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Witnesses -- Competency of Husband and Wife -- Effect of Validity and Purpose of Marriage

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has been suggested that "anti-ademption statutes" could be passed, as we now have "anti-lapse statutes," to prevent the legacy's failing;[16] but apparently no state has been willing to go so far to remedy the situation. Even if it were found under the above remedies that the legatee or devisee were entitled to the proceeds of the legacy, query as to whether insurance proceeds would be considered proceeds of the legacy or of a separate contract.

It would seem that the most practical remedy is to be found in the will itself. Thus, if the testator were to provide in his will that if the specific legacy is not a part of his estate at his death, the legatee is to take other rights, such as the proceeds of the property, the property purchased with the proceeds of the property, or the insurance derived from its damage or destruction in lieu of the property specifically bequeathed, the problem would be practically extinct except for the matter of tracing proceeds. The intent of the testator can best be served when drafting his will by informing him of the possibility of ademption and the remedies available.

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Witnesses—Competency of Husband and Wife—Effect of Validity and Purpose of Marriage

Defendant was on trial for violation of the immigration laws. He had entered into a marriage in France with an honorably discharged veteran for the purpose of bringing himself within the language of the War Brides Act[1] so as to gain entrance to the United States. At the time of the marriage both parties understood its limited purpose; it was agreed that a divorce would be obtained after the marriage had served this purpose; and the wife received a sum of money for participating in the plan. At the trial the government offered the wife as a witness against the defendant. He objected on the ground that she was his wife pursuant to a French marriage and therefore incompetent to testify against him. *Held:* The validity or invalidity of the French marriage is immaterial. The relationship was entered into with no intention of the parties to live together as husband and wife, but only for the purpose of using the ceremony in a scheme to defraud. The marriage was a sham, empty, phony affair, and the ostensible spouse was competent to testify against the defendant.[2]

[16] Mecham, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 514 (1948); III AMERICAN LAW OF PROPERTY § 14.13 (1952).

[1] See 59 STAT. 659 (1945), 8 U. S. C. § 232 (1947) which provides in effect that alien spouses of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War, shall be admitted to the United States.

[2] Lutwak v. U. S., 73 Sup. Ct. 481 (1953).

The federal courts have generally[3] followed the rule that spouses are incompetent as witnesses against each other in criminal actions unless the defendant is being tried for violence upon the person of the offered witness spouse.[4] The principal decision recognized this rule to be the existing law, but refused to apply it because the marriage was a sham. The language of the decision—*so-called marriage, ostensible spouse,* and *sham marriage*[5]—indicates that the refusal to declare the witness incompetent was based on the conclusion that the marriage was in fact invalid; however, in reaching this conclusion the Court refused to consider the appropriate law governing the marriage by stating that the legal marital status of the parties was immaterial.

In jurisdictions which adhere to the rule that spouses are incompetent as witnesses against each other in criminal actions, incompetency is treated as an incident of a valid marriage.[6] The question of whether an offered witness is the wife of an accused so as to be incompetent is determined by the trial judge.[7] However, the controlling factor in his determination of competency is the marital status of the parties at the time of the trial.[8] If the marriage, when tested by the applicable law

[3] See 28 U. S. C. § 664 (1947) which provides in effect that in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness.

[4] U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Shore v. U. S., 174 F. 2d 838 (8th Cir. 1949); Hays v. U. S., 168 F. 2d 996 (10th Cir. 1948); Brunner v. U. S., 168 F. 2d 281 (6th Cir. 1948); U. S. v. Mitchell, 137 F. 2d 1006 (2d Cir. 1943); Paul v. U. S., 79 F. 2d 561 (3d Cir. 1935). *But cf.* Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935).

[5] Lutwak v. U. S., 73 Sup. Ct. 481, 488 (1953).

