Marriage with a deceased wife's sister

Marriage Law Reform Association

PROCEEDINGS

OF THE

COLONIAL CONFERENCE,

April 14*th*, 1887.

SUBJECT:

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ISSUED BY

THE MARRIAGE LAW REFORM ASSOCIATION,

21, PARLIAMENT STREET, WESTMINSTER, S.W.

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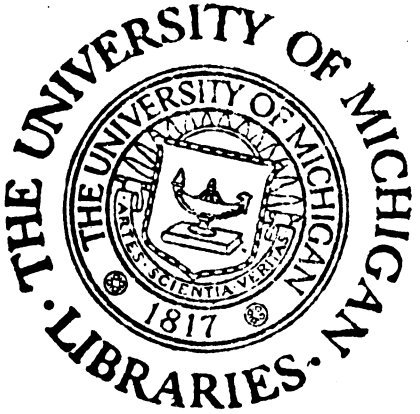
1888.



PROCEEDINGS

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COLONIAL CONFERENCE,

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THURSDAY, APRIL 14TH.

MARRIAGE WITH A DECEASED WIFE'S SISTER.

The PRESIDENT*: The only other thing that we have to consider to-day is a very different matter from that which we have been considering, namely, the question of marriage with a deceased wife's sister. (*To Mr. Downer*): I think you wish to bring this question before the Conference.

Mr. DOWNER†: It was thought amongst some of the representatives of the Colonies that the occasion of their meeting together would be a very proper one for making some representations to the Government upon this subject, and with the view of asking the Government to pass some statute recognising the laws in the Colony permitting

* Sir Henry Holland, Secretary of State for the Colonies.
† Now Sir John Downer.

marriages within certain degrees prohibited in England, and which have been duly sanctioned by the Crown. The matter is one in which there has been great interest taken, as you know, from time to time; immense interest has been taken in the Colonies in it, and the very greatest interest taken in it in England. It is a subject which has been very much debated, and upon which very great difference of opinion prevails. But be that as it may, the Colonies now for many years have had a law in force permitting the marriage of a man and his deceased wife's sister, which has been sanctioned by the Crown, and in spite of these laws being validly made in the Colonies, and being properly sanctioned, they still fail in obtaining that recognition in England which the Colonies think they should have. Of course, I do not wish to go over the old debateable ground, and into the argument as to whether marriage with a deceased wife's sister is contrary to, or in accordance with the Levitical law, or into arguments of that description. I fancy even in England they are scarcely referred to very much at the present time, but I wish to put the matter before the Government and the Conference, simply upon the ground that this time, when England and her Colonies are drawing so much more closely together than they have been before, would be a fitting time to remove what I think is a great anomaly in the laws of England and Australia upon a matter of great vital moment, and upon a matter in which the people of both countries take the very greatest interest. As far as the history of the legislation of the Colonies is concerned, it is in a sufficiently small compass. South Australia, the Colony which I represent, was the first, I think, to pass a statute permitting these marriages. For four different sessions of Parliament the statute was passed, and after four different

sessions the Royal Assent was refused, but finally, upon the 30th of March, 1871, the Royal Assent was given. That statute permitted marriages in the province between a man and the sister of his deceased wife, or the sister's daughter. The next statute that was passed on this subject was the statute which was passed in the Colony of Victoria, and that was assented to on the 24th of March, 1873. That statute simply related to marriage with a deceased wife's sister, and did not refer to the sister's daughter. The Tasmania Act was assented to upon the 9th of August, 1873, and is substantially the same as the Victoria statute. The New South Wales statute was assented to upon the 27th November, 1875, and is the same in effect as the Victoria statute. The Queensland Act, in the same direction, was also passed in 1875, the only difference between the Queensland statute and the other statutes being, that whereas all the other statutes simply make lawful a marriage in the Colony between a man and the sister of his deceased wife, the Queensland statute provides that such marriages are valid if made in the Colony, though the parties are not domiciled there; that is what I take to be the construction of the statute, that marriages between a man and his deceased wife's sister made in the Colony, though the persons are not domiciled in the Colony, will be good marriages; and secondly, that the marriages of persons within those prohibited degrees, domiciled in the Colony would be valid though solemnised elsewhere. That is the only difference between the Queensland statute and those of the other Colonies. It goes a little further than the other statutes, and is entirely in the same direction.

