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Domestic Relations - Conflicts of Laws - Incestuous Marriages Where Relationship Is by Affinity and Parties Evade Law of Domicile by Attempting Marriage Elsewhere

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Domestic Relations—Conflict of Laws—Incestuous Marriages Where Relationship is by Affinity and Parties Evade Law of Domicile by Attempting Marriage Elsewhere.—Dr. C. C. Watkins and Viola Watkins were domiciled in Alabama. Viola was the widow of the doctor's blood uncle, by whom she had had three children, all living. Alabama law prohibited the doctor from marrying Viola, but the law of Georgia did not. Accordingly the doctor and Viola went through a marriage ceremony in Georgia, returned to Alabama where they lived until the doctor's death. His heirs then brought this action to have the marriage to Viola declared void on the ground that it was repugnant to the incest statutes of Alabama and so intensely opposed to the state's public policy that it was a nullity. *Held,* that the marriage was void *ab initio;* that although generally a marriage valid where celebrated is valid everywhere, yet that rule does not apply to marriages between parties who leave the state of their domicile for the purpose of avoiding its statute, go through a ceremony in another jurisdiction and then return to the state of their domicile.—*Osoinach* v. *Watkins,* 235 Ala. 564, 180 So. 577, 117 A.L.R. 179, annotated at 186 (1938).

The language of the decision of the instant case purports to include the situation of parties validly married in the state of their domicile, but who could not validly marry in Alabama and who later come into that state. However, the facts present no such issue.

If a marriage is invalid by the law of the state in which it is contracted it is invalid everywhere. *De Fur* v. *De Fur,* 156 Tenn. 634, 45 S.W. (2d) 341 (1928); *Kitzman* v. *Werner,* 167 Wis. 308, 166 N.W. 789 (1918). But if it is valid in the state in which it is contracted, the marriage usually is held valid everywhere. *Reifschneider* v. *Reifschneider,* 241 Ill. 92, 89 N.E. 255 (1909); *Lyannes* v. *Lyannes,* 171 Wis. 381, 177 N.W. 683 (1920). Strictly speaking, the latter rule applies only when a marriage performed in State *A* is challenged in State *B* for failure to comply with some formal requisite imposed by the law of State *B*. If the formal requisites of the state in which the marriage is contracted have been complied with the marriage is valid, even though it would not have been valid had it been contracted in the state where it is subsequently challenged. *Lyannes* v. *Lyannes,* 171 Wis. 381, 177 N.W. 683 (1920). According to the latter case the formal requisites controlled exclusively by the law of the state in which the marriage is contracted include not only such matters as the performance of the ceremony and the obtaining of a license, but also the requirement that the parties undergo a physical examination prior to the marriage.

The rule that a marriage valid where contracted is valid everywhere breaks down when a marriage contracted validly in State *A* is challenged in State *B* on the ground that the parties lacked capacity to marry. This is especially true if State *B* is the domicile of both of the parties, and the breakdown increases as the lack of capacity grows in social importance. Thus, in the marriage of minors most courts continue to apply the rule that a marriage valid where contracted is valid everywhere, even when the minors leave their home state to avoid its marriage laws. *Levy* v. *Downing,* 213 Mass. 334, 100 N.E. 638 (1913). But here the breakdown commences, for it has been held that a marriage between minors is void in the state of their domicile, even though it was valid where contracted, if the minors are prohibited from marrying by the law of their domicile and they go out of the state of their domicile to evade its law. *Ross* v. *Bryant,* 90 Okla. 300, 217 Pac. 364 (1923).

The exception to the rule that marriages valid where contracted are valid everywhere becomes more pronounced in the case of consanguineous marriages

which are not generally regarded as incestuous. Thus, although many states which forbid cousin marriages will nevertheless recognize them as valid if they were contracted in a state which allows them, *Garcia* v. *Garcia,* 25 S.D. 645, 127 N.W. 586, 32 L.R.A. (N.S.) 424 (1910), yet, a great many others will refuse to give recognition to such marriages especially where the parties to them marry abroad in evasion of the law of their domicile. *Johnson* v. *Johnson,* 57 Wash. 89, 106 Pac. 500, 26 L.R.A. (N.S.) 179 (1910).

The rule that marriages valid where contracted are valid everywhere breaks down completely when the marriage at issue is one which was contracted in evasion of the law of the state in which both parties are domiciled and if it is a marriage which the law of such domicile regards as incestuous or miscegenetic, even though it may not have been so regarded by the law of the state where the ceremony was performed. The state of the authorities with respect to incestuous marriages thus contracted is exhaustively considered in the A.L.R. annotation to the principal case. Annotation, 117 A.L.R. 186 (1938).

In the principal case the parties were not related by blood, but merely by affinity. Where the relationship of aunt and nephew is consanguineous, marriage is prohibited by statute as incestuous in most states. But where the relationship is only by affinity there is no such agreement.

At common law in England, relationship by affinity was as serious an impediment to marriage as relationship by blood. But this rule, derived from the canon law, was not generally accepted as part of the common law in America. American courts have refused to declare even a consanguineous marriage void unless the parties were so closely related as to make the marriage clearly incestuous by the natural law. *Weisberg* v. *Weisberg,* 112 App. Div. 231, 98 N.Y.S. 260 (1906). All states now have statutes fixing the degrees of relationship by blood within which marriage is forbidden, but only half of them have statutes forbidding marriage between persons related by affinity. 1 Vernier, *American Family Laws* 183. And these statutes have been variously interpreted.

It has been held that the affinity ends with the dissolution, either by death or divorce, of the marriage which created the relationship. *Back* v. *Back,* 148 Iowa 223, 125 N.W. 1009 (1910). In Alabama only a few years prior to the principal case it had been held that the relationship by affinity ends with the dissolution of the marriage which brought about the relationship unless there is surviving issue of that marriage. *Henderson* v. *State,* 26 Ala. App. 263, 157 So. 884 (1934). In the principal case there was issue surviving. Other states hold that the relationship survives the marriage from which it arose at all events. *Spear* v. *Robinson,* 29 Me. 531 (1849); *Commonwealth* v. *Perryman,* 2 Leigh (29 Va.) 717 (1830). In five states statutes provide that the prohibition of marriages between persons related by affinity shall continue after the dissolution of the marriage by which the affinity was created. 1 Vernier, *American Family Laws* 184.

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Husband and Wife—Husband's Duty to Support Wife.—The Committee of the Estate of Martha Gray, incompetent, brought action against Martha's husband, Robert, for moneys expended by Martha for her own support prior to her being adjudicated insane and for moneys expended from her estate by the Committee for her maintenance at a hospital. Robert and Martha had separated and Martha had supported herself thereafter without manifesting any desire that Robert should provide for her.