[6] Miles v. U. S., 103 U. S. 304 (1880); U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Matz v. U. S., 158 F. 2d 190 (D. C. 1946); Elmore v. State, 140 Ala. 199, 37 So. 156 (1904); State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942); People v. Thornton, 235 P. 2d 227 (Cal. App. 1951); People v. McIntire, 213 Cal. 50, 1 P. 2d 443 (1931); State v. Chrismore, 223 Iowa 957, 247 N. W. 3 (1937); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Rowland v. State, 75 Okla. Cr. Rep. 164, 129 P. 2d 609 (1942); Scott v. State, 59 Okla. Cr. Rep. 231, 57 P. 2d 639 (1936); Commonwealth v. Carey, 105 Penn. Super. Ct. Rep. 362, 161 A. 410 (1932); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946).

[7] When an accused objects to the competency of an offered witness on the grounds that she is his spouse and the prosecution challenges the validity of the marriage, the judge holds a special preliminary examination to determine the issue. Dickerson v. State, 30 Ga. App. 352, 118 S. E. 67 (1923); State v. Chrismore, 223 Iowa 957, 274 N. W. 3 (1947); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Commonwealth v. Carey, 105 Penn. Super. Ct. Rep. 362, 161 A. 410 (1932); State v. McGinty, 14 Wash. 2d 71, 126 P. 2d 1086 (1942); State v. Frye, 45 Wash. 645, 80 Pac. 170 (1907). *See also,* U. S. v. Walker, 176 F. 2d 564, 568 (2d Cir. 1949); See Shores v. U. S., 174 F. 2d 838 (8th Cir. 1949) (followed procedure); Brunner v. U. S., 168 F. 2d 281 (6th Cir. 1948) (followed procedure). *Contra:* Goodson v. State, 162 Ga. 178, 132 S. E. 899 (1926) (issue left to jury). When the validity of the marriage is also an issue which is material in the case being tried, the judge still rules on the issue for the purpose of competency; however, his ruling can come only after enough evidence on the issue has been presented during the course of the trial to convince him of the validity or invalidity of the marriage. Miles v. U. S., 103 U. S. 304 (1880); Matz v. U. S., 158 F. 2d 190 (D. C. 1946).

[8] Elmore v. State, 140 Ala. 199, 37 So. 156 (1904); State v. Chrismore, 223

governing the relationship,[9] is valid, the witness thenceforth becomes the lawful wife of the defendant, and thus is incompetent.[10]

The general rule is that marriages will, if valid by the laws of the place where entered into, be recognized as valid in every other jurisdiction.[11] Once the validity of the marriage is determined according to the law at the *lex loci contractus,* its incidents are automatic elsewhere[12] unless recognition of the marriage would contravene some public policy of the forum.[13]

Hence, in the instant case, the Court's disregard of French marriage law and local public policy controlling recognition of the marriage seems to have been inconsistent with its recognition of the rule that spouses are incompetent to testify against each other.[14] The Court could have used the power conferred upon if by the Federal Rules of Criminal Procedure[15] to effectuate the suggestion made by several preceding decisions[16] that the rule disqualifying spouses as witnesses against each other in criminal action be abrogated. However, once the Court chose not to take this step, it is difficult to comprehend how it could recognize the rule and at the same time completely ignore the marital status—the controlling factor in determining whether the rule should be applied.[17]

As a practical matter, the same result probably could have been reached by the Court if the marital status had been considered. A persuasive indication that the so-called sham marriage here did not

Iowa 957, 274 N. W. 3 (1937); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Scott v. State, 59 Okla. Cr. Rep. 231, 57 P. 2d 639 (1936); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946); State v. McGinty, 14 Wash. 2d 71, 126 P. 2d 1086 (1942). *See also,* U. S. v. Walker, 176 F. 2d 564, 568 (2d Cir. 1949).

[9] State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942).

[10] See note 6 *supra.*

[11] Loughram v. Loughram, 292 U. S. 216 (1934); Baron v. U. S., 191 F. 2d 837 (9th Cir. 1951); Frozen v. Du Pont, 146 F. 2d 837 (3d Cir. 1944); Toshcko Inaba v. Noyle, 36 F. 2d 481 (9th Cir. 1929); Modianos v. Tuttle, 12 F. 2d 927 (E. D. La. 1925); *Ex parte* Suzanna, 295 F. 713 (D. Ct. D Mass. 1924); Great Northern Ry. v. Johnson, 254 F. 683 (8th Cir. 1918); *In re* Miller's Estate, 239 Mich. 455, 214 N. W. 428 (1927).

