And Negro children in Los Angeles, who were relatively few in number and were educated in the same classroom with white children, had an average I.Q. slightly above that of their white companions. [FN18] The difficulty, of course, is that no testing techniques can completely discount environment: there is as yet no way of testing a newborn infant before the umbilical cord is cut. [FN19]

Equally unproved are contentions that the average American Negro is ***476** physically inferior to the average American white. Modern anthropologists state that no inherent inferiority has yet been measured by scientific methods. [FN20] Through popular exaggeration, actual differences in physical appearance, in combination with many imaginary ones, have become synonymous with inferiority. [FN21] Admittedly, many of these have played a strategic function in the justification of the American caste system. [FN22] But, after all, they are merely aesthetic differences, which a potential spouse is far more qualified to evaluate than is the legislature.

Nor is there scientific proof that Negroes are inherently more susceptible to diseases such as tuberculosis and pneumonia-influenza. [FN23] Again, any discrepancy in susceptibility seems to be environmental rather than inherited. [FN24] While the Negro death rate from tuberculosis is now higher than that of the whites, recent studies have shown that it is declining and is lower today than the white rate of a few decades ago. [FN25] And there is some evidence that, prior to the Civil War, tuberculosis was more prevalent among whites than among Negroes. [FN26] One study of a few

unusual Tennessee communities, where Negroes work and live in healthier surroundings than do whites, has shown that the Negro tuberculosis rate is the lower of the two. [FN27] In the case of pneumonia-influenza, evidence as to the environmental factor is less direct, but there is little scientific support for any theory of racial susceptibility. [FN28]

***477** Again, investigation reveals no proof of necessarily inferior progeny from miscegenation. Contentions of mulatto sterility [FN29] are unsupportable, for even as their proponents admit they are based on inadequate data which fails to account for such factors as mulattoes passing as whites or Negroes. [FN30] More significantly, since racial commingling has already rendered the pure-blooded Negro a biological rarity, [FN31] studies proving the absence of inherent medical and physical inferiorities in the modern Negro group disprove contentions of mulatto inferiority.

In addition to contentions of Negro inferiority, sociological considerations are offered as indicia of the reasonableness of anti-miscegenation statutes. Inasmuch as these considerations probably underlie both legislative and judicial attitudes towards the problem, they merit particular consideration even though their basis is societal rather than constitutional.

Proponents of the statutes argue that miscegenation occurs among the "dregs of society," and that the progeny, therefore, are likely to become a ***478** burden on the community. [FN32] But the evidence indicates that racial intermarriage now occurs most frequently in the better educated groups. [FN33] Moreover, the statutes do not purport to aim at or define the amorphous category of "dregs," but rather apply to all racial groups.

More significant is the argument that, since miscegenous marriages expose the spouses and their progeny to social tensions, invalidation of the statutes would increase animosity towards racial minorities. [FN34] Admittedly, these tensions are acute. But the spectre of resultant community violence will materialize only when local law enforcement is lax. [FN35] To prohibit miscegenous marriage in order to avert tension perpetuates by law the very prejudices which have given rise to that tension. Such a procedure can be rationalized only by a policy which would condone total isolation of any individual from the community on the basis of prejudice alone. [FN36]

In the absence of evidence establishing a rational basis, racial restrictions on marriage infringe the Constitutional guarantee of "equal protection." ***479** The State of California, proposing in essence an application of the "separate but equal doctrine" to marriage, argued that the statute was not discriminatory since it applied equally to Caucasians and non-Caucasians. [FN37] But the California court rejected this contention, citing the opinion of the Supreme Court of the United States in *Shelley v. Kraemer* [FN38] that: "equal protection of the laws is not achieved through the indiscriminate imposition of inequalities." The essence of the right to marry is the right to marry whomever one wishes, regardless of race. [FN39]

Scientific and sociological evidence indicates that anti-miscegenation statutes are merely remnants of a deep-seated cultural lag. [FN40] Only an abrogation of the judicial function can explain failure to follow the California court in striking down such legislative expressions of community prejudice. [FN41]

***480** APPENDIX I

STATE ANTI-MISCEGENATION STATUTES

State and Citation	*Marriages between Whites and the following prohibited*	*Effect given such marriages*
Alabama ..... ALA. CONST., Art. 4, § 102; ALA. CODE, tit. 14, §§ 360-61 (1940).	Negro or descendent of a Negro to the third generation inclusive, though one ancestor of each generation was a white.	Parties each guilty of felony.
Arizona ..... ARIZ. CODE, c. 63, §§ 107-8 (1939).	Negroes, Mongolians, Malayans, Hindus, Indians.	Null and void.
Arkansas ..... ARK. STAT., tit. 55, §§ 104-05 (1947).	Negroes or Mulattoes.	Illegal and void.
California ..... CAL. CIVIL CODE, § 60 (Deering 1937).	Negroes, Mongolians, Malayans, or Mulattoes.	Illegal and void.
Colorado ..... COLO. STAT. ANN., c. 107, §§ 2, 3 (1935).	Negroes or Mulattoes.	Absolutely void. Misdemeanor.

