Recognition of Validity and Incidents of Marriages between Whites and Blacks

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"Negroes who are born in the United States, and are in high favor at Moscow as potential workers for a future revolution in the United States, such as Negroes in William Zinsser's Patterson, frankly a Communist, who after three and one-half years in Russia returned to this country last week and began to preach a Communist doctrine. Eventually Negroes also in Moscow a Negro can take a white bride without attracting comment. Recently Communist Patterson left his white bride of 18 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, intermarriage is shunned by the dominant race in varying degrees. In forty-nine states, Mr. Patterson would have accused something more annoying than "Communism" by taking unto himself a white female—by violating such a union in one of these states, the least he could expect would be the legal act of absolute nullity. In those others his marriage would be "unlawful" or "prohibited." And the reason that southern states would sanction the union is not that their states are more "Christian," not that the citizens of those states are actually less opposed to the alleged social evils—but simply because the problem is not one of any real importance. Not one of the southen has more than five percent of its population made up of Negroes, while in many of the southern states we find almost an

1. Time, April 13, 1931 - pg 32.
equal division between the sexes.

Obviously this situation presents manifold ramifications 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 the two exceptions to the extent that, in Anglo-American jurisprudence 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 sought a third exception, treating miscegenation on the same basis as incest and polygamy. The menace of public policy which gives rise to the first two exceptions and strange to many found as the alleged necessity for the third exception. The language of Judge Christian in Kentucky Commonwealth is accurately descriptive of the attitude most frequently found in southern and some western states: "The points of public morals, the moral and physical development of both races, and the highest advancement of our chivalric Southern civilization under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them in this continent -- all require that they should be kept distinct and separate, and that connections and alliances so immoral that God and nature seem to forbid them should be prohibited by positive law, and be subject to no exception."

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 these
third exception to the rule. In general it may be said that statutes prohibiting intermarriage of
whites and blacks are constitutional. State v. Gibson held that "neither the 14th Amendment
nor the Civil Rights Bill has impaired or
altered the laws of this state on the subject
of marriages of whites and negroes." Similar
claiming equally applicable constitutionality may be found in
the footnote. Only full faith and credit need not
be given a marriage valid in one state which is
repugnant to so pronounced a public policy as
that involved in miscegenation.

(3) 316 Ind. 287; (4) State v. Tuttle, 41 Ind. 753; Green v. State, 58 Ala.
190 (1887); Dobson v. State, 61 Ark. 57 (1895); Succession of
Gabren, 119 La. 706 (1902); Florida v. State, 3 Tex. App. (1872);
Fernandez v. State, 9 Tex. App. 154 (1879); and Blake v. Lemma, 59 Or. 716
(1925)
The conflicts of law situation regarding the problem of, as reflected by the decisions, can best be treated under three factual divisions.

First, when the parties domiciled in the same state, leave it temporarily, and marry in another state, which permits such a union. Second, when the parties are residents of a state permitting intermarriage of races, marry in that state, but later become residents of a state prohibiting such marriages. Third, when there is a conflict between the laws of respective parties' domiciles, and after a marriage valid in state of performance, couple move to a state opposed to mixed marriages. 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 in the foreign state. The case of Kimsey v. Commonwealth (supra, 3rd type of this view) and bears some analysis:

A negro man and a white woman, domiciled in Virginia, were 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 marriage was invalid to that extent. The action was by the husband in the District of Columbia to reform and for the recovery of alimony. The Supreme Court of the District of Columbia was a mere prosecutor of the laws of Virginia, and could not be pleaded in lieu 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 on this point the penal before a decision of the case, was adopted after the marriage of the parties. The court in this case and saying:
"But without such statute, the marriage was invalid. It was contrary to the declared public law, founded upon notions of public policy, — a public policy approved 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, Jones v. Jones, involving analogous facts is to the same effect; the court again taking the unequivocal position that the "law domicilli" determines the matrimonial capacity.

The only federal authority on this question is in the case of State v. Tutty, in which the court stated that precisely the same facts and questions were presented as those in the Kuney case, and, after a careful survey of the authorities, the Virginia case was entirely approved. One additional point brought out by the decision was the point that the "Contracts clause" of the Constitution was not violated, granting Chief Justice Marshall in the Dartmouth College Case, 4

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. Here as in the Kuney 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 formalities of the marriage, the law does not provide. But when the law of North Carolina declares that all marriages between negro and whites shall be void, this is a personal incapacity which paralyzes the parties whenever they go as long as they remain domicilli in North Carolina. And we cannot believe 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 been paid anywhere a domicile element at
the time of the marriage." These two cases adopted
the English view of Brooke v. Brooke, that the
intent to evade the local law is not important
Adding mutuality to the above except the
weight of one more jurisdiction in the case of
Morgan v. Boulard, where the court held that
it could not give effect to a French marriage
of this kind without sustaining an evasion of the
 laws and duties as sought the deliberate policy of
the state.

