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Aliens: Validity of Marriage for Immigration Purposes

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general minority rule of contracts that the market value is to be determined as of the date of the breach, but then the court assumed that the contract was breached as of the date of the repudiation. Even under that minority rule, if the court had given recognition to the rule of the *Frost v. Knight* case[19] the result would have been to determine the market value as of the date fixed for performance, because, under that case, if the repudiation is not accepted the contract is not breached until the time set for performance.

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Aliens—Validity of Marriage for Immigration Purposes—Defendants participated in civil marriage ceremonies with three refugees in Paris, France, for the sole purpose of enabling these refugees to enter the United States as spouses of honorably discharged American veterans under the War Brides Act.[1] The refugees were subsequently admitted into the United States as such spouses, although the marriages were never consummated and the parties in two of the cases involved have never cohabited as husband and wife. Defendants were convicted of a conspiracy to defraud the United States by the making of false statements or concealing material facts from the immigration authorities.[2] *Held:* Affirmed. No evidence of French law having been presented at the trial, it will be presumed that French law on the point is the same as American law. Under American law these marriages would not be valid. Furthermore, the validity of these marriages as such is not in issue here, as the marriages were but one step in the defendants' scheme to defraud the United States. The question whether the marriages might be valid for other purposes is of no importance. *Lutwak et al. v. United States, 344 U.S. 809 (1953),* petition for rehearing denied *73 S.Ct. 726.*

The status of marriage has for many years occupied a position of some importance under our imigration legislation. Under the Immigration Act of 1917,[3] which, despite several amendments is still the basic immigration law of this country,[4] preferential treatment is accorded to spouses of citizens or legal residents of the United States. This policy is preserved in the Immigration Act of 1924,[5] and the recent Immigration and Nationality Act, also known as the McCarran Act.[6] In many

[19] *Supra,* notes 13 and 4.

[1] 59 STAT. 659 (1945), 8 U.S.C. §232. The minority opinion expressly states, and the majority opinion appears to concede, that the marriages in question were ceremonially valid, at least in the sense that some judicial proceedings would be necessary if the parties wished to be relieved of their marital obligations. 71 L.Ed. 364 (1953).

[2] Under 43 STAT. 153, 8 U.S.C. §220(c) (1946 ed.).

[3] 39 STAT. 874 (1917).

[4] KANSAS, U.S. IMMIGRATION EXCLUSION AND DEPORTATION 103 (3rd ed. 1948).

[5] Sec. 4; 43 STAT. 153, 8 U.S.C. §220 (1946 ed.).

[6] 8 U.S.C. 1101 *et seq.* In particular, see 205(b).

immigration and nationality cases, therefore, the question of what constitutes a valid marriage within the meaning of these Acts has been, and still is, one of decisive effect.

At first blush, the problem might appear capable of relatively simple solution by the application of the familiar rule of conflict of laws that a marriage valid where celebrated is valid everywhere.[7] The majority in the principal case, however, clearly indicated that the above rule in this connection is of little, if any, value, by stating that:

> "With the legal consequences of such ceremonies under other circumstances, either in the United States or France, we are not concerned."[8]

Another possible solution of our problem might be reached by looking to the law generally prevailing in American jurisdictions. The majority in the principal case appears to assume that the marriages in question would, under American law, be invalid. If by that the Court means that the marriages would be null and void, the validity of that assumption is somewhat doubtful; the rule which seems to represent the weight of American authority on the point has been stated in the following terms:

> "Once a marriage has been properly solemnized and the obligations of married life undertaken, its validity cannot be affected by an antenuptial agreement that the marriage should not be valid and binding, nor because one or even both of the parties did not intend it to be a permanent relation."[9]

Be that as it may, the majority in the principal case clearly indicated that this test also is unlikely to be of much practical help.[10]

It would thus appear that marriage under our immigration laws has a meaning separate and distinct from its general legal interpretation. This assumption finds strong support in the following language of the majority in the principal case:

> "The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien spouses' in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations."[11]

The above definition, of course, is authority only with respect to the

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[7] RESTATEMENT, CONFLICT OF LAWS §121, 132-134 (1934).
[8] 71 L.Ed. 361 (1953).
[9] KEEZER, MARRIAGE AND DIVORCE 3 (1946) and cases there cited; See, also, NELSON, DIVORCE AND ANNULMENT §31.01 (1945) and cases there cited; See, notes 14 A.L.R.2d 620 (1950); DeVries v. DeVries, 195 Ill. App. 4 (1915), involving a marriage ostensibly entered into for the sole purpose of nullifying a contract of employment, and Hanson v. Hanson, 287 Mass 154, 191 N.E. 673 (1934) involving a sham marriage entered into for the purpose of obtaining a salary increase.
[10] See note 8, *supra*.
[11] 71 L.Ed. 360 (1953).

War Brides Act.[12] The question remains, however, whether this test is applicable to the remainder of our statutory immigration law.

A search of our immigration statutes reveals two provisions which might be of possible value. Section 13(a) of the Immigration Act of 1924[13] provides as follows:

> ". . . any alien who at any time after entering the United States is found to have secured a . . . visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to the date of marriage, shall be taken into custody and deported . . . on the ground that at time of entry he was not entitled to admission, on the visa presented upon arrival in the United States."

There appear to be no decisions directly involving the interpretation of the above provision. An examination of its language, however, appears to indicate that it can not be safely relied upon as a test of a valid marriage for immigration purposes. The decision in the principal case itself indicates that the mere fact that a marriage has not been judicially annulled subsequent to entry in the United States does not necessarily indicate that such marriage satisfies the requirements of the immigration laws.

Another statutory provision of possible value is found in Section 101(a) of the Immigration and Nationality Act of 1952,[14] which reads as follows:

> "Definitions . . .
> (35) The term 'spouse,' 'wife' or 'husband' do [sic] not include a spouse wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."

The above provision appears to have been designed to prevent the utilization of so-called proxy marriages for obtaining the preference provided for under the Act.[15] Whether, by application of the principle of *inclusio unius, exclusio alterius,* it might be argued that all other ceremonially valid marriages satisfy the requirements of the Act, is highly doubtful.

The only safe conclusion under these circumstances appears to be that attorneys engaged in immigration practice should not advise their clients to apply for preferential treatment as spouses of American citizens or residents under existing immigration statutes, unless such clients are parties to a marriage which fully satisfies the test laid down by the majority of the principal case.

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[12] *Supra,* note 2.
[13] *Supra,* note 5.
[14] *Supra,* note 6.
[15] *Supra,* note 6.