Delaware ..... REV. CODE, § 2992 (1915) amended by Sess. Laws, p. 578 (1921).	Negro or Mulatto.	Void. Misdemeanor.
Florida ..... FLA. CONST., Art. 16, § 24; STATS. ANN., §§ 741.11-.12 (1944).	Any Negro, a person having more than or at least one-eighth Negro blood.	Utterly null and void. A felony.
Georgia ..... GA. CODE ANN., §§ 53-106, 53-9902, 53-9903 (1937)	Negroes, Indians, Malayans, Mongolians, Asiatic Indians, West Indians, or Mulattoes.	Utterly void, null and void. A felony.
Idaho ..... IDA. CODE, § 32-206 (1947).	Mongolians, Negroes, or Mulattoes.	Illegal and void.
Indiana ..... IND. STAT. ANN., § 44-104 (1933).	Persons having one-eighth or more of Negro blood.	Absolutely void without any legal proceedings. A felony.
Kentucky ..... REV. STAT. ANN., § 402.010 (1946).	Negro or Mulatto.	Prohibited and declared void.
Louisiana ..... LA. CIVIL CODE, Art. 94 (1945).	Negroes. Intermarriage of Indians and Negroes prohibited.	Have no effect and at null and void.
Maryland ..... Code, Art. 27, § 365 (1924); Laws, c. 60 (1935).	Negroes, or a person of Negro descent to the third generation. Malayans. Marriages of Negroes and Malayans are also prohibited.	Void. Felony.
Mississippi ..... MISS. CONST., Art. 14, § 263; Code, tit. 4, § 459; tit. 11, §§ 2002, 2234, 2339 (1942).	Negro, Mulatto, or Mongolian. Any person having one-eighth or more Negro or Mongolian blood.	Unlawful and void. Felony.
Missouri ..... MO. REV. STAT., §§ 3361, 4651 (1942).	Persons having one-eighth or more Negro blood. Mongolians.	Prohibited and declared absolutely void. Felony.
Montana ..... MONT. REV. CODES, §§ 5700-5702 (1935).	Negro or a person of Negro blood or in part Negro. Chinese person and Japanese person.	Utterly null and void
Nebraska ..... NEB. REV. STAT., § 42-103 (1943).	Persons possessed of one-eighth or more Negro, Japanese, or Chinese blood.	Void.
Nevada ..... NEV. COMP. LAWS, §§ 10197-10200 (1929).	Any person of Ethiopian or black race, Malay or brown race, or Mongolian or yellow race.	Unlawful. Misdemeanor.
North Carolina ..... N. C. CONST., Art. 14, § 8; STAT., § 51-3 (1943).	Negro or Indian, or person of such descent to the third generation, or a Cherokee Indian of Robeson County and a Negro, or any persons of such descent to the third generation.	Void. Felony.
North Dakota ..... N. DAK. CODE, §§ 14-0304, 0305 (1943).	Negro or person having one-eighth or more Negro blood.	Void. Felony.
Oklahoma ..... OKLA. STAT., tit. 43, §§ 12-14 (1938).	Any person of African descent.	Unlawful and prohibited. Felony.
Oregon ..... ORE. COMP. LAWS, § 63-102 (1940).	Negro or Mongolian, or any person having one-fourth or more of Negro or Mongolian blood.	Prohibited. Felony.
South Carolina ..... S. CAR. CONST., Art. 3, § 33; SO. CAR. CODE, §§ 8571, 1438 (1942).	Negroes, Indians, Mulattoes, or half-breeds.	Unlawful and prohibited. Misdemeanor.
South Dakota ..... SO. DAK. CODE, § 14.0106 (1939).	Members of the African, Korean, Malayan, or Mongolian races.	Void. Felony.
Tennessee ..... TENN. CONST., Art. 11, § 14; TENN. CODE,	Negroes, Mulattoes, or persons of mixed blood descended from a Negro,	Prohibited and unlawful. Felony.

