St. John's Law Review

Volume 28
Number 1 *Volume 28, December 1953, Number 1*

Article 10

Conflict of Laws--Incestuous Marriages--Uncle-Niece Marriage, Valid Where Performed, Valid in New York (Matter of May, 305 N.Y. 486 (1953))

St. John's Law Review

allowing partial abrogation in cases like the instant one, where, after a divorce, the foster parent retaining custody of the child remarries.[18]

A more important item for legislative attention is the present limitation of Section 118 of the Domestic Relations Law relative to the abrogation of institutional adoptions. Where all the parties consent, or where the foster parents fail in their duties, abrogation is allowed regardless of whether or not the adoption is institutional.[19] Since the grave misbehavior of the child would give rise to the same intra-family tensions in the case of voluntary as in the case of institutional adoptions, there seems to be no valid reason for retaining in the adoption law the distinction between voluntary and institutional adoptions, and for restricting the application of the section in question to the latter.

CONFLICT OF LAWS — INCESTUOUS MARRIAGES — UNCLE-NIECE MARRIAGE, VALID WHERE PERFORMED, VALID IN NEW YORK.— Decedent and her uncle by the half-blood, both New York residents of the Jewish faith, were married in Rhode Island which exempts from its incest prohibitions marriages between Jews within the degrees of consanguinity permitted by their religion.[1] Appellant, daughter of decedent, petitioned for letters of administration on the ground that this marriage was incestuous and void pursuant to New York statute.[2] The Court of Appeals, applying the rule that a marriage valid where contracted is valid everywhere, held that the New York statute did not extend to a foreign marriage of domiciliaries, and that the marriage was not so repugnant to the public policy as to be adjudicated invalid. *Matter of May,* 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Although marriage is considered a civil contract,[3] it is regulated and prescribed by law to a greater extent than other contracts because of the social importance of the relationship created.[4] To

---

in 14 MCKINNEY'S CONS. LAWS OF N. Y. ANN. 341, 344 (1941).

[18] In Arkansas, abrogation is allowed if the foster parents are separated or divorced within two years of the adoption, if the child is still a minor. ARK. STAT. c. 56, § 110 (1947).

[19] N. Y. DOM. REL. LAW §§ 116-117.

[1] R. I. GEN. LAWS c. 415, §§ 1-4 (1938).

[2] N. Y. DOM. REL. LAW § 5(3), Audley v. Audley, 196 App. Div. 103, 187 N. Y. Supp. 652 (1st Dep't 1921).

[3] N. Y. DOM. REL. LAW § 10; *see* di Lorenzo v. di Lorenzo, 174 N. Y. 467, 472, 67 N. E. 63, 64 (1903).

[4] See Fearon v. Treanor, 272 N. Y. 268, 5 N. E. 2d 815 (1936); *see* Maynard v. Hill, 125 U. S. 190, 211 (1888); Pisciotta v. Buccino, 22 N. J.

prevent confusion with respect to legitimacy, succession, and other rights,[5] the validity of a marriage is determined by the *lex loci contractus*.[6] But where the marriage is opposed to the natural law,[7] as in the case of polygamy and incest, or where it is declared void by statute of the domicile although validly solemnized in another jurisdiction,[8] this rule is not followed.

Marriages which are opposed to the natural law and which are deemed incestuous by the common consent of nations [9] include marriages between ancestor and descendant,[10] brother and sister,[11] and aunt and nephew.[12] These unions are declared void in the state of domicile regardless of where they are contracted. Uncle-niece marriages, on the other hand, are not universally condemned.[13] Since these marriages are not prohibited by the Levitical and Talmudic law,[14] they have been sanctioned in several states.[15] Indeed, New York had recognized their validity prior to imposing a statutory prohibition in 1893.[16] Hence, such marriages, validly contracted in a foreign jurisdiction, have been held acceptable in a domicile which

---

Super. 114, 91 A. 2d 629, 630 (1952) (marriage considered a triaded union with the state as the third party).

[5] *See* Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586, 589 (1910); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 306 (1889); see STORY, CONFLICT OF LAWS § 121 (3d ed. 1846).

[6] Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); Thorp v. Thorp, 90 N. Y. 602 (1882); Medway v. Needham, 16 Mass. 157 (1819); Herbert v. Herbert, 3 Phil. Ecc. 58, 161 Eng. Rep. 1257 (Eccl. 1819); see RESTATEMENT, CONFLICT OF LAWS § 121 *et seq.* (1934).

[7] *See* Earle v. Earle, 141 App. Div. 611, 613, 126 N. Y. Supp. 317, 319 (1st Dep't 1910); Incuria v. Incuria, 155 Misc. 755, 757, 758, 280 N. Y. Supp. 716, 719, 720 (N. Y. Dom. Rel. Ct. 1935).

