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Recognition of Validity and Incidents of Marriages between Whites and Blacks

Lewis F. Powell, Jr.

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April 28, 1931

Dennis
Jo
Lewis
Campbell
Dudley
Mumford
McDaniel
Williams
Smith
Young
Beasley
Turner
Hunstead

Recognition of Validity and Incidents of Marriages between Whites and Blacks

"Negroes who are bona fide United States citizens are in high favor at Moscow as potential workers for a ~~Soviet~~ revolution in the United States. Such a Negro is William Lorenzo Patterson, frankly a Communist, who after three and one-half years in Russia returned to ~~[redacted]~~ this country last week ---- and began to preach on Communist doctrines ---- ~~Prudently Communist~~ Also in Moscow a Negro can take a white bride without adverse comment. Prudently Communist Patterson left his white bride of 15 months with her parents in Moscow when he returned to the United States last week" (1)

The above quotation indicates the nature of the situation found in this country with regard to the intermarriage of whites and negroes. Whether legally prohibited or not, ~~race segregation~~ intermarriage of races is shunned by the dominate race in varying degrees. In twenty-nine states, Mr. Patterson would have aroused something more annoying than "comment" by taking unto himself a white bride — by ~~[redacted]~~ entering such a union in one of twenty-six of these states, the least he could expect would be the legal ax of absolute nullity. In these others his marriage would be "unlawful" or "prohibited." And the reason that nineteen states would sanction the union is not that these states are more "Christian", not that the citizens of these states are actually less opposed to the alleged social evils — but simply because the problem is not one of any real importance. ~~In~~ Not one of the nineteen has more than five percent of its population made up of negroes, while in many of the southern states we find almost an

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1. Time, April 13, 1931 - pg 32.

equal division between the races.

Obviously this situation presents manifold complications from the conflict of laws viewpoint. The general rule, that a marriage valid where celebrated is valid everywhere, is too well settled to need citation of authority. And equally well established are its two exceptions to the effect that, in Anglo-American jurisdictions at least, polygamous and incestuous marriages are void regardless of validity at place of celebration. Not finding this English common law rule entirely adequate, most of our states have engrafted a third exception, treating miscegenation on the same basis as incest and polygamy. The reasons of public policy which give rise to the first two exceptions, are likewise found as the alleged necessity for the third exception. The language of Judge Christian in Kinney v. Commonwealth (2) is accurately descriptive of the attitude most frequently found in southern and some western states: "The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished Southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent — all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."

With this brief statement of the general rule regarding validity of marriages contracted in foreign jurisdictions, let us pause for a moment before considering the cases themselves, and comment on the constitutionality of statutes which codify this

(2). 30 Gratton 856

thend exception to the rule. In general it may be said that statutes prohibiting intermarriage of whites and blacks are constitutional. State v. Gibson (3) held that "neither the 14th amendment nor the Civil Rights Bill has impaired or abrogated the laws of this state on the subject of marriages of whites and negroes". Similar decisions squarely upholding constitutionality may be found in the footnote. (4) And, it would seem that full faith and credit need not be given a marriage valid in another state which is repugnant to so pronounced a public policy as that involved in miscegenation.

(3.) 36 Ind. 389 (4) State v. Tutty, 41 Fed 753; Green v. State, 58 Ala. 190 (1877); Dodson v. State, 61 Ark. 57 (1895); Succession of Gabriso, 119 La. 704. (1907); Frasher v. State, 3 Tex App. (1877); Francis v. State, 9 Tex App. 144 (1880); and Blake v. Simms, 99 Okl 876 (1923)

The conflicts of law situations regarding this ~~miscegenation~~ problem, as reflected by the decisions, can best be treated under three factual divisions. First, where the parties domiciled in the same state, leave it temporarily, and marry in another state which permits such a union. Second, where the parties as residents of a state sanctioning intermarriage of races, marry in that state, but later become residents of a state prohibiting such marriages. Third, where there is a conflict between the laws of respective parties' domiciles, ~~but~~ and after a marriage valid in state of performance, couple moves to a state opposed to ~~racial intermarriages~~ miscegenation. Strange as it may seem, and in spite of the relatively few decisions involved, there exists confusion and conflict in each of these divisions.