§ 8409 (1938).		
Texas ..... CIVIL STAT., § 4607 (1925).	to the third generation inclusive.	Null and void.
Utah ..... Code, § 40-1-2 (5, 6) (1943).	Africans or the descendants of Africans.	Felony.
Virginia ..... Code, §§ 5087, 5099a(5) (1942).	Negroes, Mongolians, Malayans, Mulattoes, quadroons, or octoroons.	Void and prohibited.
	Colored persons. White can only marry a person with no other admixture of blood than white or one-sixteenth or less American Indian blood.	Void without any decree or legal process. Felony.
West Virginia ..... Code, § 4701 (1943).	Negroes.	Void. Misdemeanor.
Wyoming ..... REV. STAT., c. 68-118 (1931).	Negroes, Malayans, Mongolians, and Mulattoes.	Illegal and void. Misdemeanor.

**482 States Formerly Prohibiting Miscegenation*

Iowa	Omitted in 1851.
Kansas	Omitted 1857. See Laws, c. 49 (1857).
Maine	Repealed 1883. See Laws, p. 16 (1883).
Massachusetts	Repealed 1840. See Acts, c. 5 (1843).
Michigan	Prior interracial marriages legalized 1883. See Comp. Laws, § 12,695 (1929).
New Mexico . .	Repealed 1886. See Laws, p. 90 (1886).
Ohio	Repealed 1887. See Laws, p. 34 (1887).
Rhode Island .	Repealed 1881. See Acts, Jan. Sess., p. 108 (1881).
Washington . .	Repealed 1867. See Laws, pp. 47-48 (1867).

[FNa1]. Perez v. Lippold, 32 A.C. 757 (Cal. 1948).

[FN1]. If the Negro can be placed lower in the biological order than the Caucasian, there is no difficulty in rationalizing him out of the Caucasian's social order. The Negro then receives some of the attributes of full citizenship not as rights, but as charities extended to an inferior being. 1 MYRDAL, AN AMERICAN DILEMMA 101-10 (1944).

[FN2]. These are listed and discussed in MANGUM, THE LEGAL STATUS OF THE NEGRO 263-73 (1940), and Appendix *infra*. The states still banning miscegenation are the only part of the world, outside of the Union of South Africa, with extensive prohibitions against miscegeny. Brief for Respondents, p. 8, Perez v. Lippold, 32 A.C. 757 (Cal. 1948).

[FN3]. None of these decisions reveals any examination of recent and unbiased scientific evidence. Only in one case has an anti-miscegenation statute been invalidated, Burns v. State, 48 Ala. 195, 198 (1872) (statute prohibiting minister from performing marriage of white and Negro held unconstitutional), and this case was expressly overruled by Green v. State, 58 Ala. 190 (1877).

The Supreme Court of the United States has never directly ruled on the constitutionality of these statutes, having declined the gambit in *In re* Monks' Estate, 48 Cal. App.2d 603, 120 P.2d 167 (1941), *app. denied*, 317 U.S. 590 (1942) (on ground papers not filed in time), and Lee v. Monks, 318 Mass. 513, 62 N.E.2d 657 (1945), *cert. denied*, 326 U.S. 696 (1946) (both cases involving loss of Negro wife's dower rights because marriage to white man void under Arizona anti-miscegenation statute). But in Pace v. Alabama, 106 U.S. 583 (1882), the Court upheld an Alabama statute making fornication a felony for a Negro and white, but merely a misdemeanor for any other couple, on grounds that the statute was non-discriminatory and was directed at the offense rather than at any particular race or color. *Id.* at 585. The California court distinguished this decision on the ground that while there is a basic right to marry, there is no right to adultery or fornication. *See* Perez v. Lippold, *supra* note 2, at 772.

Lower federal courts have upheld two anti-miscegenation statutes despite attacks based on the Fourteenth Amendment: Stevens v. United States, 146 F.2d 120 (10th Cir. 1944) (marriage of Negro to deceased full-blooded Creek Indian void in Oklahoma; statute affects all parties alike); State v.

Tutty, 41 Fed. 753, 762 (C.C.S.D.Ga. 1890) (comity does not require recognition of out-of-state marriage of Negro and white residents of Georgia who returned to Georgia to live, where such marriage is against state's public policy).