[8] Matter of Takahashi, 113 Mont. 490, 129 P. 2d 217 (1942); Pennegar v. State, *supra* note 5; Maurer v. Maurer, 163 Pa. Super. 264, 60 A. 2d 440 (1948); Brook v. Brook, 9 H. L. Cas. 193, 11 Eng. Rep. 703 (1861). *Compare* Medway v. Needham, *supra* note 6, *with* State v. Kennedy, 76 N. C. 251 (1877).

[9] *See* Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358, 360 (1916); Pennegar v. State, *supra* note 5, 10 S. W. at 306; see STORY, *op. cit. supra* note 5, § 114.

[10] *See* Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586, 589 (1910); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 306 (1899).

[11] See note 10 *supra*.

[12] See Incuria v. Incuria, 155 Misc. 755, 280 N. Y. Supp. 716 (N. Y. Dom. Rel. Ct. 1935); Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938). No distinction is made in all the incest cases between marriages of relatives of the whole or half blood. Shelley v. State, 95 Tenn. 152, 31 S. W. 492 (1895); State v. Wyman, 59 Vt. 527, 8 Atl. 900 (1887).

[13] See Beale, Laughlin, Guthrie, and Sandomire, *Marriage and the Domicil*, 44 HARV. L. REV. 501, 509 (1931).

[14] *See* Incuria v. Incuria, *supra* note 12 at 757, 280 N. Y. Supp. at 719; see HOROWITZ, THE SPIRIT OF JEWISH LAW § 148 (1953).

[15] GA. CODE § 53-105 (1933); R. I. GEN. LAWS c. 415, §§ 1-4 (1938) (Rhode Island gives the qualified acceptance mentioned above).

[16] See Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. Supp. 260 (1st Dep't 1906); *see* Audley v. Audley, 196 App. Div. 103, 104, 187 N. Y. Supp. 652, 653 (1st Dep't 1921).

forbids these unions when solemnized within its boundaries.[17]

Many states, on the other hand, proscribe uncle-niece marriages by statutory enactment.[18] Thus, although such a validly contracted foreign marriage is not deemed void as being opposed to the generally accepted opinion of Christendom, it is declared invalid in those jurisdictions wherein the prohibitory statute is given extraterritorial application to domiciliaries.[19] Not all states, however, give this effect to their inhibitive statutes.[20] The basis used in determining the scope of the statutes is the intent of the legislature.[21]

The instant case delineates the New York position on the two exceptions to the general rule. The Court of Appeals refused to consider the uncle-niece marriage involved as repugnant to the policy of the state and refrained from applying the domestic statute prohibiting such unions to a valid foreign marriage of its domiciliaries.[22]

This decision clearly aligns New York with those jurisdictions favoring the broadest interpretation of the general rule that the *lex loci contractus* should control.[23]

CORPORATIONS — REIMBURSEMENT FOR LITIGATION EXPENSES INCURRED IN DEFENDING CRIMINAL ACTION DENIED.—The petitioner, former vice-president and director of defendant corporation, was indicted by a federal grand jury for alleged violations of the Sherman Anti-Trust Act.[1] He pleaded *nolo contendere*[2] and was

---

[17] Campione v. Campione, 201 Misc. 590, 107 N. Y. S. 2d 170 (Sup. Ct. 1951); Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358 (1916).

[18] See, *e.g.*, N. Y. DOM. REL. LAW § 5(3); CAL. CIV. CODE § 59 (1951); ILL. REV. STAT. c. 89, § 1 (1951); MASS. ANN. LAWS c. 207, § 2 (1933).

[19] Matter of De Wilton, [1900] 2 Ch. 481 (marriage between Jewish uncle and niece, English domiciliaries, deemed invalid in England although it was validly contracted abroad).

[20] See Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); Matter of Perez, 219 P. 2d 35 (Cal. 1950); Putnam v. Putnam, 25 Mass. 433 (1829). Those states which have adopted the Uniform Marriage Evasion Act determine the validity of marriages of foreign domiciliaries within their jurisdiction by applying the laws of the domicile of the parties. Beaudoin v. Beaudoin, 270 App. Div. 631, 62 N. Y. S. 2d 920 (3d Dep't 1946).

[21] *See* Van Voorhis v. Brintnall, *supra* note 20 at 35.

[22] N. Y. DOM. REL. LAW § 5(3).

[23] *But cf.* Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845 (1912).

[1] 26 STAT. 209 (1890), 15 U. S. C. § 1 (1946).

[2] FED. R. CRIM. P. 11. Although a plea of *nolo contendere* is not to be deemed an admission of facts in any other action [38 STAT. 731 (1914), 15 U. S. C. § 16 (1946)] the trial court in the instant civil case held that the imposition of a fine was such an adjudication of defendant's negligence in the performance of his duties as to deny him the right to reimbursement under