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Conflict of Laws Governing Annulment of Marriage

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faced with the problem of letting a judgment go by default or traveling some distance to litigate a groundless claim.[20]

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CONFLICT OF LAWS GOVERNING ANNULMENT OF MARRIAGE

H and W, domiciled in Montana, are married in Idaho and return at once to Montana. By the law of one State or the other, the marriage is invalid.[1] Two questions arise: (1) The Courts of which State should take jurisdiction to annul this marriage? (2) What law should those Courts apply to determine whether an annulment should be granted?

The cases are by no means in agreement as to the answer to the first of these questions. This uncertainty is amply illustrated by reference to the decisions of one jurisdiction, New Jersey. In *Blumenthal v. Tannenholz,*[2] the Court refused to take jurisdiction to annul a marriage contracted within the State; in *Avakian v. Aviakian,*[3] the Court granted an annulment although neither party was domiciled within the State and the marriage did not take place there; and in *Capasso v. Colonna,*[4] the Court refused to annul a marriage contracted in New York when the parties were domiciled in New Jersey at all times.

Some Courts, distinguishing between void and voidable marriages, have held that, whereas a void marriage may be annulled in either the State of domicil at time of suit or the State where it was celebrated, a marriage which is voidable merely can be annulled only in the State where it was celebrated[5]. The majority of Courts today, however, in the interest of certainty and uniformity, are inclined to give exclusive jurisdiction to the Courts of the State wherein the parties are domiciled at the

[20]While the Montana statute, drafted carefully in the light of earlier test cases, answers most questions, some are left unanswered. E. g., may a non-resident plaintiff take advantage of the act? That he may, see Beach v. Perdue Co., 35 Del. 285, 163 Atl. 265 (1932). It was held in State *ex rel.* Ledin v. Davidson, 216 Wis. 216, 256 N. W. 718 (1934), that plaintiff may not sue the executor or administrator of the deceased non-resident.

[1] Cross v. Cross, —— Mont. ——, 99 P. (2d) (1940), involved similar facts. It was decided, however, after this note was written.

[2] 31 N. J. Eq. 194 (1879).

[3] 69 N. J. Eq. 89, 60 Atl. 521 (1905).

[4] 95 N. J. Eq. 35, 122 Atl. 378 (1923) aff'd., 96 N. J. Eq. 385, 124 Atl. 760 (1924).

[5] Levy v. Downing, 213 Mass. 334, 100 N. E. 638 (1913); Sutton v. Warren, 10 Met. 451 (Mass., 1845); Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555 (1858); Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355 (1912); JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935), Sec. 115.1.

time the annulment is sought.[6] Thus, in *Antoine v. Antoine*,[7] a suit to annul a Mississippi marriage, the Supreme Court of Mississippi said, "Both of these parties being domiciled in Alabama, that Court, and not this one, has jurisdiction in this cause." This trend is likewise shown by the fact that Dean Goodrich, in the 1927 edition of his text on the Conflict of Laws, favored the taking of jurisdiction by the State wherein the marriage took place, but in the 1938 edition he said, "Jurisdiction to annul a marriage by declaring it ineffective from the beginning is vested only in the courts of the domicil of the parties"[8]. But it may be doubted whether the jurisdiction of either State should be exclusive. Even though Montana is allowed jurisdiction to annul a marriage celebrated in Idaho, it would not seem to follow that Idaho, the State by whose law the validity of the marriage is generally determined, should be denied jurisdiction.

In the case where the parties have separated and so have given rise to the possibility of different domiciles, the rules governing jurisdiction to annul the marriage are, in general, the same as those governing jurisdiction to grant a divorce[9].

Turning now to the second question, it is apparent that, although the Montana Court may properly take jurisdiction to annul the marriage, its own annulment statutes setting forth the grounds of annulment would not necessarily apply. There remains the independent problem of choice of the law governing the right to an annulment. A solution to this problem requires that a further question be asked, *viz.*, what law determines the validity of the marriage[10]? Whose law will determine, for instance, whether the parties were old enough to enter into an unimpeachable marriage contract without the consent of their parents, or whether they were of too close kinship to enter into an unimpeachable marriage contract? It is a generally accepted maxim that a marriage valid where celebrated is valid

[6] McCormack v. McCormack, 175 Cal. 292, 165 Pac. 930 (1917); Montague v. Montague, 25 S. D. 471, 127 N. W. 639, 30 L. R. A. (N. S.) 745, Ann. Cas. 1912C 591 (1910); Turner v. Turner, 85 N. H. 249, 157 Atl. 532 (1931); Gwin v. Gwin, 219 Ala. 552, 122 So. 648 (1929).