Now, Sir, as to the position of persons between whom marriages may be solemnised according to any of those

statutes in England, I find very great difficulty in ascertaining precisely what it really is. The judges are not agreed upon the subject. In the only important decision that has been given upon it, we have two eminent judges upon the one side against two eminent judges upon the other : and certainly it is a matter which should be removed from all possible doubt. The leading case, that of Brook against Brook, was the case of two English people who went to Denmark and availed themselves of the law there for the purpose of getting married, they being a man and his deceased wife's sister. Upon that case coming before the Court, the Court agreed unanimously that the marriage was void, because the parties were domiciled in England, and being domiciled in England could not make their marriage valid in England by visiting a country where the marriage was allowed. Everybody was agreed upon that. But upon the question of whether the marriage would have been valid in England had the parties been domiciled in Denmark there was a difference of opinion. Sir Cresswell Cresswell and Lord Wensleydale, both eminent judges, said the marriage would have been void in England anyhow, and they appear to have proceeded upon the principle that although by the comity of nations the *lex loci contractûs* should govern matters of this kind, yet at the same time it was not to legalise in any country laws which sanctioned incest in other countries. That appears to have been substantially the view taken by Sir Cresswell Cresswell and by Lord Wensleydale, who arrived at the conclusion that although the parties had been domiciled in Denmark, still the marriage would have been void in England. The Courts decided that the marriage was void. As far as Lord Wensleydale's opinion on the other question was concerned, and as far as the opinion

which Lord Campbell and Lord Cranworth expressed in the other direction, that the marriage would have been valid if the parties had been domiciled in Denmark, those were really *obiter*, they were not necessary to the decision of the facts. The parties were admittedly not domiciled in Denmark, but admittedly domiciled in England. The only question, therefore, was, being domiciled in England, was the marriage in Denmark valid? and any remarks of their lordships as to whether the marriage would have been good had they been domiciled in Denmark were clearly *obiter*. But still they were the opinions of Lord Cranworth and Lord Campbell against the opinions of Lord Wensleydale in the House of Lords, and in the Court below of Sir Cresswell Cresswell.

Now, Sir, I think that is not a very satisfactory condition of things, and although I believe it is the general opinion of English lawyers, I know it was the opinion of Lord Justice Jessel, I believe it was the opinion of the greatest of English lawyers, that the views of Lord Campbell and Lord Cranworth were the correct views upon the subject, rather than the views taken by Lord Wensleydale and Sir Cresswell Cresswell, still the matter should not remain in this condition of doubt, but certainly should be put upon a perfectly intelligible and certain basis.

Then there is this to be said too, even assuming that the opinions of Lord Campbell and Lord Cranworth were right, that the marriage would have been good had the parties been domiciled in the country where the marriage was lawful, still there comes up this question, which is also indisputable, and that is, that even although the marriage is lawful in the country in which it is celebrated, still, as far as its recognition in England is concerned, when it comes to the issue inheriting land, the issue to inherit

must be the issue of a marriage which would have been lawful had it been solemnised in the country where the land lies.

As a matter of practical administration, going from these general principles to the manner in which it is practically administered by the fiscal departments in England, as far as personalty is concerned the marriage is considered good; as far as realty is concerned the marriage is considered bad.

The PRESIDENT: There is no doubt that the marriage is valid for all purposes, except that as regards the inheritance the *lex loci* prevails. In our debates both the Attorney-Generals have agreed to that.*

Mr. DOWNER: It is so, and yet it would have been very much more satisfactory had it been so decided. It is quite true that as far as the judgments are concerned we have got Sir Cresswell Creswell and Lord Wensleydale, certainly both eminent judges, who said that the marriage would have been void to all intents and purposes, though the parties had been domiciled in the country where the marriage was lawful. On the other hand we have the judicial opinions of Lord Campbell and Lord Cranworth in the opposite direction, and certainly we have the opinions of many eminent lawyers given since in the same direction. But as far as any judicial decision has been given upon the subject, it left the matter in a very unsatisfactory state, and it left the judges practically equally divided in opinion.† So I say, even from that point of

* Not, however, without considerable hesitation on the part of Sir Henry James.

