Michigan Law Review

Volume 33 | Issue 3

1935

CONFLICT OF LAWS - FOREIGN MARRIAGE - DOWER

CONFLICT OF LAWS — FOREIGN MARRIAGE — DOWER — Plaintiff was divorced in the District of Columbia on the ground of her adultery with defendant's intestate. A statute of the District provided that the innocent party only may remarry. With no intention of evading the statute,[1] plaintiff and defendant's intestate established a domicil in Florida and were there married. On the death of the latter in the District of Columbia, plaintiff claimed a dower interest in real estate located there. *Held*, plaintiff can recover. *Loughran v. Loughran*, 292 U. S. 216, 54 Sup. Ct. 684 (1934), reversing *Loughran v. Loughran*, (App. D. C. 1933) 66 F. (2d) 567.

The unusual compromise position taken by the District of Columbia court had been noted previously in this Review,[2] and elsewhere.[3] The reversal by the Supreme Court on the ground that the statute was not intended to express an extra-territorial prohibition [4] makes clear the point that under the guise of statutory construction offended states have gathered from local disqualifications a

[1] It is doubtful whether the District of Columbia court proceeded on this factual basis. No mention of a foreign domicil is made in the lower court's opinion, and the total reliance on Olverson v. Olverson, (App. D. C. 1923) 293 Fed. 1015, intimates that the lower court felt the existence of an intent to evade the local prohibition. If such be the fact, the conflict in holdings really rests on different factual assumptions.

[2] 32 MICH. L. REV. 999 (1934).

[3] 34 COL. L. REV. 563 (1934); 14 BOSTON UNIV. L. REV. 392 (1934); 1 UNIV. CHI. L. REV. 496 (1934).

[4] The Court comments at p. 688 (292 U. S. 226) that "Section 966 is not extra-territorial in its operation. It does not purport to prohibit remarriage outside the District; and no other statute denies dower to a widow because by remarrying elsewhere she had disregarded the prohibition contained in section 966. It does not make remarriage a crime, or in terms impose any penalty, even if contracted within the District; and obviously it could not make criminal remarriage elsewhere. Nor does it in terms declare the marriage void." The difficulty with this analysis is that rarely do statutes in terms declare all that courts read in by implication. For a discussion of similar statutes and their interpretation see the previous note on this case in 32 MICH. L. REV. 999 (1934).

protection otherwise not available.[5] In the consideration of results which may be reached in the absence of statutes containing extra-territorial prohibitions lies the chief value of the opinion. The valid foreign marriage will be respected if a domicil is established, and perhaps also if the foreign marriage is entered into in good faith even though no domicil is established.[6] But the careful distinguishing of *Olverson v. Olverson*[7] implies that the intentional evasions will not be tolerated, at least if no foreign domicil is established. The Court refused to apply the doctrine of "clean hands" or the plea of illegality commonly interposed in suits brought to enforce tainted contracts on the theory that "the wrong done is a thing of the past and collateral."[8] Accordingly the remedy of offended jurisdiction lies in legislation expressly prohibiting the foreign marriage. It may well be that the marriage of the adulteress with her paramour will irk the local sensibilities as much as the traditionally forbidden incest or polygamy.[9] It is more likely that such a marriage is socially undesirable because of its tendency to disrupt the first marriage.[10] At any rate it is time that statutes drew distinctions recognizing the difference between a dislike of the relation assumed, a wish to penalize further for a past wrong, and a wish to check abuse of local marriage and divorce laws. To hope for protection otherwise is to ask for judicial extensions of statutory language which this Court rejected.

M. L.

[5] See Beale et al., "Marriage and the Domicil," 44 HARV. L. REV. 501 at 529 (1931).

[6] The Court considers both factors in deciding the case and distinguishing it from previous cases. Since both were here present the Court did not need to decide whether one would be enough without the other.

[7] (App. D. C. 1923) 293 Fed. 1015.

[8] Citing Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431 (1902); Nat. Bank & Loan Co. v. Petrie, 189 U. S. 423, 23 Sup. Ct. 512 (1903). As to the defense of "clean hands" the court concludes at p. 689 (292 U. S. 229), "Equity does not demand that its suitors shall have led blameless lives."

[9] Statutes forbidding marriage of the accomplice and the guilty party to a divorce for adultery have received interpretations which nullified the valid foreign marriage. Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1898) (evasion); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305 (1888) (evasion); Succession of Gabisso, 119 La. 704, 44 So. 438 (1907) (evasion). *Quære*, may not local morality go a step further and insist that the guilty party to a divorce for adultery shall not remarry at all?

[10] Beale et al., "Marriage and the Domicil," 44 HARV. L. REV. 501 at 513 (1931): "This provision is peculiarly in protection of the first marriage. There is so vital a moral and social policy of the state involved that the usual desire to protect the second marriage can not overcome it."