CONFLICT OF LAWS—ESSENTIAL VALIDITY OF MARRIAGE.

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In English private international law, the question "What laws determine the essential validity of marriage?" has not yet received a decisive answer. Essential validity involves three elements; firstly, an agreement, which may be affected by mistake, duress, undue influence or fraud; secondly, capacity to marry in the narrow sense (herein called capacity), *i.e.*, legal ability to marry at all; and thirdly, freedom from legal prohibitions of the particular intermarriage (herein called prohibitions). No English authorities even purport to deal with the first element. No English cases actually raise questions of capacity, but many purport to deal with it, and there is a considerable number on prohibitions. Judicial usage has hopelessly intermingled the problems of capacity and prohibition, and it is now generally accepted that these two elements of essential validity are in general governed by the same principles;[1] indeed Westlake[2] describes prohibitions as "relative incapacities." It is clear that individual prohibitions of a penal character are governed by peculiar considerations;[3] subject to this, I shall in what follows use the term "essential validity" as referring both to capacity and prohibition, but otherwise will use the latter expressions in the sense defined above.

The text writers are in substantial agreement (though without the support of any modern cases) that a marriage to possess essential validity must be given essential as well as formal validity by the *lex loci celebrationis*. According to Dicey,[1] Foote[4] and Latey[5] a marriage must also have essential validity according to the domiciliary law of each of the parties, excepting that in the case of a marriage celebrated in England between parties one of whom is domiciled there, English municipal law exclusively determines essential validity. According to Hibbert,[6] this additional validity must be given by the domiciliary law of one only of the parties. According to Cheshire,[7] this additional validity must be given by the law of the matrimonial domicil, by which he means the law of the country where the parties intend to establish the matrimonial home. According to Story,[8] Beale[9] and the Restatement,[10] American private international law refers essential validity exclusively to the *lex loci celebrationis*, excepting that a prohibition of the domicil of either of the parties intended to have extra-territorial operation or based on fundamental public policy will invalidate the marriage; Beale considers that this is a possible and preferable view of the English authorities.[9] Westlake[11] considers that it is not possible to state, on the existing authorities, whether the rule is as stated by Dicey or by Story; he would prefer a rule requiring simply essential validity by the laws of each party's domicil, and in company with Dicey, Foote and Cheshire, regards with disfavour the exception

1. Dicey, Conflict of Laws, 5th Edn., rr. 158, 182, 183.
2. Private International Law, 7th Edn., pp. 42 and 57.
3. *Warter v. Warter*, 15 P.D. 152.
4. Private International Law, 5th Edn., p. 123.
5. In Halsbury, 2nd Edn., vol. 6, pp. 285-6.
6. International Private Law, pp. 178-180.
7. Private International Law, 2nd Edn., p. 220.
8. Commentaries on the Conflict of Laws, ss. 113, 113a.
9. Conflict of Laws, vol. 2, pp. 673 *ff.*
10. American Law Institute, Restatement of the Law, Conflict of Laws, rr. 121, 132.
11. *op. cit.*, pp. 57-62.

in the case of marriages in England mentioned above. The objection to that exception expressed by these writers with varying degrees of vehemence appears to be based on æsthetic grounds; it conflicts with their sense of *elegantia juris* or of international comity.