The state cases directly upholding these statutes as valid under the Fourteenth Amendment are: Kirby v. Kirby, 24 Ariz. 9, 206 Pac. 405 (1922) (marriage purely a subject for state regulation); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895) (marriage is subject to exercise of state police power). Occasionally the ground for decision is more esoteric: Green v. State, 58 Ala. 190 (1877) (God made black and white different and meant them to be separate); State v. Gibson, 36 Ind. 389 (1871) (natural law forbids racial intermarriage). Statutory variations on the standard anti-miscegenation theme have been similarly treated: Frasher v. State, 3 Tex. App. 263 (1877) (statute penalizing only whites for miscegenation); Ford v. State, 53 Ala. 150 (1875) (statute making miscegenous adultery a felony while non-miscegenous adultery is a misdemeanor). Among the more intriguing fact situations is Blake v. Sessions, 94 Okla. 59, 220 Pac. 876 (1923) (marriage of man three-fourths Indian and one-fourth Negro to woman three-fourths Indian and one-fourth white; statute prohibiting marriage of Negroes to anyone not Negro held valid).

[FN4]. 32 A. C. 757 (Cal. 1948), *rehearing denied*, October 28, 1948 (communication to the YALE LAW JOURNAL from the Clerk of the Supreme Court of California, November 15, 1948, in Yale Law Library), *app. waived*, N.Y. Times, December 13, 1948, p. 37, col. 7. Traynor, J., wrote the court's opinion, in which Gibson, C. J., and Carter, J., joined, *id.* at 777; separate concurring opinions were written by Carter, J., *id.* at 777, and Edmonds, J., *id.* at 785; Shenk, J., dissented, along with Schauer, J., and Spence, J. *Id.* at 787.

[FN5]. The term miscegenation, when used in this note, means sexual relations between members of different races, unless specially qualified.

[FN6]. Brief for Petitioners pp. 9-19, Perez v. Lippold, 32 A. C. 757 (Cal. 1948).

[FN7]. Moreover, the Supreme Court in the Mormon polygamy cases upheld restrictions on marriage even where it was required by religion. Reynolds v. United States, 98 U.S. 145 (1878) (polygamy an act in violation of social duties or subversive of good order, and thus regulable despite incidental religious restriction). In Cleveland v. United States, 329 U.S. 14, 18 (1946) (Mann Act prosecution of polygamists), the Supreme Court reaffirmed this earlier stand.

The court evaded a direct ruling on this issue, 32 A.C. 757, 759 (Cal. 1948). But see Edmonds, J., (concurring), *supra* note 4 (right to marry is protected by Constitutional guarantee of religious freedom).

[FN8]. 32 A. C. 757, 777 (Cal. 1948). The right to marry is also protected by the "due process" clause, and cannot be infringed by action that is arbitrary or bears no reasonable relation to legitimate legislative objectives. *See* Meyer v. Nebraska, 262 U.S. 390, 399, 400 (1923).

The state invoked the precedents of Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding state law for sterilization of mental incompetents because public welfare may require that citizens be deprived of fundamental right to marry and bring up children), and Hirabyashi v. United States, 320 U.S. 81, 100 (1943) (distinction between citizens based on race upheld). But the California court rejected these on the grounds, inter alia, that the sterilization statute guaranteed a comprehensive investigation in each case before it was applied, and that in the Nisei case the exigencies of the war situation made discrimination permissible. 32 A. C. 757, 761, 772 (Cal. 1948). See Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L. J. 489 (1945).

[FN9]. In answering the state's assertion of a presumption of validity, the court relied on the opinions in Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) and Oyama v. California, 332 U.S. 633, 646 (1948) (only most exceptional cases can excuse discrimination on the basis of race or color).

[FN10]. 32 A.C. 757, 761-74 (Cal. 1948).

[FN11]. See REUTER, RACE MIXTURE 107, 108 (1931), who claims that the Negro group is mentally inferior because it has produced few men of real ability and no one whose accomplishments have not been surpassed by scores of white men. Intelligence testing shows an "enormous and reliable

superiority of whites over Negroes...." PETERSON, 5 MENTAL MEASUREMENT MONOGRAPHS 151 (1929); *cf.* Castle, *Biological and Sociological Consequences of Race Crossing*, 9 AMER. JOURNAL OF PHYS. ANTHROPOLOGY 152-3 (1926).