† As, for example, it was maintained by Lord Justice Lush, concurring with the Master of the Rolls, in the celebrated case of Goodman's Trusts, that personalty is governed by the law of the domicile of the owner of the effects and not that of the beneficiaries.

view, there ought to be some legislation initiated here to put the matter beyond all doubt—to put beyond all doubt that which lawyers generally are inclined to admit at the present time, that the *lex loci contractûs* will settle the question of whether the marriage should be recognised here or not. But even that will not touch the question of the inheritance of land, because, as I have said before, there is no doubt about that, in order to create a good heirship, the marriage of which the claimant is the issue must be a marriage which would have been good had it been celebrated in the place where the land lies. Upon that the delegates from the Colonies venture to appeal to Her Majesty's Government for consideration and assistance. I think there is no country in Europe in which these marriages—that is to say, marriages in the Colonies —would not be recognised. They would be recognised, I think, in every one of the United States. They would either be immediately recognised without any question at all by most of the states of Europe, or their recognition could easily be obtained by a very simple process; England is the only country in which marriages which have been in effect sanctioned by the English Government in the Colonies are not recognised.

The PRESIDENT: Is there any instance (I do not say there is not, but I want to know) in which in a country where marriage with a deceased wife's sister is not recognised, they are prepared to recognise marriages with a deceased wife's sister, and all the consequences of them as valid in that country, so that the issue can inherit land? I want to know whether there is any case in which the issue of this kind of marriage, whether in the United States or elsewhere, can inherit land where the marriage is invalid in that country?

Mr. DOWNER: No, there is not.*

The PRESIDENT: Then you do not take it any further by saying it is recognised in all other countries. I am only asking for information.

Mr. DOWNER: In most† of the States of America the marriages would be lawful and would be recognised.

The PRESIDENT: As far as I know, England is exactly in the same position with regard to her Colonies as any other country in this respect, that if the marriage is not recognised as valid in that country, the issue of that marriage cannot inherit land in that country. I believe that is so.‡

Mr. DOWNER: I am not prepared to say that you are wrong, therefore I do not wish to say anything upon that matter.

Mr. J. S. DODDS: I do not think there is any country in which that would not be the case as you have stated.

Mr. DOWNER: It is not at all probable, but there is no doubt about this, that the United Kingdom is about the only country in the world in which these marriages are absolutely prohibited. Whatever may be the laws of the European nations, dispensations can always be obtained, and there is no difficulty whatever in obtaining the celebration of these marriages.

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* For the reason that there is no country outside the British Empire in which such marriages are not recognised.

† In all.

‡ In the French and Dutch Colonies, as in those of Spain and Portugal and the German Protectorates, the marriage law is that of the mother country, and what is valid in the colony carries with it all the consequences of legality throughout the respective states. The only answer, therefore, to the inquiry raised by Sir Henry Holland, is that which is furnished by the practice of federated States like those of America, where, in the opinion of the best authorities, a marriage legal at the place of contract, if not against public morals and in the general belief inimical to the interests of the federal community, would everywhere entitle the issue to inherit land.

The PRESIDENT: You must allow us to have our law* just as we have allowed the Colonies to have theirs. You know that there has been great feeling upon this matter, although there have been majorities in the debates upon this subject.

Mr. DOWNER: Of course I would not presume to express any opinion to the Imperial Government upon the question of her own laws. The view the Colonies take is this, they say to the English Government, we ask you to permit us to pass these laws as you yourself have given your sanction to these laws. They are laws which regulate the most sacred position in life, a position that required to be most sacredly protected for the well-being of the community generally, and now that you have enabled us to pass these laws, do us the justice to recognise these laws when they come to be acted upon. That is in effect what we say.

