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THE LAW OF THE DOMICIL AS AFFECTING THE VALIDITY OF MARRIAGES IN A FOREIGN JURISDICTION

A perplexing problem of conflict of laws confronts a court which must decide to what extent the law of the domicile affects the validity of marriages celebrated in other states. The decisions in this jurisdiction concerning the validity of such marriages are not clear.¹ Much of the confusion is to be attributed to ambiguities in the statute law.² And because the marriage law has been altered in the few years since the Revised Code, it is evident that the legislature is still seeking a more workable marriage law.³ However, these changes are expressive of the desire to alter our social policy, rather than an attempt to clarify the law. Therefore, in discussing this problem of the validity of foreign marriages, a brief discussion of the law of West Virginia is deemed necessary.

By legislative action, the great majority of invalid marriages celebrated within this jurisdiction are rendered voidable.⁴ By construction of another statute⁵ the majority of the court has held that a second marriage celebration here in violation of a divorce decree is absolutely void.⁶ It will be noted that these are the only

¹ *McManus v. Commissioner*, 113 W. Va. 566, 169 S. E. 172 (1933); *Johnson v. Commissioner*, 116 W. Va. 232, 179 S. E. 814 (1935).

² W. VA. REV. CODE (1931) c. 48, art. 2, § 1, "All marriages between a white person and a negro; all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; all marriages which are prohibited by law on account of consanguinity or affinity between the parties; . . . [enumerating other instances of marriages] . . . shall be void from the time they are so declared by a decree of nullity." This section is hereafter referred to as the voidable marriage statute. W. VA. REV. CODE (1931) c. 48, art. 2, § 22, "When a divorce from the bond of matrimony is decreed, neither party to the marriage so dissolved shall in any case again marry within six months from the date of the decree. . . and any marriage contracted by any divorced party, except a remarriage to the person from whom divorced, within the prohibited period, shall be void, and the party shall be criminally liable the same as if no divorce had been granted. . . ." This section is hereafter referred to as the prohibitory statute. The inconsistency was found to exist when the court was called upon to determine whether the word "void" (as used in the second quoted section) was to be construed in the light of the preceding section, and thus mean voidable only. Italics ours.

The sections have now been amended by Acts 1935, c. 35, but not in any material way, so as to effect the quoted sections as commented upon in this note.

³ W. Va. Acts (1935) c. 35. § 1 is amended, but the amendment is immaterial to this article. § 22: "When a divorce is decreed neither party to the marriage so dissolved shall in any case again marry within sixty days from the date of the decree, or pending an appeal of the case in the supreme court. . . ." (Italics ours, to indicate change in 1931 section).

⁴ W. VA. REV. CODE (1931) c. 48, art. 2, § 1, *supra* n. 2.

⁵ W. VA. REV. CODE (1931) c. 48, art. 2, § 22, *supra* n. 2.

void marriages in West Virginia, as marriages usually held void as against public policy, are grouped under the voidable marriage statute.⁷

It is generally accepted that the validity of a marriage is determined by the laws of the state of celebration. Although a common-law marriage is not recognized here, such a marriage if valid where consummated is valid here also.⁸ But the law of the domicile may determine the validity of a foreign marriage, where public policy of the state of domicile is against such a marriage.⁹ An express statutory provision has been made for domiciliaries who go outside of this jurisdiction to be married in order that they may evade our statutory requirements.¹⁰ And as the voidable marriage statute expressly says *all* marriages, it may be argued that it will apply with equal force to marriages in a foreign jurisdiction, where the parties to the marriage are domiciliaries of this state.

The law is not so clear where the foreign marriage is a second marriage within the prohibition period of a divorce decree. If the prohibition is applicable to the guilty party only, courts have regarded it as merely a penalty, and therefore without extra-territorial effect, and the subsequent marriage in another jurisdiction valid.¹¹ But where the prohibition exists as to both parties, as under our prohibitory statute,¹² it is no longer a penalty, but rather a method of discouraging collusive divorces obtained with a view to a quick marriage with another. In this case, the foreign marriage cannot be so easily disposed of.

⁶ Majority opinion. *Hall v. Baylous*, 109 W. Va. 1, 153 S. E. 293 (1930). *A* got a divorce *a vinculo* from her husband *B* in West Virginia. The decree forbade her marrying again for six months. Four months later, and in West Virginia, she married *C*, who died. *A* claimed certain property of *C*'s as her dower.