The leading case contrary to the line of
authority considered above is Midway v.
Needham, 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 law of Rhode Island, not
withstanding that it would have been voided if celebrated
in Massachusetts." 8 It is important to remember that
the state statute making void inter-racial marriages
had been repealed just before the action, indicating
that there was no public policy against racial
marriage against mixed marriages to the extent that
these in our states were popular with the negro.
These facts overcome 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 Fuller
in Pennsylvania v. State, considered it to be an
extreme thing, and the Lord Chancellor in Brook v.
Brook (Morgan) went so far as to say that "Midway
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 opinion in

8 9 H.L. Cas 193 15 10 L.R. 411 16 Mass. 157 (1819)
12 57 ALR 167 13 10 S.W. 305 (1889) (Perm)
cases, reaching a different result, have treated this Massachusetts case with great importance.

But in spite of criticism, and the current of authority to the contrary, we find that the Medway case is adhered to today in its preemption at least on other jurisdiction. In the 1910 Nebraska case of State v. Hand it was held, "A marriage .... which is prohibited by statute because contrary to the policy of our law is yet valid if celebrated according to the law 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; hence being no legislative enactment that such marriages out of the state shall have no validity here."

This is just a further in the first and simplest situation. The cases above involve some subtle distinctions, but no fundamental difference is found, and courts have not attempted to reconcile the two lines. In final analysis, about an extra-territorial statute, it devolves upon the courts to interpret the law's statute in light of what it believes to be the sounder public policy for that particular state.

The second element of our characterization of cases involves marriages good when celebrated both according to law of domicile and place of celebration. The question, possibly to be second, capable of answering our numerous when the married couple later moves to a state whose laws concern and regal to the public policy. Can the latter state declare the marriage void? Can it deny certain incidents usually connected with marriage — such as right of habitation, right of divorce or custody, and right of inheritance? Can
much 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 is perhaps the most outspoken authority holding a marriage between white and black persons invalid, though such marriage was valid according to the law of origin and domicile. A white man married a woman of color in Mississippi where such marriage was 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 pointed out helpful picture:

"We might have in Tennessee the father living with his daughter, the son with his mother, the brother with his sister, in lawful wedlocks, because they had formed such relations in a state or country which they were not prohibited. The Turk or Mahometan, with his numerous wives, may establish his harem at the shore of the capitol, and we are unwillingly, yet none of these are more revolting, nor to be avoided, or more unconstitutional than the case before us." The opinion doesn't expressly declare such marriage valid, but in view of the results and the language presented by it seems that in effect this indication was reached.

An illustration given by way of data in the many cases cited of Johnson v. Jordan "was fully as far as the cases above: "For example, the statutes of Maryland expressly 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

[16] 3 Bax. 8 (Tenn. 1872) 1882 Md. 17 (1884)
may be valid elsewhere, they will be absolutely void here, so long as the statutory inhibition remains unchanged." In the opinion of the state court in 57 L.R.A. 163, this state "in apparently broad enough to cancel a marriage between persons was

in Maryland at the time of its celebration."

Wittmiller v. McCashill represents a different attitude. Quoting from the syllabus: "Although

marriages between white persons and negro persons

are prohibited in this state by constitution

and statutes, when such a marriage takes place

in another state between such persons who are

hereafter 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,

when she dies intestate, without leaving any children

or descendants." It is noticed of course, that the

parties never returned to Illinois, attempted to reside

in Illinois, and accordingly the same interests were

not impaired as in the Bell case. However, this

decision, by admitting the right of intestating died,

within undoubtably the validity of the marriage, and

held the parties attempted to live together within

the state, the more that this court could hold true

and remain consistent, would have been to prevent

cohabitation without declaring the marriage void. The

court argued that the statute could not be

interpreted to cancel the coating made, but it did not

venture an opinion as to whether statute so enacted

in application would be constitutionally adopted.

It appears that California is not particularly

impressed with void progeny of the Tennessee courts

in State v. Bell (supra), for it adopted a statute

13 65 Fla. 162 (1913)
efficiently 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 Sanchez v. Ramon held valid a marriage between a master and his slave contracted in Utah. The court said that the statute avoided what it was powerless to do which upheld as valid all good foreign marriages except wherein polygamy was sanctioned.

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

(7) 51 Cal. 162.
(8) 57 L.R.A. 168.
(9) 24 L.R.A. 573.
(10) 3 Ann. Cas. 1055.
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 upheld the validity of a marriage for one purpose, and in a state distance not 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 anomaly. Perhaps the opinion has been misinterpreted, but more probably this is simply a plain and simple case of the inaccurate use of terms, place a failure in a court grant to distinguish between declaring a foreign marriage void, and declaring to such union certain incidents within the state because of their infringement upon a cherished public policy.