[12] Loughram v. Loughram, 292 U. S. 216 (1934) (dower award); Frozen v. Du Pont, 146 F. 2d 837 (3d Cir. 1944) (workmen's compensation award); Modianos v. Tuttle, 12 F. 2d 927 (E. D. La. 1925) (immigration privilege); *Ex parte* Suzanna, 295 F. 713 (D. Ct. D Mass. 1924) (immigration privilege); Great Northern Ry. v. Johnson, 254 F. 683 (8th Cir. 1918) (death claim of surviving spouse).

[13] *Ex parte* Soucek, 101 F. 2d 405 (7th Cir. 1939); Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938); Takahashi's Estate v. Jorgensen, 113 Mont. 490, 129 P. 2d 217 (1942); Lederkremer v. Lederkremer, 18 N. Y. S. 2d 725 (1940).

[14] See note 6 *supra.*

[15] See FED. R. CRIM. P. 26 which provides as follows: ". . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States *in the light of reason and experience.*" (Italics added.)

[16] See Funk v. U. S., 290 U. S. 371 (1934); U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935).

[17] See note 8 *supra.*

contravene any public policy in American jurisdictions is the fact that such marriages have been held valid in many of the states.[18] However, under French law, where the marriage ceremony was performed, when parties go through a ceremony of marriage for some purpose other than that of creating a true relationship of husband and wife, the marriage is treated as void.[19]

Aside from the means used by the Court in the instant case, there is no particular quarrel with the ultimate result of the decision. The reason usually given for the disqualification of spouses as witnesses against each other is to protect the sanctity of the marital relationship.[20] When two people marry with no intention by either to enter the relationship for the purposes commonly understood, the reason for the rule obviously disappears. The Court here attempted to alleviate such a situation by basing competency on the purpose of the marriage rather than on its validity. This approach would undoubtedly be desirable in that it would prevent the application of the rule for the sake of the rule[21] rather than for the sake of the reason underlying the rule. However, as pointed out above,[22] such a departure would be inconsistent with the rule itself since the rule applies to married persons as such. To effectuate this approach, it would seem necessary to abandon the rule of incompetency as to married persons and substitute therefor a rule declaring a witness incompetent where it appears that the sanctity of the witness's marital relationship would be affected by allowing her to testify. The dissenting opinion in the principal case[23] recognized the necessity of determining the invalidity of the marriage according to the proper law governing the relationship in order to be consistent with the rule of incompetency and summed the situation up as follows: "Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effort to bridge the gap is apt to produce bad law."[24]

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[18] See Schilbi v. Schilbi, 136 Conn. 196, 69 A. 2d 831 (1949) (legitimizing child); De Vries v. De Vries, 195 Ill. App. 4 (1915) (nullification of employment contract); Hansen v. Hansen, 287 Mass. 154, 191 N. E. 673 (1934) (retention of position and salary increase); Delfino v. Delfino, 35 N. Y. S. 2d 693 (1942) (protection of reputation); Erickson v. Erickson, 38 N. Y. S. 2d 588 (1942) (legitimizing child); Campbell v. Moore, 189 S. C. 497, 1 S. E. 2d 784 (1939) (legitimizing child). For a compilation of cases involving limited purpose marriages see 14 A. L. R. 2d 624 (1950).

[19] 1 RABEL, CONFLICT OF LAWS 272 (Draper-Yntema, ed. 1945).

[20] 8 Wigmore, Evidence § 2228 (3d ed. 1940).

[21] See U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949) (accused had married witness solely for the purpose of defrauding her of money; the parties had separated; and reconciliation seemed highly unlikely); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946) (accused married witness for the exclusive purpose of rendering her incompetent to testify against him).

[22] See note 14 *supra*.

[23] See Lutwak v. U. S., 73 Sup. Ct. 481, 490 (1953) (dissenting opinion).

[24] *Ibid.*