For reports of physical inferiority, see HOLMES, THE NEGRO'S STRUGGLE FOR SURVIVAL 47 (1937) (Negro general mortality higher than white); EMBREE, BROWN AMERICANS 40 (1943) (Negro death rate is more than 33% above the white rate. The death rate from tuberculosis is three times that of the whites; from syphilis, maternal and child ills, heart disease and pneumonia, it is ten times that of the whites); *cf.* Hoffman, *Race Traits and Tendencies of the American Negro*, XI PUB. AM. ECO. ASS'N 146-8 (1896); Davenport, *State Laws Limiting Marriage Selection Examined in the Light of Eugenics*, 9 EUGENICS RECORD OFFICE BULLETIN (1913) (Negroes are apt to form keloid and uterine tumors). 2 CYCLOPEDIA OF MEDICINE, SURGERY AND OBSTETRICS 275 (1946) (sickle cell anemia is a congenital disease occurring only in Negroes).

[FN12]. Race crossing of the primary races leads to retrogression, and to eventual extinction of the resultant type unless fortified by reunion with the parent stock: Dixon, *Morbid Proclivities and Retrogressive Tendencies in the Offspring of Mulattoes*, 20 JOURN. AMER. MED. ASS'N 1 (1893); WOODRUFF, THE EXPANSION OF RACES 251 (1909); GREGORY, THE MENACE OF COLOR 229 (1925) (where two distinct races are in contact, inferior qualities are not bred out and may be emphasized in progeny); DAVENPORT AND STEGGERDA, RACE CROSSING IN JAMAICA (1929) (study of 300 adults in Jamaica indicates that crossing of distinct races is biologically undesirable); HOLMES, *op. cit. supra* note 11, at 175-7 (setting out findings of Nott in 1843 that mulattoes of South Carolina were decidedly infertile); Castle, *supra* note 11 ("race crossings disturb social inheritance"); Matas, *Surgical Peculiarities of the Negro*, 4 TRANS. AM. SURG. ASS'N (1896) (dental caries are rare in pure blooded Negroes but frequent in mulattoes); Davenport, 27 CURRENT HISTORY 403 (1927) (mulattoes are not fully compatible with their environment, "combin[ing] something of the white man's intelligence and ambition with an insufficient intelligence to realize that ambition"); LASKER, FILIPINO IMMIGRATION 35 n. 3 (1931) ("[C]onsidering the necessity of adaptation to conditions controlled by the dominant race, the results of interbreeding ... are decidedly dysgenic"); Mjoen, *Harmonic and Disharmonic Race Crossings*, 2 EUGENICS IN RACE AND STATE 41-61 (1923) (hybrid offspring of Lapps and Scandinavians are inferior to either of their parents); *see* Perez v. Lippold, 32 A.C. 757, 801-5 (Cal. 1948) (dissenting opinion). See also, Brief for Respondents, pp. 61-97, Perez v. Lippold, *supra*.

[FN13]. KLINEBERG, CHARACTERISTICS OF THE AMERICAN NEGRO 335 (1944), claims that the superior techniques employed in investigations subsequent to those set out in notes 10 and 11 *supra*, clearly shift the burden of proof to those who contend that there are innate differences in the intelligence of persons of pure and mixed bloods. Many of the materials cited in notes 10 and 11 *supra* were mentioned in Judge Shenk's dissent, and in the Respondent's Brief, *supra* note 12. A concurring judge skillfully equated portions of the state's brief with quotations from Hitler's *Mein Kampf*. 32 A.C. 757, 784-5 (Cal. 1948).

[FN14]. Even Castle, *supra* note 11, at 146, states that there are no biological obstacles to crossings between the most diverse human races, while HOLMES, *op. cit. supra* note 11, at 176, points out that there is insufficient data on how the mixed origin of the mulatto effects fertility.

KLINEBERG (a cultural anthropologist) *op. cit. supra* note 13, at 328, states that the samples used in the DAVENPORT-STEGGERDA report, *op. cit. supra* note 12, were too small and were drawn from too heterogenous a population to provide any trustworthy conclusions. Montagu (a physical anthropologist), in MAN'S MOST DANGEROUS MYTH-THE FALLACY OF RACE 116-19 (1942), implies that Davenport's work is not objective; he also attacks the grotesque reasoning of eugenists like Mjoen, Gregory (by profession a geologist), and Hoffman (a statistician for an insurance firm), (all cited *supra* notes 11 and 12), on grounds that eugenics, being concerned with breeding a superior group, starts with an inherent doctrine of racism. *Id.* at 134, 135.

