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Interstate Recognition of Marriage - Bannister v. Bannister

INTERSTATE RECOGNITION OF MARRIAGE

Bannister v. Bannister[1]

Plaintiff alleged that he and defendant were married on March 10, 1935 in California,[2] at which time the defendant represented that she had secured, in that state, a divorce from her former husband. As a matter of record, defendant had obtained in 1929 an interlocutory[3] decree of divorce in California from her former spouse. For a reason or reasons not disclosed a final decree of divorce was not entered by the California Court until May 27, 1935, or almost three months after the marriage ceremony entered into by plaintiff and defendant. On March 17, 1942, the plaintiff, who had meantime moved to Maryland,[4] filed against his wife a bill of complaint in the Circuit Court for Anne Arundel County, asking for a decree annulling their marriage, which he contended was invalid under Maryland law because it took place before defendant's California interlocutory decree of divorce from her previous husband had been made final.[5] Finally, on April 4, 1942, or eighteen days after the bringing of these proceedings, the California court, acting in pursuance of a California statute[6]

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[1] 29 A. (2d) 287 (Md., 1942).

[2] Both parties were domiciled in California at the time of the ceremony.

[3] Under California law then in force defendant could have obtained a final decree one year after the rendition of the interlocutory decree.

[4] The pleadings show that plaintiff had resided in Maryland for a period exceeding one year prior to institution of the suit, and that defendant was a non-resident of Maryland, having remained in California.

[5] It appears from the record and briefs that defendant believed she was absolutely divorced when she married plaintiff and that he, upon learning of the non-finality of his wife's divorce, ignored advice of his lawyer to remarry, and chose to rely on the validity of his marriage to defendant.

[6] Civil Code of California (1937 Ed.) Sec. 133, as amended in 1941, and reading as follows: "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory judgment or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed or entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for. Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof."

passed in 1941, ordered with respect to defendant's 1929 divorce proceeding that the final decree therein "be signed, dated, filed and entered *nunc pro tunc* granting the Final Decree of Divorce as and of the 18th day of October, 1930, the date when the same could have been given or made by the court if applied for." Defendant demurred to the bill of complaint, whereupon plaintiff filed an amended bill asking (a) that the marriage be declared void *ab initio,* and (b) for a divorce *a vinculo matrimonii.* The lower court dismissed the amended bill and plaintiff appealed. *Held:* Affirmed.

The Court reasoned that marriages are valid everywhere if valid where made. Thus in this case it was within the power of the state of California, where not only the marriage in question but also the defendant's first marriage and her divorce took place, to establish the validity *vel non* of the second marriage. That state having provided for its affirmance, the Maryland Court will recognize the California marriage as valid.

It has been customary to state as the general rule that a marriage valid by the law of the state where it was celebrated will be regarded everywhere as valid.[7] The Maryland Court has indicated willingness to apply this principle[8] except with respect to marriages which are (a) incestuous,[9] (b) miscegenetic,[10] or (c) polygamous.[11]

Dependent upon the degree of relationship, incestuous marriages are viewed in Maryland as either void or voidable. Brother-sister, parent-child, and grand parent-grand child unions are so clearly offensive as to make the marriage absolutely void in this state, irrespective of the law of the place of celebration or of the domicil of the parties.[12] Marriages between uncle and niece or aunt and nephew

[7] Fornshill v. Murray, 1 Bl. 479 (1828); Jackson v. Jackson, 82 Md. 17, 33 A. 317, 34 L. R. A. 773 (1895); Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A. L. R. 1562 (1916); In re Miller's Estate, 239 Mich. 455, 214 N. W. 428 (1928); McDonald v. McDonald, 6 Cal. (2d) 457, 58 P. (2d) 163, 104 A. L. R. 1290 (1936); RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 121, Maryland Annotations (1937) Secs. 121-136; GOODRICH, CONFLICT OF LAWS (2d Ed., 1938) Sec. 113; STUMBERG, CONFLICT OF LAWS (1937) 255, *et seq.* The following states have adopted by statute the general rule that a marriage outside the state, valid where contracted, is valid within the state: California, Idaho, Kansas, Kentucky, Nebraska, New Mexico, North Dakota, South Dakota and Utah. See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) Ch. XVII; also Deak, *Conflict of Laws: Recent Development Concerning Marriage* (1929) 27 Mich. L. Rev. 389.