⁷ W. VA. REV. CODE (1931) c. 48, art. 2, § 1, *supra* n. 2.

⁸ *Jackson v. Commissioner*, 106 W. Va. 374, 145 S. E. 753 (1928).

⁹ *Kinney v. Commonwealth*, 30 Gratt. 858 (Va. 1878); *Heflinger v. Heflinger*, 136 Va. 289, 118 S. E. 316 (1923); Note (1927) 33 W. VA. L. Q. 207, 208.

¹⁰ W. VA. REV. CODE (1931) c. 48, art. 1, § 17. Under this section "such marriages shall be governed by the same law, in all respects, as if it had been solemnized in this State." Therefore, these marriages will be voidable because they, if solemnized in this jurisdiction, would come under the voidable marriage statute.

¹¹ 2 BEALE, CONFLICT OF LAWS (1935) § 130.1 at p. 685. RESTATEMENT, CONFLICT OF LAWS (1926) § 130.

¹² *Supra* n. 2.

It has been held in the case of *McManus v. Commissioner*¹³ that a marriage within the prohibited period, though it be celebrated in another state and by that law valid, is void *ab initio*. This decision blindly follows the rule of the *Baylous* case without regard to the separate and distinct situations of the two cases.¹⁴ The most practical solution of this problem is set forth in the Restatement of Conflict of Laws.¹⁵ Under this rule, if the marriage during the period of prohibition is valid under the law of the state of celebration, it is *valid everywhere*, unless (1) the time named is the time within which an appeal may be taken, or (2) the statute is interpreted as being applicable to the marriage of domiciliaries in another state, or (3) the marriage be incestuous, bigamous, or inter-racial and therefore void.

It appears that our prohibitory statute may have extra-territorial effect under the exceptions to the Restatement rule. Under the amendment to this statute,¹⁶ the clause "or pending an appeal in the supreme court" has been added. And further, in the *McManus* case,¹⁷ while the court did not expressly state that our statute applied to the marriage of our domiciliaries in other states, yet in effect, they interpreted the statute as having that purpose.

Another interesting situation is presented by the case of *Johnson v. Commissioner*.¹⁸ Here the plaintiff's husband, *J*, domiciled in Virginia, received his divorce decree there, under the Virginia statute which provided that:

" . . . such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on account thereof, until the expiration of such six months."

Within three months, *J*, having come to West Virginia and found a job here, married the plaintiff. The court held this subsequent marriage void. It will be noted that the court, purporting to apply

¹³ *Supra* n. 1. Here *A* was divorced in West Virginia, the decree prohibiting marriage for six months. Within such period, *A* married in Ohio, this marriage being in regular form and valid under Ohio law.

¹⁴ In the *Baylous* case the prohibited marriage was celebrated in West Virginia, and governed directly by our statute. In effect, what the court is saying in the *McManus* case is that because *A* was domiciled in West Virginia, our prohibitory statute applies to her subsequent marriage wherever celebrated.

¹⁵ §§ 131, 132.

¹⁶ W. Va. Acts 1935, c. 35, § 22, *supra* n. 3.

¹⁷ *Supra* n. 13.

¹⁸ 116 W. Va. 232, 179 S. E. 814 (1935).

Virginia law, cited as authority the *Baylous* case.¹⁹ If the Virginia law is to be applied to this marriage the decision of the *Johnson* case cannot be attacked. However, the facts of the case suggest the question of whether *J* had become domiciled in West Virginia. Assuming the domicile as changed to West Virginia, what law should the court apply?

Upon conflicts principles, the law of Virginia should be applied to determine *J*'s status when he came to West Virginia. Under the Virginia statute a divorce decree was provisional only until the expiration of the six-month period. Therefore *J* was, in effect, a validly married man. Whether from this point the law of West Virginia or of Virginia should be applied depends on the domicile of *J* at the time of his second marriage. If *J* were here domiciled, West Virginia law would apply, and *J* would be the party to a bigamous marriage, which by statute is voidable only. If, however, *J* retained his Virginia domicile, it is the duty of the court to apply Virginia law to reach its decision. Therefore, it appears that the extra-territorial effect of any prohibitory statute must depend on whether the party is still a domiciliary of the state rendering the divorce decree when he enters into his subsequent marriage.²⁰

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¹⁹ See Judge Maxwell's dissent that the *Baylous* case cannot properly apply to this situation. This seems to be the correct view.

²⁰ RESTATEMENT, CONFLICT OF LAWS §§ 131, 132.