[FN15]. HOLMES, *op. cit. supra* note 11, at 130, states that "the mortality of the Negro is so greatly affected by his environment and habits of life, that for most diseases, it is quite impossible to detect an influence of hereditary racial factors ..." EMBREE, *op. cit. supra* note 11, at 40, specifies that the Negro death rate today is less than half of what it was fifty years ago.

[FN16]. See KLINEBERG, NEGRO INTELLIGENCE AND SELECTIVE MIGRATION 59 (1935).

1 MYRDAL, *op. cit. supra* note 1, at 149, states that "*when we* ... [study the Negro's performance on psychological tests] *on the hypothesis that differences in behavior are to be explained largely in terms of social and cultural factors, we are on scientifically safe ground. If we should, however, approach them on the hypothesis that they are to be explained primarily in terms of heredity, we do not have any scientific basis for our assumption.*"

[FN17]. Yerkes, *Psychological Examining in the U.S. Army*, 15 MEM. NAT. ACAD. SCI. 705-42 (1921); KLINEBERG, RACE DIFFERENCES 182 (1935). Studies of troops in World War II are not yet available.

[FN18]. PETERSON, *op. cit. supra* note 11, at 6, 11, 12, 38, 91, 96; KLINEBERG, *op. cit. supra* note 17, at 183. The average I.Q. of the Los Angeles Negro children was 104.7, as against an average of 75 for Southern Negro children and 100.0 for Los Angeles white children. Price, *Negro-White Differences in General Intelligence*, 3 J. NEGRO EDUCATION 424, 441 (1934).

[FN19]. For a brief statement of the problems not yet met in testing, see 1 MYRDAL, *op. cit. supra* note 1, 149-53.

[FN20]. *Id.* at 138, 143. *See* Perez v. Lippold, 32 A.C. 757, 768-70 (Cal. 1948).

[FN21]. The differences more commonly referred to are: shorter stature; greater amount of black pigment; wooly or frizzy hair; less body hair; flattened nose; thicker lips; and protruding jaw. 1 MYRDAL, *op. cit. supra* note 1, at 139; BENEDICT, RACE: SCIENCE AND POLITICS 100-7 (1940); HERSKOVITS, ANTHROPOMETRY OF THE AMERICAN NEGRO (1930) *passim;* KLINEBERG, *op. cit. supra* note 17, 73-89; HERSKOVITS, THE AMERICAN NEGRO 34-50 (1928).

As for "primitive characteristics," it is interesting to note that the anthropoids have hairy coats and thin lips, and that the whites most closely approximate these characteristics. Thus the Negro's thick lips and lack of body hair seem to evidence more advanced physical development. BENEDICT, *op. cit. supra* at 101.

Some of the imaginary beliefs are that the Negro has a peculiar and repulsive body odor, and that male Negroes have unusually large genitalia; both of these play a role in the sexual taboos designed to maintain the Caucasian social order. 1 MYRDAL, *op. cit. supra* note 1, at 139-40.

[FN22]. See note 1 *supra*.

[FN23]. See note 10 *supra*. 1 MYRDAL, *op. cit. supra* note 1, at 140-2 also lists pellagra, syphilis and nephritis. HOLMES, *op. cit. supra* note 11, at 47-129, also lists whooping cough, malaria, tetanus, syphilis, nephritis, heart disease, keloid tumors, nervous disorders, and childbirth diseases.

[FN24]. See note 15 *supra*, and 1 MYRDAL, *op. cit. supra* note 1, at 142-3.

[FN25]. 1 MYRDAL, *op. cit. supra* note 1, at 142. An excellent study of the physical anthropology of the Negro is LEWIS, THE BIOLOGY OF THE NEGRO (1942).

[FN26]. See Hoffman, *op. cit. supra* note 11, at 69 (citing preponderant opinion of southern physicians in pre-civil war practice); HOLMES, *op. cit. supra* note 11, at 39. And a survey in Charleston, South Carolina, revealed that the tuberculosis rate in the period 1841-1848 was somewhat lower for Negroes than for whites. See WEATHERFORD & JOHNSON, RACE RELATIONS 375 (1934); EMBREE, BROWN AMERICA 49 (1st ed. 1931).

[FN27]. EMBREE, *op. cit. supra* note 26, at 54.

[FN28]. Studies of respiratory diseases have not revealed an hereditary susceptibility. See 1 MYRDAL, *op. cit. supra* note 1, at 143; Lowe and Davenport, *A Comparison of White and Colored Troops in Respect to Incidence of Disease*, 5 PROCEEDINGS OF NAT. ACAD. OF SCI. 58-67 (1919).