In summarizing the state of the law in this division of our discussion, it is readily apprehended that extending, definite, and uniform rules so 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 we exhort the court, this is the failure, pointed out above and so graphically illustrated by the Cabell case, to appreciate that a state may preserve its so-called policy by refusing to permit a wife and unadulterated a child, by refusing to allow inheritance, dower, and other rights without attempting to declare that a foreign marriage 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 to thus hold a marriage a foreign marriage in an uninconsequent assumption of power. Of course full faith and credit need not be given such a marriage, but a denial of such faith and credit is quite a different matter from an attempt.
of a state
to hold void the creation of another sovereign,
invoking the union of two persons not
subject to dominion controls. Taking this view
of the situation, it is submitted that the case
of State v. Bell (supra), and the cases in the case
of Johnson v. Jordan (supra) and Cabealson v. Sweeney,
(supra) are erroneous in principle. Of course, the
Whittington 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
County on these facts had moved within the
state before death of the wife. It is held that
the marriage would not have been valid to be void
but that the incidents only be limited or prohibited.
And it would seem in behalf of intellectual honesty
that no distinction should be made between those
various incidents to far as the "powers" of the state
of the persons is concerned. What incidents it would
probably would of course depend upon the nature of
the public policy.

III. The last general class of cases to be considered
presents the problem of a conflict between the
dominion status of the two parties, assuming that
the union is valid when performed. This
problem becomes acute when the couple attempts
to live in a state opposed to inter racial marriage
of the inhabitants of property in such a state is
involved. Since the usual situation
intersection with parties are from the same state,
there are few cases involving the problem of
spousal domicile. The only case in this category
within a miscegenation marriage is concerned
in State v. Ross. In this case a white woman
married 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
forfeiture. In a divided court, it was held
that North Carolina would recognize this marriage.
The meaning of the court through the fact
situation into classification was considered above,
and made this case an authority diametrically
opposed to State v. Bill (supra). The
point is made that since, upon marriage, the
domestic of the husband became the domicile of the
wife, the woman and property were both domiciled
and property was no basis of control
left in North Carolina. Note the syllabus: "A
marriage solemnized in a state whose law
permits 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." 44 N.C. 581

The court refuses to put upon racial
mixture 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.

Leaving our consideration of this case for the
time being, let us consider extracts from Mr. Seals
latest exposition on the subject of recognition
of marriages. The general theme of this particular
extract is that a marriage is a dual concept,
consisting, first, a marriage contract which must
be valid when performed, and involving second, the
power of the state of domiciliary control to predicate
a status on this contract. Speaking of the type
problem being considered in this decision, Mr.
Seals says: "An interesting problem is presented
whereby only one party is domiciled in a state whose
law makes the marriage invalid. The question
preserves the formulation of four possible rules.

44 N.C. 581 (of course this article is dealing with the subject
generally, and not with the particular problem of inter-racial unions).
The statute might be held to depend upon (a) the matrimonial domicile; (b) the domicile of the other party; or (c) the domicile of the husband. In discussing these rules, the writer very properly dismissed the matrimonial domicile, and then pointed out: "The argument may be advanced in favor of the domicile of either party. On the other hand, it seems to follow from the intent of each party in the marital relation that the domicile of either party may create the relation, and that the failure of one domicile to concern will not prevent the other from completing the marriage in accordance with its own policy. It seems on the whole that this meaning is more persuasive."---Our American case, State v. Long (supra) has however suggested a rule giving the control over the status to the domicile of the husband."---But this standard, "one looks the fact that the domicile of the wife has no interest in the status.

In contemplating these dual concepts of marriage, several objections seem to be obvious. How can it be truthfully stated that a marriage invalidates more than one legal relationship? It would seem impossible to separate the contract from the status, and if your force a particular separation does it not seem to be conducive to greater complexity of results, causing 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 domiciliary state to predicate a status upon the so-called marriage contract regardless of either of other domiciliary state. (That is, rule #2 above is opposed to the recent one in this situation by this writer). It is submitted that this application of the duality idea is as extravagant 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 marriage. The familiar
law of domiciliary contracts enunciates that
neither party be under an absolute incapacity, and
of course a resort to interpretation of the local law
of the domicile is necessary to determine whether the
incapacity is absolute or not. The writer of
opinion is avowedly of the opinion that in cases arising
under classification made by this treatment, the
sounder approach would enable 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
which supports the view taken in 44 H. L.
P. 501 (supra).

Returning for a moment to the case of State v.
Rice (supra), it may be observed in light of the
preceding discussion, that North Carolina adopted
a more liberal attitude than the states necessitated,
or even warranted. Where the validity of
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 had left the state for
purpose of avoiding local law, how can the
be said that by the marriage the domicile of the
wife shifted. This is espoused reasoning of the
most appealing kind — the act in question is itself allowed to cut off the basis
of attacking the act. Approaching from another
angle, let us suppose that the parties
were
reversed, and that the men 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 intended to be the easier rule to the facts of the Ross case, North Carolina would have had the privilege of declining the marriage void through its domiciliary control of one of the parties. Whether this would have been done, depends upon the interpretation of the local statute, and in view of the law of the Kennedy case (supra) it is thought that the marriage should have been held void.
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