This conflict of authorities reflects the contradictions of the scanty case law on the subject, contradictions which arise chiefly from the late introduction into our courts of the concept of the personal law. That concept was first expressed in a general way by Lord Westbury in *Udny v. Udny* (1869)[12] and has received a mixed reception ever since. In 1877, the Court of Appeal in *Sottomayor v. De Barros* (No. 1),[13] dealing with the case of a prohibited marriage, laid down two general rules; firstly, that capacity to contract in general is determined by the *lex domicilii*; and secondly, that this applies to capacity to marry. The Court's dictum as to capacity to contract in general was obiter and probably wrong. Otherwise, the decision is accepted by Dicey, Latey and Foote as the chief authority for the proposition that essential validity of marriage is dependent upon the *lex domicilii* of each of the parties. The decision has been expressly approved and followed in only one subsequent decision—*Re Bozzelli's Settlement.*[14] The validity of marriage celebrated abroad has also been considered in *De Wilton v. Montefiore*,[15] *Re Green*,[16] and *Re Paine*,[17] but all these cases were decided on a simple application of *Brook v. Brook* or *Mette v. Mette* (post) without any discussion of the general principle laid down in *Sottomayor v. De Barros* (No. 1). In *Sottomayor v. De Barros* (No. 2),[18] *Ogden v. Ogden* (C.A.)[19] and *Chetti v. Chetti*,[20] the language used in *Sottomayor v. De Barros* (No. 1) was criticised, and the first and third of those cases establish the exception in the case of marriages celebrated in England referred to above which the text-writers criticise—an exception, however, which was foreshadowed in *Sottomayor v. De Barros* (No. 1) itself. The question has been referred to by the House of Lords[21] and the Privy Council,[22] but in terms which leave it quite open. The text-writers also call in aid the dicta of the House of Lords and Court of Appeal in two cases of property contracts ancillary to marriage—*Cooper v. Cooper*[23] and *Viditz v. O'Hagan.*[24] Those dicta, however, are extremely ambiguous even if applicable to marriage contracts; indeed, Lord Halsbury in *Cooper v. Cooper* refers approvingly to the views of Story, which do not support any general principle such as that in *Sottomayor v. De Barros* (No. 1).

Since these modern authorities are inconclusive, it has become necessary for the text-writers to draw what comfort they can from the cases prior to *Sottomayor v. De Barros* (No. 1). These begin with *Scrimshire v. Scrimshire* (1752),[25] in which Sir Edward Simpson, sitting in the Consistory Court of London, laid down as a general proposition admitting

12. L.R. 1 Sc. App. 441, at p. 457.
13. 3 P.D. 1.
14. [1902] 1 Ch. 751.
15. [1900] 2 Ch. 481.
16. 25 T.L.R. 222.
17. [1940] 1 Ch. 46. See *post* p. 151.
18. 5 P.D. 94.
19. [1908] P. 46.
20. [1909] P. 67.
21. *Salvesen v. Administrator of Austrian Property*, [1930] A.C. 641, at p. 653.
22. *Berthiaume v. Dastous*, [1930] A.C. 79, at p. 83.
23. (1883) 13 App. Cas. 88.
24. [1900] 2 Ch. 87.
25. 2 Hag. Con. 395.

no exceptions that the validity of a marriage was to be determined exclusively by reference to the *lex loci celebrationis*. The case would now be regarded as dealing with forms and ceremonies, but the judge did not confine himself to those matters. But in *Harford v. Morris* (1776),[26] Sir George Hay sitting in the Court of Arches held, with some vehemence, that the validity of a marriage ought to be determined exclusively by reference to the *lex domicilii* of the parties. He was dealing with a case where the pre-marital domicile of both parties was English, so did not have to consider the problems raised where the domiciles are different. In *Dalrymple v. Dalrymple* (1811)[27] and *Ruding v. Smith* (1821),[28] Lord Stowell, then Sir William Scott, used expressions to the effect that a marriage good by the *lex loci celebrationis* is good everywhere, but the dicta as well as the facts of the cases are capable of being interpreted as applicable only to forms and ceremonies. In *Conway v. Beazley* (1831),[29] Dr. Lushington indicated, though did not definitely hold, that essential validity according to the *lex domicilii* might be necessary to the validity of a marriage. This is the first case in which the terms prohibition and incapacity were treated as interchangeable. In *Warrender v. Warrender* (1835),[30] the House of Lords on appeal from the Court of Session upheld a divorce *a vinculo* decreed between persons married in England but domiciled in Scotland. Lord Brougham in an elaborate speech examined the whole question of marriage validity, and enunciated a general rule[31] closely similar to that stated in Story's then recently published work, referred to above. Similar views were expressed in an Irish case, *Steele v. Braddell*, in 1838.[32] In *Simonin v. Mallac* (1860),[33] Sir C. Cresswell, dealing with a problem of forms and ceremonies, again expressed a preference for the *lex loci celebrationis* as determining all questions of validity with the exceptions stated by Story. Finally, the whole matter was re-examined by Sir C. Cresswell in *Mette v. Mette* (1859)[34] and by the House of Lords in *Brook v. Brook* (1861).[35] *Mette v. Mette* was decided after Stuart V.C. had given his decision at first instance in *Brook v. Brook*, so it is convenient to consider the latter case first. Cheshire discovers in the speech of Lord Campbell dicta favouring his theory, while Dicey cites it as favouring the *lex domicilii*. It might be a useful, and would certainly be a novel, procedure to discover the *ratio decidendi* of the case. Lord Campbell[36] uses dicta which might be said to favour the *lex domicilii*, the law of the matrimonial domicile, or the *lex loci celebrationis* with the exceptions mentioned by Story. His reference to the matrimonial domicile, however, appears to be merely argumentative, and he expressly disclaims the notion that the *lex domicilii* impresses a personal law which the praepositus carries around with him, which leaves his opinion resting on one of Story's exceptions. Lords Wensleydale[37] and Cranworth[38] rest

