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Conflict of Laws—Foreign Marriage Incestuous by Lex Domicilii Held Valid

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The present decision reflects the modern trend requiring the testator to state explicitly any election he may intend in his will. However, it appears quite possible that a different decision might be reached in other jurisdictions by allowing recovery in quantum meruit only for the difference between the legacy and the value of plaintiff's services.

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CONFLICT OF LAWS—FOREIGN MARRIAGE INCESTUOUS BY LEX DOMICILII HELD VALID

An uncle and niece, at all times domiciled in New York, were married in Rhode Island, where such a marriage is valid. By New York Dom. Rel. Law § 5 (3) a marriage between uncle and niece is incestuous and void. The niece died, and her husband sought letters of administration. *Held:* Letters granted. In re *May's Estate,* —— App. Div. ——, 117 N. Y. S. 2d 345 (3d Dep't 1952).

The English courts hold that a marriage involving an English domiciliary, forbidden by English law, although valid where performed, is void and the children illegitimate. *Brook v. Brook,* 9 H. L. Cas. 193 (1861); In re *Paine* [1940] 1 Ch. 46. It is generally said by American courts that a marriage valid by the law of the place of celebration is valid everywhere. *Van Voorhis v. Brintnall,* 86 N. Y. 18 (1881); *Fensterwald v. Maryland,* 129 Md. 131, 93 Atl. 358, 3 A. L. R. 1562 (1916); GOODRICH, CONFLICT OF LAWS 116 (3d ed. 1949). The marital status is of primary concern to the domiciliary state. Accordingly, this general rule has been limited on grounds of policy, and marriages otherwise valid have not been respected where forbidden by the *lex domicilii* on grounds of polygamy, *Earle v. Earle,* 141 App. Div. 611, 126 N. Y. Supp. 317 (1st Dep't 1910); miscegenation, *Green v. State,* 58 Ala. 190 (1877); bigamy, *Bennett v. Smith,* 21 Barb. 439 (N. Y. 1856); nonage, *Ross v. Bryant,* 90 Okl. 300, 217 Pac. 364 (1923); incest, *United States v. Rodgers,* 109 Fed. 886 (E. D. Pa. 1901).

By the common consent of Christian nations, marriages between persons in the direct line of ascent and descent and between brother and sister are incestuous. *Wightman v. Wightman,* 4 Johns. Ch. 343 (N. Y. 1820); *Commonwealth v. Lane,* 113 Mass. 458 (1873); In re *Miller's Estate,* 239 Mich. 455, 214 N. W. 428 (1927). However, there is no general agreement as to the incestuous character of marriages between aunt and nephew, *Martin v. Martin,* 54 W. Va. 301, 46 S. E. 120 (1903); *Incuria v. Incuria,* 155 Misc. 755, 280 N. Y. Supp. 716 (Dom. Rel. Ct. 1935);

uncle and niece, *Stevenson v. Gray,* 56 Ky. 193 (1856); *Audley v. Audley,* 196 App. Div. 103, 187 N. Y. Supp. 652 (1st Dep't 1921); first cousins, *Meisenhelder v. Chicago & N. W. Ry. Co.,* 170 Minn. 317, 213 N. W. 32 (1927); *Leefield v. Leefield,* 85 Ore. 287, 166 Pac. 952 (1917); STUMBERG, CONFLICT OF LAWS 284 (2d ed. 1951). However, New York has expressly defined what relationships constitute incest, in Dom. Rel. Law § 5: "A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either . . . (3) An uncle and niece or an aunt and nephew."

Whether this statute is to apply to a marriage celebrated outside of the state might be determined by several factors. The court in the instant case was probably deterred from such a construction because numerous children had been born of a marriage unchallenged for three decades. Children of a void marriage, however, are now deemed legitimate. C.P.A. § 1135 (5). The court also relied heavily on the supposed authority of *Van Voorhis v. Brintnall, supra,* in which a foreign marriage in apparent contravention of N. Y. Dom. Rel. Law § 8 was sustained on the grounds that § 8 was penal in character and there was no legislative intent to give it extraterritorial effect. It is true that § 5 (3), involved in the instant case, is also supported by penal sanctions. N. Y. PENAL LAW § 1110; N. Y. DOM. REL. LAW § 5. However, subdivisions one and two of § 5, covering ascendants and descendants and brothers and sisters, clearly have extraterritorial effect, *Wightman v. Wightman, supra,* although supported by the same penal sanctions. It is possible, of course, that the Legislature intended that § 5 (3), adopted at a later time and covering marriages morally and eugenically less odious, should receive a different construction than § 5 (1-2). However, it seems more likely that a uniform construction of § 5 was intended. So far as the penal aspect is concerned, a distinction between the *Van Voorhis* and instant cases seems possible. In the former, the prohibition of the marriage was itself the objectionable penal feature, while in the instant case it is possible to deny the marriage without invoking the penal sanction. § 5 (3) may be taken as expressive of the strongest public policy without any penal law being enforced. This policy is meaningless if cases like *Campione v. Campione,* 210 Misc. 590, 107 N. Y. S. 2d 170 (Sup. Ct. 1951), which is in exact accord with the principal case, are a correct statement of the law. And it is submitted that a policy based in part on principles of eugenics should not be thwarted by a mere crossing of a state line.

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