[7] 132 Miss. 442, 96 So. 305 (1923).

[8] HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICTS OF LAWS, 1st Edition (1927), page 301; 2d Edition (1938), page 354.

[9] RESTATEMENT, CONFLICTS OF LAWS, Sec. 115; BEALE, TREATISE ON THE CONFLICTS OF LAWS, Sec. 113.11.

[10] In a divorce proceeding, the original validity of the marriage contract itself is not in question, because a divorce is based on causes arising after the marriage took place; accordingly, the Courts to which the parties have appealed for their divorce look to their own law to determine whether a divorce should be granted. Since an annulment is given for causes antedating the marriage (which causes, to be grounds for an annulment, must be shown in some measure to affect the validity of the marriage contract itself), it is a fundamentally different proceeding.

everywhere[11]. This maxim is misleading because it intimates that the State wherein the marriage took place is the sole determiner of the validity of the marriage, but as will be shown presently, the State of the domicil of the parties at the time of the marriage has an equally important interest[12]. Consequently, distinctions must be drawn, based on public policy, between the types of grounds of annulment. Thus, in the case originally put, if the laws of Idaho as to the age of H and W were not satisfied, then Montana clearly could annul the marriage, relying however, on Idaho law. If, on the other hand, the marriage were valid according to Idaho law, then a Montana Court could not annul it; since it is valid in Idaho, this marriage, even though it would have been invalid if celebrated in Montana, is valid in Montana[13]. The prevalent policy of upholding marriages outweighs the advisability of granting an annulment unless the marriage runs counter to the morals of the domicil[14]. But the role played by public policy readily appears if it be assumed that H in the illustration were a negro and W a white woman. A Montana Court should have no hesitancy in declaring the marriage void even though it was valid under Idaho law, because R.C.M., Secs. 5700[15] and 5703[16], taken together, de-

[11]5 R. C. L. 993; RESTATEMENT, CONFLICT OF LAWS, Sec. 121; and see note 13.

[12]According to BEALE, TREATISE ON THE CONFLICTS OF LAWS, Secs. 136.1 and 132.6, the law of the domicil is the final determiner of the validity of the marriage; the law of the place of celebration applies only as a result of the former's choice of law rule.

[13]R. C. M., 1935, Sec. 5707. "All marriages contracted without the State, which would be valid in by the laws of the country in which the same were contracted, are valid in this State."

[14]McDonald v. McDonald, 6 Cal. (2d) 457, 58 P. (2d) 163, 104 A. L. R. 1290 (1936); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724 (1908); Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683 (1920); but see Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923).

[15]R. C. M., 1935, Sec. 5700. "Every marriage hereafter contracted or solemnised between a white person and a negro, or a person of negro blood or in part negro, shall be utterly null and void."

[16]R. C. M., 1935, Sec. 5703. "Every such marriage mentioned in either of th foregoing sections (5700-5702) which may be hereafter contracted or solemnised without the State of Montana by any person who has, prior to the time of contracting or solemnising said marriage, been a resident of the State of Montana, shall be null and void within the State of Montana". This statute, while the language is broad, probably does not mean that such a marriage is void if the parties were *at any time* prior thereto domiciled in Montana. Acquisition of a new domicil between the time of their marriage in another State, and the time when they were formerly domiciled in Montana should insulate their marriage from a suit for nullity in Montana. State v. Ross, 76 N. C. 242 (1877); Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45 (1910); State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, 1907). Instead of annulling the marriage in this situation, it would be better to adopt the view suggested by the RESTATEMENT, CONFLICTS OF LAW (Sec. 134), and refuse to allow these persons cer-

clare the policy of this State that the marriage of a white person and a negro who were, prior to their marriage in another State, domiciled in Montana, is void[17] in Montana. These sections thus clearly amend the general rule of Sec. 5707 that a marriage valid by the laws of the State wherein it was celebrated is valid in Montana. The marriage might possibly be declared void[18] on grounds of policy not expressly stated in Sec. 5703.

That the law of both the State of marriage and the domicil at the time of marriage determines the validity of the marriage is more forcefully brought out when three States are involved. Suppose H and W are domiciled in Washington at the time of their marriage in Idaho and move at once to Montana. The cases[19] indicate that while Montana should take jurisdiction, it should look to the laws of both Washington and Idaho to determine the validity of the marriage, and that if Washington would have annulled, Montana should do so[20].