26. 2 Hag. Con. 423.
27. 2 Hag. Con. 54, at 59, 61-2.
28. 2 Hag. Con. 371, at 391-2.
29. 3 Hag. Ecc. 639, at 647, 65-2.
30. 2 Cl. & F. 488.
31. *ibid*, at pp. 530-531.
32. Milw. Ecc. 1.
33. 2 Sw. & Tr. 67.
34. 1 Sw. & Tr. 416.
35. 9 H.L.C. 193.
36. *ibid*, at 206 ff.
37. *ibid*, at 241 ff.
38. *ibid*, at 224.

their opinions squarely on Story's doctrine. Lord St. Leonards[39] treats the question as resting simply on the interpretation of the relevant English statutes prohibiting certain marriages; he considers that they have extra-territorial operation on all British subjects, so that in an English forum no questions of private international law arise. Hence it is submitted that the *ratio decidendi* of the case is as follows: the essential validity of a marriage is determined by the *lex loci celebrationis*, but the marriage will be void, although valid by that law, if it offends against a prohibition of the domiciliary law of the parties which is intended to have extra-territorial operation or is based on a fundamental public policy of that law. English statutes prohibiting marriage of persons within certain degrees of affinity have extra-territorial operation and express a fundamental English public policy since they purport to be based on the law of God. It is to be observed that all the speeches in this case describe the parties as British *subjects* domiciled in England, and it is by no means certain that this reference to nationality would at that time have been treated as immaterial, which brings us to *Mette v. Mette*. In that case, one only of the parties—the husband—was domiciled in England, and he was a naturalized British subject, whereas in *Brook v. Brook* both parties were domiciled and natural born British subjects. Sir C. Cresswell considered that the decision of Stuart V.C. holding the marriage in *Brook v. Brook* void was equally applicable where one only of the parties was British, but his main difficulty was whether the same doctrine applied to naturalized as to natural born liege subjects. He held that it did. It would require considerable hardihood at the present day to suggest that nationality is relevant to the question, but it requires even greater hardihood to cite *Mette v. Mette*—as do Latey[40] and Foote[41]—as authority for the proposition that nationality is irrelevant.

This survey of the cases prior to *Sottomayor v. De Barros* (No. 1) suggests the following comments. Firstly, that it is not just to say—as does Lord Hannen in *Sottomayor v. De Barros* (No. 2)—that there was no previous authority for the rule laid down in *Sottomayor v. De Barros* (No. 1), or that previous authority was flatly to the contrary of that rule. Secondly, that the overwhelming weight of previous authority favours the rules stated by Story and substantially repeated in the Restatement. Thirdly, that if those rules had been followed after *Brook v. Brook*, they would have required the Court of Appeal in *Sottomayor v. De Barros* (No. 1) to examine the Portuguese law on prohibited degrees to see whether it was intended to have extra-territorial operation or expressed Portuguese public policy. If the Portuguese law had this character, then the decision in *Sottomayor v. De Barros* (No. 1) would have been the same, but the decision in *Sottomayor v. De Barros* (No. 2), (though probably not in *Chetti v. Chetti*[42]), would be wrong. Fourthly, that the English writers, except Westlake, have a tendency to state what they think the law ought to be rather than what the authorities justify. Lastly, that only the House of Lords or the Privy Council is in a position to state what the law actually is.

39. *ibid*, at 235.
40. Halsbury, 2nd Edn., vol. 6, p. 285.
41. *op. cit.*, pp. 125-6.
42. Because the Hindu caste rule there considered was strictly neither an incapacity nor a prohibition of the domiciliary law; see [1909] P., at 78.