I. Under the first division above, it seems that at least the numerical weight of authority supports the rule that the state of domicile may declare void the marriage contracted ~~by~~ in the foreign state. The case of Kinney v. Commonwealth (supra) is typical of this view, and bears some analysis:

> A negro man and a white woman, domiciled in Virginia went to the District of Columbia and were regularly married, returning to their home in Virginia after ten days where they continued to reside as husband and wife. The law of Virginia prohibits marriages between whites and blacks, and it was held that the parties were liable to indictment for lewd and lascivious cohabitation; that the marriage in the District of Columbia was a mere evasion of the laws of Virginia, and could not be pleaded in bar of the prosecution, and is void for all purposes. It must be kept in mind that this decision is not based on a statute which expressly had extra-territorial effect, because the present statute in Virginia ~~expressly~~ on this point tho passed before the decision of the case, was adopted after the marriage of the parties. The court in this regard saying:

"But without such statute, the marriage was a nullity. It was contrary to the declared public law, founded upon motives of public policy, — a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend." A later Virginia case, ~~The~~ Greenhow v. Jones ⑤ involving analogous facts is to the same effect, the court again taking the unequivocal position that the "lex domicilii" determines the matrimonial capacity.

The only federal authority found on this question is ~~found in~~ the case of State v. Tutty ⑥ in which the court itself states that precisely the same facts and questions were presented as those in the Kinney case, and after a careful review of the authorities the Virginia case was entirely approved. One additional point brought out by this decision was the fact that the "contracts clause" of the Constitution was not violated, quoting ~~from~~ Chief Justice Marshall in the Dartmouth College Case. ⑦

Reaching the same result as to the validity of such marriages but presenting a slightly different emphasis from the cases considered above is the North Carolina opinion in State v. Kennedy. ⑧ Here as in the Kinney and Tutty cases it appeared that the couple left the state with the purpose of evading the local law, but the North Carolina court said: "As to the ~~the~~ formalities of the marriage, the lex loci will govern. But when the law of North Carolina declares that all marriages between negroes and whites shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they

⑤ 80 Va. 636 ⑥ 41 Fed. 753 (Ga. 1890) ⑦ 4 Wheat. 518.
⑧ 76 N.C. 242 (1877)

had not bona fide acquired a domicile elsewhere at the time of the marriage." Thus this court adopts the English view of Brook v. Brook ⑨ that the intent to evade the local law is not important.

Adding nothing to the above except the weight of one more jurisdiction is the case of Dupre v. Boulard ⑩ where the court held that it could not give effect to a French marriage of this kind without sanctioning an evasion of the laws and setting at naught the deliberate policy of the state.

The leading case contrary to the line of authorities ~~cited~~ considered above is Medway v. Needham ⑪ in which it was held "that a marriage between a mulatto and a white woman, domiciled in Massachusetts, which was celebrated in Rhode Island, must be recognized as valid in Massachusetts, it not being prohibited by the laws of Rhode Island, notwithstanding that it would have been invalid if celebrated in Massachusetts." ⑫ It is important to remember that the state statute making void interracial marriages had been repealed just before the action, indicating that there ~~was~~ is no public policy in Massachusetts based on social necessity against such marriages to the extent that there is in states more populous with the negro. These facts overrode the consideration that the parties had left with intent to avoid the local laws. This case has been attacked severely by courts in many of our states as well as in England. Justice Folkes in Pennegar v. State, ⑬ considers it to be in definite disrepute, and the Lord Chancellor in Brook v. Brook (supra) went so far as to say that "Medway v. Needham is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage". Needless to say, the opinions in

⑨ 9 H.L. Cas 193 ⑩ 10 La. Ann 411 ⑪ 16 Mass. 157 (1819)
⑫ See 57 ALR 167 ⑬ 10 S.W. 305 (1889) (Tenn)

above
cases, reaching a different result have treated this Massachusetts case with great impatience.

But in spite of criticism, and the current of authority to the contrary, we find that the Medway case is adhered to today in ~~some jurisdictions~~ at least one other jurisdiction. In the 1910 Nebraska case of State v. Hand (14) it was held: "that a marriage between a white & a black ~~in this state~~ which is prohibited by statute because contrary to the policy of our laws is yet valid if celebrated elsewhere according to the laws of the place where celebrated, even if the parties are citizens and residents of this state, and have gone abroad for the express purpose of evading our laws; there being no legislative enactment that such marriages out of the state shall have no validity here!"