[8] See Maryland cases cited *supra,* n. 7.

[9] See Md. Code (1939) Art. 62, Sec. 1.

[10] See Md. Code (1939) Art. 27, Sec. 445.

[11] Jackson v. Jackson, 82 Md. 17, 33 A. 317, 34 L. R. A. 773 (1895); Jones v. Jones, 36 Md. 447, 456-7, 11 Am. Rep. 505 (1872).

[12] Jackson v. Jackson, 82 Md. 17, 29, 33 A. 317, 34 L. R. A. 773 (1895).

are merely voidable.[13] In *Fensterwald v. Burk*,[14] an uncle and niece, forbidden to marry by Maryland law, journeyed to Rhode Island where such a marriage was permitted to persons of the parties' faith, were there married, and then returned to Maryland. In a suit brought by a nephew after the uncle's death to have the union declared void, the Court upheld the Rhode Island marriage. Because there were present other equally good grounds[15] for reaching the same result the decision cannot be regarded as a square ruling on the recognition of the validity of a foreign marriage because valid where made. It nevertheless represents an instance where the Maryland Court, when confronted with a foreign marriage between two of its citizens, effected in evasion of its law, referred to the "valid where made—valid everywhere" rule in sustaining the out-of-state marriage. Willingness to recognize such a foreign marriage between its own citizens suggests a greater readiness to accept as valid a similar union involving non-citizens.

By statute[16] in Maryland any attempted inter-marriage of a white person and a Malayan or of either of these with a negro or person of negro descent to the third generation is forbidden and declared void. Although miscegenation has never been dealt with directly by the Maryland Court of Appeals, there is language (dictum) in *Jackson v. Jackson*[17] to the effect that a miscegentic marriage would be treated as absolutely void even though valid where made and involving non-citizens.[18] In the opinion the Court said:

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[13] Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A. L. R. 1562 (1916).

[14] *Supra*, n. 13.

[15] See Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment* (1938) 2 Md. L. Rev. 211, 218, n. 25 where the author points out that the suit, having been instituted by a third person in an Equity Court after the death of one spouse (the husband) to have the marriage annulled, could have been dismissed on any one of the following bases: (a) a third person has no standing to sue to annul a marriage, Ridgely v. Ridgely, 79 Md. 298, 29 A. 597, 25 L. R. A. 800 (1894); (b) the marriage of uncle and niece, under Maryland law, is voidable only by a proceeding during the joint lifetime of the spouses, Harrison v. State, Use of Harrison, 22 Md. 468, 85 Am. Dec. 658 (1864); or (c) a proceeding to annul a marriage between uncle and niece in Baltimore City may be brought only in the Superior Court, and not in an Equity Court, Ridgely v. Ridgely, *supra* this note.

[16] Md. Code (1939) Art. 27, Sec. 445.

[17] *Supra*, n. 12.

[18] Accord: State v. Bell, 7 Baxt. (66 Tenn.) 9, 32 Am. Rep. 549 (1872); State of Georgia v. Tutty, 41 F. 753, 7 L. R. A. 50 (C. C. S. D. Ga., 1890); Eggers v. Olson, 104 Okla. 297, 231 P. 483 (1924). Contra: People v. Godines, 62 P. (2d) 787, 788 (Cal. App. 1936); The Inhabitants of Medway v. The Inhabitants of Needham, 16 Mass. 157, 8 Am. Dec. 131 (1819).

