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Conflict Of Laws—Marriage

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time the facts of a case litigated in the New York courts fall within the section. Of great importance was the fact that the instant dispute affected the testamentary dispositions of a New York domiciliary. Because of the dominant interest which New York has in this matter, a strong protective policy appears justified. It should be remembered, however, that public policy should not be the sole ground for deciding a conflict of laws problem, except in a clear case.²³ That the court considered the instant case to be a clear one, there is no doubt; but it may be questioned whether New York, the forum, would have invoked the public policy argument had it not been simultaneously the domicile.

Marriage

Should a marriage, valid where celebrated but void where it performed in the parties' domicile, be recognized in the latter state? The generally recognized rule is that a marriage which is valid at the place of celebration is valid everywhere.²⁴ There are, however, two broadly stated exceptions to this rule:²⁵ the first includes marriages which are contrary to natural law as it is generally regarded in Christian countries,²⁶ and the second includes marriages which the legislature of the forum has declared to be invalid because violative of some particularly strong local policy.²⁷ The latter exception has caused some difficulty, since courts differ on the question of whether a particular prohibition is such a strong expression of local policy that a marriage must be declared invalid regardless of the place where it was contracted.²⁸

23. "Local policy should not . . . be an instrumentality for rationalization of refusal to give effect to the law of another state, unless there is some exceptional and unusually sound reason." STUMBERG, *CONFLICT OF LAWS* 146 n. 47 (2d ed. 1951); see Lorenzen, *supra* note 13, at 337.

24. 2 BEALE, *op. cit. supra* note 11, at 669.

25. In re *Miller's Estate*, 239 Mich. 455, 214 N. W. 428 (1927); GOODRICH, *op. cit. supra* note 14, § 116.

26. To bring it within the meaning of this exception, the marriage must be either incestuous (between persons in the direct line of consanguinity or between brother and sister) or polygamous. In re *Miller's Estate*, *supra* note 25 at 457, 214 N. W. at 429.

27. STUMBERG, *op. cit. supra* note 23, at 282. It may be noted that the second exception coincides, for all practical purposes, with the conflicts rule prevailing in some states requiring compliance with the law of the domiciliary state for the validation of a marriage, regardless of the law of the place of the marriage.

28. "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here." *Commonwealth v. Lane*, 113 Mass. 458, 464, 18 Am. Rep. 509, 514-515 (1873). *But cf.* In re *Stull's Estate*, 183 Pa. 625, 632-633, 39 Atl. 16, 18 (1898), in which it was said that a marriage is invalid where it offends the prevailing sense of good morals of the domiciliary state and there was an intention to evade the positive law of the domicile.

The Court of Appeals was faced with such a problem in the case of *In re May's Estate*.²⁹ The issue arose in a proceeding to determine whether letters of administration should be granted to the child or to the husband of a marriage attacked as invalid. The marriage was between two New York domiciliaries, uncle and niece, who had journeyed to Rhode Island apparently for the sole purpose of contracting marriage. In Rhode Island a marriage between uncle and niece is considered valid if the parties are members of the Jewish faith, whereas in New York such a marriage is incestuous and void.³⁰ The judgment of the Surrogate's Court³¹ holding the marriage void was reversed by the Appellate Division,³² with directions to grant letters to the husband.

The Court of Appeals, in affirming (5-1), restated the general rule that a marriage valid where performed is valid everywhere, together with its two exceptions.³³ As to the first exception, a marriage between uncle and niece, valid under Mosaic law and expressly declared good by the legislature of Rhode Island, was held not offensive to the public sense of morality and thus not within the prohibitions of natural law.³⁴ Chief Judge Lewis interpreted the second exception, *viz.*, cases within the prohibition of positive law, to mean that unless there is a statute clearly expressing the Legislature's intent to regulate within New York marriages of its domiciliaries solemnized abroad, there is no "positive law" within the contemplation of the exception. Since New York could have enacted such a statute³⁵ but has not seen fit to do so, the court would not extend the scope of the present statute by judicial construction. Neither exception being present, the court concluded that since the marriage was valid where performed it was valid in New York.