Thus we find conflict on this first and simplest situation. The cases above involves some slight distinctions, but no fundamental difference is found and courts have not ~~too~~ attempted to reconcile the two lines. In final analysis, absent an extra-territorial statute, it devolves upon the court to interpret its own statute in light of what it believes to be the soundest public policy for that particular state.

II. The second division of our classification of cases involves marriages good when celebrated both according to law of domicile and place of celebration. The questions ~~possibly to be raised~~ capable of arising are numerous when the married couple later moves to a state where such unions are repugnant to a declared public policy. Can this latter state declare the marriage void? Can it deny certain incidents normally connected with marriage — such as right of cohabitation, right of dower or curtesy, and right of inheritance? On

(14) 126 N. W. 1002 (1910 - Neb.)

must this state recognize the foreign marriage as valid and give it full faith and credit in every respect?

The authorities are not numerous on these points, but of those found, the following will present the different attitudes: State v. Bell (15) is perhaps the most outspoken authority holding a marriage between white and black persons invalid, though such marriage was valid according to the lex loci and the lex domicilii. A white man married a woman of color in Mississippi where such marriages were not forbidden by law, and it appears by inference in the case that they were domiciled there also. Upon moving to Tennessee the parties were indicted and convicted under an act of the general assembly for living together. The court painted a direful picture: "We might have in Tennessee the father living with his daughter, the son with his mother, the brother with his sister, in lawful wedlock, because they had formed such relations in a state or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capital, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us." The opinion doesn't expressly declare such marriage void, but in view of its results and the language resorted to, it seems that in effect this conclusion was reached.

An illustration given by way of dicta in the Maryland case of Jackson v. Jackson (16) goes fully as far as the case above: "For example, 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

(15) 7 Bax. 9 (Tenn 1872) (16) 82 Md 17 (1894)

may be valid elsewhere, they will be absolutely void here, so long as the statutory inhibition remains unchanged." In the opinion of the note writer in 57 L.R.A. 169, this dicta "is apparently broad enough to cover a marriage between persons not domiciled in Maryland at the time of its celebration."

Whittington v. McCaskill (17) represents a different attitude. Quoting from the syllabus: "Although marriages between white persons and negro persons are prohibited in this state ~~by~~ both by constitution and statutes, where such a marriage takes place in another state between such persons who are bona fide residents of such state, and who continue to reside there until the death of the wife, and such marriage is valid in the state where consummated, the husband is entitled to and takes all the property of the wife (negress) situated in this state, where she dies intestate without leaving any children or descendants." It is noticed of course that the parties never ~~returned to Florida~~ attempted to reside in Florida, and accordingly the same interests were not impinged as in the Bell case. However, this decision, by admitting the right of inheritance did concede undoubtedly the validity of the marriage, and had the parties attempted to live together within the state the most that this court could ~~have~~ done and remain consistent, would have been to prohibit cohabitation without declaring the marriage void. The court argued that the statutes ~~do~~ could not be extended to cover the contention made, but it did not venture an opinion as to whether statutes so broad in application could be constitutionally adopted.

It appears that California is not particularly impressed with vivid prophesy of the Tennessee courts in State v. Bell (supra), for it adopted a statute

(17) 65 Fla 162 (1913)

expressly providing that all marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in California. And under this statute, the case of Pearson v. Pearson (18) held valid a marriage between a master and his slave contracted in Utah. The court said that the statute acorded with previously prevailing law which upheld as valid all good foreign marriages except inbred polygamous or incestuous.

Caballero's Succession (19) appears to present an interesting combination of both views. The writer in 3 Ann. Cas. 1055 cites this case for the proposition that " where the parties to a marriage remain residents of the jurisdiction in which the marriage was contracted, the validity of the marriage should be recognized for the purposes of descent and distribution of property in another jurisdiction (Louisana) in which the marriage would not have been recognized had the parties become residents there." It seems that the negro and white left Louisana and after acquiring a domicile (it is assumed that "residents" is used ~~hypothetically~~ synonymously with domicile) in Havana were there married, later moving to Spain. And in this action by their daughter, this marriage was recognized for the sake of inheritance. Strange however, is the language of the court to the effect that had the couple ~~they~~ attempted to live in Louisana, their Havana marriage would have been held void, and its issue illegitimate. Speaking of the purpose ~~of it~~ its public policy, the court said " That purpose could not have been more effectually carried out by withholding from persons abroad, ~~legitimate~~ by the laws of the country where they lived, the right of inheriting property in this state ------ It was