> "The statutes of Maryland peremptorily forbid the marriage of a white person and a negro and declare all such marriages forever void. It is, therefore, the declared policy of this State to prohibit such marriages. Though these marriages may be valid elsewhere, they will be absolutely void here so long as the statutory inhibition remains unchanged."[19]

The rule refusing to recognize a miscegenetic marriage, however, might well be limited to the prevention of cohabitation of the spouses in this state, and be relaxed to permit the inheritance of property by the surviving spouse or children of such a union. For this there is respectable out-of-state authority.[20]

A polygamous marriage has heretofore been regarded as totally void in Maryland.[21] And it has been said that as common law marriages are not recognized in this state, a marriage polygamous in its inception could not be ratified by the continued cohabitation of the parties after the death or other removal of the impediment spouse.[22] Not all states have taken the view that such a marriage is void *ab initio*. Massachusetts specifically provides by statute[23] for the validation of a polygamous marriage from and after the removal, by death or divorce, of the impediment spouse. In West Virginia, a polygamous marriage is merely voidable until declared void by a decree of nullity.[24] Recog-

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[19] Jackson v. Jackson, *supra*, n. 12, 82 Md. 17, 30.

[20] Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L. R. A., N. S., 630, Ann. Cas. 1915B, 1001 (1913).

[21] Jackson v. Jackson and Jones v. Jones, *supra*, n. 11.

[22] Jones v. Jones, *supra*, n. 11; and Mitchell v. Frederick, 166 Md. 42, 46, 170 A. 733, 92 A. L. R. 1412 (1934).

[23] 6 Anno. Laws of Massachusetts, C. 207, Sec. 6, which reads as follows: "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents." For a case decided thereunder see Hopkins v. Hopkins, 287 Mass. 542, 192 N. E. 145, 95 A. L. R. 1286 (1934) where a marriage, invalid by the existence of a subsisting prior marriage, was by the statute validated after the removal (by death) of the impediment spouse provided the parties continued, in good faith, to live together. The Hopkins case is noted (1935) 21 Va. L. Rev. 331.

[24] West Virginia Code (1937) Sec. 4701 which reads in part as follows: "All marriages between a white person and a negro; all marriages which

nition of the West Virginia statute was recently denied by the Virginia Court in *Toler v. Oakwood Smokeless Coal Corp.*[25] There the plaintiff, mistakenly believing her first husband to be dead, remarried in West Virginia, and, with her new husband, moved to Virginia. The husband secured employment with the defendant coal company and died as a result of injuries arising out of such employment. The plaintiff claimed compensation as the widow. The Virginia Supreme Court of Appeals, in finding for the defendant, held that the general rule that the place of celebration determines the validity of a marriage could not prevail against the strong local policy as evidenced by a Virginia statute[26] declaring such a marriage to be absolutely void. The Virginia Court cited *Jackson v. Jackson*[27] in support of its view.[28].

In the instant case the Maryland Court permitted a marriage which was polygamous at its inception to be validated through the operation of a foreign *nunc pro tunc* statute which served to remove the impediment prior marriage. Note also that such validating action was taken after the attack on the second marriage had been begun. The decision indicates a departure from the earlier rigid void *ab initio* view and a readiness to apply the general rule and refer to the foreign law. The first suggests that the Maryland Court is moving in the direction of the view advanced by some writers favoring the recognition of a rule allowing an originally bigamous marriage to become ratified by continuing to live together after death or divorce removes the impediment spouse.[29] The second marks the use of the time honored approach, "valid where made—valid everywhere", to achieve a sound result in a forum which was the domicil of one of the spouses at the date of suit, and which forum could find little (or no real) social reason for condemning the marriage in question. The

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are prohibited by law on account of either of the parties having a former wife or husband then living; . . . shall be void from the time they are so declared by decree of nullity."

[25] 173 Va. 425, 4 S. E. (2d) 364, 127 A. L. R. 430 (1939), noted (1940) 26 Va. L. Rev. 529.