[FN29]. See REUTER, *op. cit. supra* note 11, 50-3; 1 MYRDAL, *op. cit. supra* note 1, at 142-3; Brief for Respondents, pp. 74-5, *supra* note 12.

[FN30]. "Passing" is the backwash of miscegenation and one of its surest results. Sometimes it occurs only for limited occupational or recreational purposes. The extent of "passing" is difficult to determine, since those who do pass conceal the fact, and many persons are completely unaware that one of their parents or grandparents has passed. 1 MYRDAL, *op. cit. supra* note 1, 129-130; 2 MYRDAL, *op. cit. supra* note 1, 1209-12; KLINEBERG, *supra* note 14, 301-19. Day, *A Study of Some Negro-White Families in the United States*, 10 HARVARD AFRICAN STUDIES 5, 44-6 (1932), states that out of the 346 families studied, 35 included one or more individuals who had passed. There was an average of 7.3 adults in these families, so her statement would allow an estimate, as a minimum, that 15 out of any 1000 Negroes passed.

See EAST, HEREDITY AND HUMAN AFFAIRS 100 (1927): "A favorite short-story plot ... is one where the distinguished scion of an aristocratic family marries the beautiful girl with the telltale shadows on the half-moons of her nails and in due time is presented with a coal-black son.... There is only this slight imperfection.... The most casual examination of the genetic formulae ... demonstrates its absurdity. If there ever was a basis for the plot in real life, the explanation lies in a fracture of the seventh commandment, or in a tinge of Negro blood in the aristocrat as dark as that in his wife." And see Day, *supra*, at 107.

Another factor is that sex relations between Negroes and whites seem to be decreasing. See REUTER, *op. cit. supra* note 11, 49-51; Day, *supra*, at 108; HERSKOVITS, ANTHROPOMETRY, *op. cit. supra* note 21, 240-1 and AMERICAN NEGRO, *op. cit. supra* note 21, at 30; 1 MYRDAL, *op. cit. supra* note 1, at 127.

[FN31]. See 1 MYRDAL, *op. cit. supra* note 1, at 113. In point of fact, the great majority of American Negroes have Caucasian as well as Negroid ancestry. HERSKOVITS, THE AMERICAN NEGRO 25 (1928), states that 80% of American Negroes show mixture with white or American Indian blood. See also EMBREE, *op. cit. supra* note 26, at 9; HERSKOVITS, ANTHROPOMETRY, *op cit. supra* note 21, at 177; and 2 MYRDAL, *op. cit. supra* note 1, at 1200. "In Latin America whoever is not black is white: in ... [the United States] whoever is not white is black." 2 BRYCE, THE AMERICAN COMMONWEALTH 555 (Rev. Ed. 1912). In British colonies and dominions the hybrids are considered a group distinct from both whites and Negroes.

[FN32]. HOLMES, *op. cit. supra* note 11, at 174, states that most mixed marriages are between white women and Negro men, and that the women are "usually either unsophisticated recent immigrants or women of very low class." See also REUTER, *op. cit. supra* note 11, at 40. Castle, *supra* note 11, at 146, states that race crossings occur between anti-social and outcast specimens of the respective races, and the "social status of the children is bound to be low, their educational opportunities poor, and their moral background bad," and *see* Green v. State, 58 Ala. 190, 194 (1877) (miscegenation must naturally cause discord, shame, disruption of family circles and the estrangement of kindred).

[FN33]. *See* 32 A.C. 757, 770 (Cal. 1948). The few studies made show that miscegenation occurs mostly in urban communities, and possibly among the better educated Negro males. See KLINEBERG, *op. cit. supra* note 13, 276-300. The "dregs of society" reference in Brief for Respondents, p. 108, *supra* note 12, was taken out of context from Linton, *The Vanishing American Negro*, 64 AMERICAN MERCURY 133, 135 (1947). Professor Linton's thesis was that it is not the "dregs of society," but just the opposite who miscegenated.

[FN34]. Brief for Respondents, pp. 97-116, *supra* note 12. DuBois, *Social Equality and Racial Intermarriage*, 5 THE WORLD TOMORROW 83 (March 1922), states that race mingling is dangerous because of widespread and deep-seated racial antagonisms and hatreds, and because of differences of taste. Castle, *supra* note 11, at 154 (strong social prejudice among whites against mixed marriages); REUTER, *op. cit. supra* note 11, at 103 (white sentiment almost universally opposed to mixed unions); 2 MYRDAL, *op. cit. supra* note 1, 1011-15, points out the increased tension in the South in recent years.