Beale asserts[21] that, if the parties are domiciled in different States at the time of the marriage, it takes both States to avoid it, *i.e.*, unless invalid by the laws of both States it will be held

tain marital privileges while within the State. But it may be doubted whether this is an example of annulment at all or rather involves R. C. M., 1935, Sec. 5728 (see footnote 18), providing for an entirely independent procedure for declaring void this marriage.

[17]R. C. M., 1935, Sec. 5699, provides that the marriage of first cousins, uncle and neice, brother and sister, etc., is incestuous and void from the beginning. It does not follow that this statute is as broad in scope as Sec. 5703. It may be held to apply to the marriages of all Montana domiciliaries wherever the marriage was entered into, to marriages entered into in Montana, or both. In Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179 (1910), H and W were domiciled in Washington at the time of their marriage in British Columbia. Washington annulled the marriage because it was in violation of their statute forbidding first cousins from marrying. The law of British Columbia did not appear. But in Leefeld v. Leefeld, 85 Ore. 287, 166 Pac. 953 (1917), H and W were domiciled in Oregon at the time of their marriage in Washington. Oregon refused to annul the marriage, saying that their statute prohibiting first cousins from marrying was penal in nature and had no extra-territorial effect. It is hard to see why an annulment could not have been granted, using the Washington statute as a basis, unless that statute had been construed to apply to Washington domiciliaries only.

[18]R. C. M., 1935, Sec. 5728. "Either party to an incestuous or void marriage may proceed, by action in the District Court, to have the same so declared." Instead of declaring the general purpose of the chapter on annulment, there are good grounds for believing that this statute provides for an entirely different procedure.

[19]Hall v. Industrial Accident Commission, 165 Wis. 364, 162 N. W. 312, L. R. A. 1917D 829 (1917); Huard v. McTeigh, 113 Ore. 279, 232 Pac. 658, 39 A. L. R. 528 (1925); Meisenhelder v. Chicago & N. W. R. R. Co., 170 Minn. 317, 213 N. W. 32, 51 A. L. R. 1408 (1927); *In re* Ommang's Estate, 183 Minn. 92, 235 N. W. 529 (1931).

[20]JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS, Sec. 132.5.

[21]Owen v. Owen, 178 Wis. 609, 190 N. W. 363, 32 A. L. R. 1100 (1922); People *ex rel.* Schutt v. Siems, 198 Ill. App. 342 (1916).

good. Of course, the State by whose law the marriage is invalid can refuse to allow these parties certain privileges of the marital relationship while the parties are within that State.[22]

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VALIDITY OF NON-VOTING PROVISIONS IN CORPORATE STOCK

According to the records of the Secretary of State, the device of non-voting stock is used occasionally in Montana. This practice apparently is authorized by Section 5905, R.C.M., 1935, which requires that the articles of incorporation set forth "the amount of its capital stock, and the number of shares into which it is divided, and if there is to be more than one (1) class of stock created by the articles of incorporation, a designation of each class and the number of shares into which it is divided, and a designation of the voting powers or rights, if any, of any or all classes of stock, with any limitations or restrictions thereof, * * *."

However, this Section must be read in the light of the State constitution, Article XV, Sec. 4, which reads: "The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every shareholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or trustees to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or trustees shall not be elected in any other manner."[1]

Article XV, Sec. 4, appears to have more than one purpose. First, it establishes the share of stock as the unit of voting

[22]Cross v. Cross, decided by the Montana Supreme Court March 15, 1940, agrees in substance with the conclusions of this note, quoting from 38 C. J. 1349 to the effect that "Jurisdiction of the marriage *res* depends upon the residence or the domicile of the plaintiff, and it is immaterial where the marriage was solemnized." However, it having been recognized earlier that annulment declares the marriage void *ab initio*, this statement, although correctly stating jurisdiction for divorce, begs the question as to annulment because the very question at issue is whether a marriage *res* ever existed. But the statement is consistent with the modern view that the domicil ultimately controls the validity of the original marriage. Moreover, it is entirely possible that R. C. M., 1935, Sec. 5729, which sets forth the causes for annulling marriages operates to dissolve the marriage from the time of the decree only, and not from the time of marriage. If this is the case, then the law governing annulment is much the same as the law governing divorce.

[1]See also Art. XV, Sec. 10, which might affect Sec. 5905.