[26] Virginia Code (1936) Sec. 5087 reading as follows: "All marriages between a white person and a colored person, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce, or other legal process."

[27] *Supra*, n. 12.

[28] For a note on the problem as it relates to polygamous unions see Lorenzen, *Polygamy and the Conflict of Laws* (1923) 32 Yale L. J. 471.

[29] Myerberg, *Common Law Marriage* (1941) 29 Georgetown L. J. 858, 872; and Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment* (1938) 2 Md. L. Rev. 211, 227.

simplicity of the instant facts, and the apparent social correctness of the instant result, should not blind the reader to the fact that the time honored phraseology under which it was obtained is not completely descriptive of judicial action in the field;[30] nor, is it necessarily a safe guide to a sound result in all cases.[31] Much can be said in favor of recognizing domicil as the controlling contact in status cases,[32] with the rule "valid where made—valid everywhere" operating in marriage cases only because the domicil on the facts of a particular case accepts that rule because it is wiser to sustain than to condemn the marriage in question. Such has been the result of decided cases as distinguished from the language for justifying it.[33] The Uniform Marriage Evasion Act takes the approach of referring the validity of marriage primarily to the state of the domicil of the spouses.[34] The most recent analytical writing in the field is critical of the "valid where made—valid everywhere" rule (as not being an accurate guide to either what the law is or what it should be) and suggests that the "intended family domicil" should control the right of the spouses to live together as husband and wife.[35] It may be that this problem should be controlled separately from that of the legitimacy of issue,[36] the right to inherit property,[37] and similar problems collateral to the validity of the marriage.

It is not the purpose of this brief note to discuss in detail the pros and cons of the above suggested rules. Rather it is to observe that while little fault is to be found

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[30] See: Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L. R. A., N. S., 630, Ann. Cas. 1915B 1001 (1913); Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, L. R. A. 1917D 829 (1917); Meisenhelder v. Chicago & N. W. R. Co., 170 Minn. 317, 213 N. W. 32, 51 A. L. R. 1408 (1927); COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) Ch. XVII.

[31] *Ibid.*

[32] *Ibid.* Also, see RESTATEMENT, CONFLICT OF LAWS (1934) Ch. 5; GOODRICH, CONFLICT OF LAWS (2d Ed., 1938) Ch. 8. It might be observed that on the facts of the instant case, the spouses were domiciled in California when the marriage occurred and the wife was still there at the time of suit although the husband had moved to Maryland, *supra*, ns. 2, 4.

[33] See, COOK, *op. cit. supra*, n. 30. The usual case involves a suit at the domicil.

[34] 9 Uniform Laws Annotated 479.

[35] *Supra*, n. 33.

[36] *Ibid.*

[37] See, Whittington v. McCaskill, *supra*, n. 30. Also, for suggestion of similar segregation of problems related to divorce see Bingham, *The American Law Institute vs. The Supreme Court* (1936) 21 Corn. L. Q. 393; and *cf.* Strahorn, *A Rationale of the Haddock Case* (1938) 32 Ill. L. Rev. 796, 813-815; and Strahorn and Reiblich, *The Haddock Case Overruled—The Future of Interstate Divorce* (1942) 7 Md. L. Rev. 29, 61, n. 95.

with the result of the instant case it might be well to be aware of the possible limitations of the stated rule of the case that marriages valid where made are valid everywhere.[38]

[38] For further examination of the subject of this note see Note, *Foreign Marriages in Evasion of Local Statutes* (1942) 17 Tenn. L. Rev. 378; Taintor, *Effect of Extra-State Marriage Ceremonies* (1938) 10 Miss. L. Rev. 105; Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage* (1939) 19 Boston Univ. L. Rev. 353; Deak, *Conflict of Laws: Recent Development Concerning Marriage, supra*, n. 7; and Goodrich, *Foreign Marriages and the Conflict of Laws* (1923) 21 Mich. L. Rev. 743.