(18) 51 Cal 120 (The writer has been unable to find a report of this case and is indebted to the note in 57 LRA 168 for this information).
(19) 24 La Ann 573 (not found in library, but is considered in the note in 3 Ann. Cas. 1055.) (Also it must be kept in mind that Louisiana cases are ~~based~~ not based on the common law, and hence are not to be relied upon to the normal extent).

strictly personal to parties living in Louisiana who had anywhere contracted the kind of marriage not permitted by its policy." It would appear from the above that this court upholds the validity of a marriage for one purpose, and in a dicta declares that for other purposes the same marriage would be held void. We have frequently heard of marriages void in one state and valid in another, but to find the same marriage both void and valid in one state at a particular time is a surprising anomoly. Perhaps the opinion has been misinterpreted, but more probably this is simply a flagrant example of the inaccurate use of terms, plus a failure on a courts' part to distinguish between declaring a foreign marriage void, and denying to such union certain incidents within the states because of their infringement upon a cherished public policy.

In summonizing the state of the law ~~as explicated~~ in this division of our discussion, it is readily appreciated that extracting definite and uniform rules is difficult, if not impossible. It would seem that much of the attendant confusion is attributable to careless use of terms, particularly the word "void". And in conjunction with this is the failure, pointed out above and so ~~readily~~ graphically illustrated by the Caballero case, to appreciate that a state may preserve its so-called policy by refusing to permit a wife and negro to cohabit, by refusing to allow inheritance, dower, ~~and~~ or curtesy, without attempting to declare a foreign marriage void, between parties domiciled at the time in a foreign jurisdiction. Upon what possible theory has a state the power to make such a marriage void? Being neither the state of the domicile, nor the state of performance, it would seem that any attempt ~~of~~ to thus hold negatory a foreign marriage is an unwarranted assumption of power. Of course full faith and credit need not be given such a marriage, but a denial of ~~full~~ faith and credit is quite a different matter from an attempt

to hold void the creation of a status of another sovereign, involving the union of two persons ~~domiciled~~ not subject to domiciliary control. Taking this view of the situation, it is submitted that the case of State v. Bell (supra), and the dicta in the cases of Jackson v. Jackson (supra) and Caballero's Succession (supra) are erroneous in principle. Of course the Whitlington case (supra) is sound, the only question arising as to what would be its limits. We can only speculate as to the action of the Florida court in event the parties had moved within the state before death of the wife. It is hoped that the marriage would not have been said to be void, but that its incidents only be restricted or prohibited. And it would seem on behalf of intellectual honesty that no distinction should be made between these various incidents so far as the "power" of the state of the forum is concerned. What incidents it would prohibit would of course depend upon the nature of its public policy.

III. The last general class of cases to be considered presents the problem of a conflict between the of course domiciliary states of the two parties, assuming that the union is ~~of course~~ valid where performed. This problem becomes acute when the couple attempts to live in a state opposed to interracial marriages, or the inheritance of property in such a state is involved. Since in the usual situation ~~the~~ ~~pertains to~~ both parties are from the same state, there are few cases involving the problem of split-domicile. The only case found in this category, wherein a miscegenations marriage is concerned, is State v. Ross.(20) In this case a white woman domiciled in North Carolina went over into South Carolina and there married a negro domiciliary of that state. After residing there a few months, the couple

(20.) 76 N.C. 242 (1877)

removed to North Carolina, and were indicted for fornication. In a divided court, it was held that North Carolina would recognize this marriage. The reasoning of the court throws the fact situation into clear relief considered above, and makes this case an authority ~~doubtfully~~ diametrically opposed to State v. Bell (supra). The point is made that since, upon marriage the domicile of the husband becomes the domicile of the wife, the woman and man were both domiciles of South Carolina and therefore there was no basis of control left in North Carolina. Note the sylabus: "A marriage solemnized in a state whose laws permit such marriage between a negro and a white person domiciled in such state is valid in this state." "The domicile of the husband becomes that also of the wife upon marriage." ~~After thus throwing the Case in to~~ The court refuses to put inter-racial unions upon the same grounds as the two well known exceptions to the general rule, and thus reached the result of Pearson v. Pearson (supra) without the aid of a statute.

no more ?