Intermarriage is the ultimate danger feared by adherents of a caste system. The closer an act violating a caste taboo comes to sexual association, the more furious is the public reaction. All discussions of the Negro problem sooner or later come down to the classic question, "would you like to have your daughter marry a Negro?" 1 MYRDAL, *op. cit. supra* note 1, at 587; BAILEY, RACE ORTHODOXY IN THE SOUTH 42 (1914). But seldom is reaction aroused by a white's making use of a

comely Negress. See 1 MYRDAL, *op. cit. supra* note 1, at 55, 56, 586.

[FN35]. There have been few race riots or lynchings in recent years. When these occur, the local police are often known to be on the side of the whites. See 1 MYRDAL, *op. cit. supra* note 1, 567-9; OTTLEY, BLACK ODYSSEY 217, 218 (1948).

There are few reported riots attributable to miscegenation. One in 1834 and one in 1849 seem to be the sole recorded examples. See Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 JOURNAL OF NEGRO HISTORY 335, at 349 (1918).

[FN36]. *See* 32 A.C. 757, 772-3 (Cal. 1948).

[FN37]. See Brief for Respondents, p. 59, *supra* note 12.

[FN38]. 334 U.S. 1, 22 (1947).

[FN39]. On this ground, the California court attempted to distinguish segregated marriage from segregated travel and education. *See* 32 A.C. 757, 771 (Cal. 1948). Conceivably, however, holding that there can be no truly equal substitute for the individual's choice in marriage may not be a far cry from holding that there can be no truly equal substitute for the individual's choice in travel and education. The very human relations that so obviously make "separate but equal" inapplicable to marriage, make it just as inapplicable to other relationships. See Note, *Segregation in Public Schools-A Violation of "Equal Protection of the Laws,"* 56 YALE L. J. 1059 (1947).

[FN40]. These statutes have extensive repercussions. Most of them are silent as to the effect on the legitimacy of children, but it seems that if the marriage is expressly declared void rather than voidable, the children will be held illegitimate in the absence of a statutory provision to the contrary. Moore v. Moore, 30 Ky. L. 383, 98 S.W. 1027 (1907) (even where there was a subsequent valid marriage in another state); Greenbow v. James, 80 Va. 636 (1885). *Contra:* Succession of Caballero, 24 La. Ann. 573 (1872) (white and Negress had been living together in Louisiana, were married under Spanish law intending to live in Spain. They legitimatized their daughter in Spain, and she became their lawful heir in Louisiana). FLORIDA REV. GEN. STAT. §§ 3938-9 (1920) provide that the issue of a miscegenous union shall be regarded as bastards and shall be incapable of having or receiving any estate real, personal, or mixed, by inheritance.

An additional problem posed by these anti-miscegenation statutes is that of dower rights. See cases cited note 3 *supra;* Britell v. Jorgensen, 113 Mont. 490, 129 P.2d 217 (1942); Succession of Gabisso, 119 La. 704, 44 So. 438 (1907).

A moral problem also ensues. By preventing marriage, the probable effect of illicit relations may be covertly encouraged. In a few instances, moreover, the statutes have been resorted to in an attempt to dissolve a marriage. Kirby v. Kirby, 24 Ariz. 9, 206 Pac. 405 (1922); Ferrall v. Ferrall, 153 N. C. 174, 69 S.E. 60 (1910).

Additional confusion stems from the conflict of laws rules applied by the different states, some of which make racial intermarriage an exception to the rule that a marriage is valid everywhere if valid where celebrated. See 1 VERNIER, AMERICAN FAMILY LAWS § 45 (1931) and Comment, *Intermarriage With Negroes-A Survey of State Statutes*, 36 YALE L. J. 858, 864-6 (1927). California is not one of these. *See* Pearson v. Pearson, 51 Cal. 120, 125 (1875), and 32 A.C. 757, 775 (Cal. 1948).

[FN41]. Two similar cases have recently arisen. A husband claiming to be white was found to be part Negro and sentenced to five years in prison for violating the Mississippi anti-miscegenation statute, N.Y. Times, December 19, 1946, p. 56, col. 1. Perhaps inspired by this decision a lady has now brought similar charges against her son-in-law under the Virginia anti-miscegenation statute. Washington, D.C. Post, December 25, 1948, p. 1, col. 6; December 29, 1948, p. 1, col. 2; December 30, 1948, p. 16, col. 5; January 1, 1949, p. 1, col. 6.