Judge Desmond, the sole dissenter, seemed to advocate a more liberal interpretation of the second exception, to the effect that as

29. 305 N. Y. 486, 114 N. E. 2d 4 (1953).

30. N. Y. DOM. REL. LAW § 5 (3).

31. 110 N. Y. S. 2d 430 (Surr. Ct. 1952).

32. 280 App. Div. 647, 117 N. Y. S. 2d 345 (3d Dep't 1952).

33. See *Van Voorhis v. Brintnall*, 86 N. Y. 18, 26-27, 40 Am. Rep. 505, 509 (1881); *Thorp v. Thorp*, 90 N. Y. 602, 605, 43 Am. Rep. 189 (1882).

34. *Accord, Fensterwald v. Burk*, 129 Md. 131, 138, 98 Atl. 358, 360 (1916), "An incestuous marriage, within the meaning of our exception is . . . not every one forbidden . . . by . . . legislative enactments . . ., for a State may prohibit . . . matrimonial connections between persons related in blood or affinity, not incestuous by natural law." But see *United States ex rel. Devine v. Rodgers*, 109 Fed. 886, 888 (D. C. E. D. Pa. 1901).

35. For example, several states have enacted laws similar to what was formerly the Uniform Marriage Evasion Act, § 1, 9 U. L. A. 480 (1942), "If any person residing . . . in this state . . . shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

THE COURT OF APPEALS, 1952-53 TERM

long as the prohibitions of a statute indicate that public policy of the domicile is against the marriage in question, such marriage must fall.³⁶ He further indicated that all the subdivisions of § 5 should be given equal construction. Therefore, since the first two subsections, which invalidate marriages between ancestor and descendant or brother and sister, are given extraterritorial effect, the third should be likewise construed.³⁷

Thus, it appears the Court of Appeals has clearly indicated by reason of its strict interpretation of the second exception that, even as to domiciliaries, no extraterritorial effect will be given to Domestic Relations Law § 5 (3). If the first two subsections are to be given extraterritorial effect, it is not because the cases within their scope are "prohibited by positive law," but because such marriages are generally regarded with abhorrence by all Christian countries.

Contracts

The problem of the recognition of exchange controls in conflict of laws has become increasingly important in the past few years by virtue of their almost universal usage. Early cases often ignored or refused to apply the foreign exchange restrictions, primarily on the ground of repugnance to the public policy of the forum. Whereas two decades ago we would have looked askance at such regulations, today we can count the countries which do not have currency restrictions on the fingers of one hand. Although the United States has no such controls, it recognizes and gives some effect to those of other countries.³⁸ Despite this fact, the law is not fully settled as to whether the courts will uphold defenses based on such restrictions in all cases.

The Court of Appeals was faced with a reasonably uncomplicated version of this problem in *Perutz v. Bohemian Discount Bank in Liq.*³⁹ Under an agreement with defendant's predecessor bank,

36. But see RESTATEMENT, *op. cit. supra* note 2, § 134, comment b, "The mere fact that the foreign marriage would have been contrary to the statute of the forum had it occurred within the state, does not make it so offensive to local policy as to be refused enforcement."

37. See 2 BFLQ. L. REV. 325 (1953) (instant case noted in Appellate Division stage).

38. The Bretton Woods Agreements Act, § 11, 59 STAT. 516 (1945), 22 U. S. C. § 286 h (1946), gives full force and effect in the United States to certain sections of the Articles of Agreement of the International Monetary Fund, among which is the first sentence of Art. VIII, § 2(b): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member." See *Kraus v. Zivnostenska Banka*, 187 Misc. 681, 685, 64 N. Y. S. 2d 208, 211 (Sup. Ct. 1946).

39. 304 N. Y. 533, 110 N. E. 2d 6 (1953).