Leaving our consideration of this case for the time being, let us consider extracts from Mr. Beale's latest exposition on the subject of ~~the~~ recognition of marriages.(21) The general theme of this particular treatment is that a marriage is a dual concept, involving, first, a marriage contract which must be valid where performed, and involving, second, the power of the state of domicile control to predicate a status on this contract. Speaking of the type problem being considered in this division, Mr. Beale says: "An interesting problem is presented where only one party is domiciled in a state whose law makes the marriage invalid ---- The question provokes the formulation of four possible rules.

(21) 44 H.L.R. 501 (Of course this article is dealing with the subject generally, ~~-~~ and not with the particular problem of inter-racial unions).

The status might be held to depend upon (a) the matrimonial domicile; (b) the concurrent action of both domiciles; (c) the domicile of either party; or (d) the domicile of the husband." In discussing these rules, the writer very properly dismissed the matrimonial domicile, and then pointed out: ~~that~~ "The argument may be advanced in favor of the concurrent action of both domiciles, that if either state finds the marriage so contrary to its policy and so repugnant to its moral sense as not to countenance it, it must have the power to prevent the creation of the status. ... On the other hand, it seems to follow from the interest of each state in the marital relation that the domicile of either party may create the relation and that the failure of one domicile to concur will not prevent the other from completing the marriage in consonance with its own policy. It seems ~~that~~ on the whole that this reasoning is more persuasive." ----- One American case, State v. Ross, (supra) has however suggested a rule giving the control over the status to the domicile of the husband "--- but this standard "overlooks the fact that the domicile of the wife has an interest in the status."

In contemplating this dual conception of marriage, several objections seem to be obvious. How can it be truthfully stated that a marriage involves more than one legal relationship? It would seem impossible to separate the contract from the status, and if you force a partitions separation does it not seem to be conducive to greater confusion of results, causing more frequently the same marriage to be void in one state and valid in another? And more specifically to the point at hand, it is evident that Mr. Beale would allow either ~~state~~ domiciliary state to predicate a status upon the so-called marriage contract regardless of the view of other domiciliary state. (That is, rule #(C) above is approved as the correct one in this situation by that writer). It is submitted that this application of the duality idea is as ~~erroneous~~ subject to objection as the idea

itself. Assuming as we are entitled to do, the soundness of domiciliary control, each state is entitled to regulate the capacity of its citizens to marry, and if one of the parties to the marriage contract is incapacitated to enter such a union there can be no such union. The familiar law of ~~the~~ elementary contracts necessitates that neither party be under an absolute incapacity, and of course a resort to interpretation of the law of the domicile is necessary to determine whether the incapacity is absolute or not. The writer ~~of this~~ is accordingly of the opinion that in cases arising under classification three of this treatment, the sounder approach would involve the application of the rule that the marriage is void if declared so by either of the domiciliary states. This view is adhered to, without being too dogmatic it is hoped, in spite of the Conflict of Laws Restatement (28) which ~~this~~ supports the view taken in 44 H.L. R. 501 (supra).

Returning for a moment to the case of Stokes v. Ross (supra), it may be observed in light of the preceding discussion that North Carolina adopted a more liberal attitude than the facts necessitated, or even warranted. Where the validity of ~~the~~ a marriage itself is in question, and it is practically conceded by the court that the marriage would be void if one of the parties were domiciled in North Carolina and and left the state for purpose of avoiding local laws, how can ~~the~~ it be said that by the marriage the domicile of the wife shifts. This is specious reasoning of the most amazing kind — the act ~~itself is also~~ in question is itself allowed to cut off the basis of attacking the act. Approaching from another angle, let us suppose that the parties ~~are~~ were

(28) Am. L. Inst. § 140

reversed and that ~~a man~~ the man had gone into South Carolina. The holding of the North Carolina court was obviously pointed out, and we doubt the validity of a distinction based on the difference between husband and wife. Applying what is believed to be the sounder rule to the facts of the Ross case, North Carolina would have had the privilege of declaring the marriage void through its domiciliary control of one of the parties. Whether this would have been done, depends upon ~~a~~ the interpretation of the local statute, and in view of the law of the Kennedy case (supra) ~~it~~ it is thought that the marriage should have been held void.

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