The PRESIDENT: But they are recognised, are they

* Lord Brougham, in a well-known case, said of this law:—"Nor can anything be more inconvenient or more inconsistent with principle than the inevitable consequence of taking the *lex loci rei sitæ* for the rule; because this makes a man legitimate or illegitimate according to the place where his property lies or rights come in question—legitimate when he sues for distribution of personal estate, a bastard when he sues for succession to real; nay, legitimate in one country where part of his land may lie, and a bastard in some other where he has the residue." And again:—"One should say that nothing can be more pregnant with inconvenience; nay, that nothing can lead to consequences more strange in statement than a doctrine which sets out with assuming legitimacy to be not a personal *status*, but a relation to the several countries in which rights are claimed, and, indeed, to the nature of different rights. That a man may be bastard in one country and legitimate in another seems of itself a strong position to affirm, but more staggering when it is followed up by this other—that in one and the same country he is to be regarded as bastard when he comes into one Court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same Court of Equity (when the real estate happens to be impressed with a trust) must view him as both bastard and legitimate in respect of a succession to the same intestate."

not, except as to certain points in which our law comes in, as to inheritance I mean. I daresay, as many of you know, I did speak against the alteration that you are contending for, still, I am quite open to conviction. But I feel this difficulty. We have got our law in this country —we very properly, after perhaps an unreasonable demur, allowed you to have your law, and now you want us to change our law of inheritance, although we have not changed our law as to the validity of marriages in this country, because we have allowed you to make these marriages valid in the Colonies. Is not that so?

Mr. DOWNER: Quite so; that is technically what it does come to.

The PRESIDENT: It is more than technically—it is actually.

Mr. DOWNER: It is substantially, no doubt; but I think we are justified in saying that, because in the first place you will observe that the position of the English law is rather inconsistent upon the subject. You recognise the marriage for one purpose, but you will not recognise it for another. I am assuming that the administration of the fiscal departments is properly carried on, and that they are acting upon sound principles. You say it is a perfectly good marriage, as at the present time the *lex loci contractûs* applies to it, but when it comes to land you apply a different criterion and you will not let it apply at all.

Mr. ADYE DOUGLAS: Does not it apply to the Scotch law too?

The PRESIDENT: It does; the Scotch law legitimises children born before the marriage was entered into, and though no one has ever doubted that the children are legitimate in Scotland, they cannot inherit in England.

Mr. DOWNER: I fancy our case is a little stronger than

that because our marriages are celebrated under the authority of English law.

The PRESIDENT: The Colonial law. It is English in one sense.

Mr. DOWNER: It is English law in the sense that the English Government have assented to the Colonial law ;* and it appears to me that certainly the Government would be disposed to adopt a line of policy to the Colonies which would tend to make the Colonists wish to return to the old country, and settle down there with all the advantages they could possibly enjoy, rather than adhere to a condition of law which is practically being departed from altogether, which is being administered in one way as to personalty, and in another way as to realty, and which above all affixes a sort of stigma to the marriage relations in the Colonies, which has prevented, and is even now preventing, some persons from returning who are very anxious to return to the Mother Country.

The PRESIDENT: I am very anxious to hear what the Colonies have to say ; you have the advantage of a majority of the House of Commons twice on your side.

Mr. DOWNER: Yes, and I think the majority in the House of Lords is getting smaller by degrees and beautifully less ; but that is on the main question.

The PRESIDENT: But I refer to the fact that in 1877 and 1878 there was on both occasions a majority in the House of Commons in favour of just what you are arguing.

Mr. DOWNER: Was that upon the Colonial Bill?

The PRESIDENT: Yes, upon the Colonial Bill, there was a majority of 51, in 1877.

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* And they have so assented after having determined that marriage should be among the questions specially reserved for consideration by the Crown.

Sir ALEXANDER CAMPBELL: On behalf of Canada, I wish to say that we do not join in this request in any way. The law in Canada allows a person to marry his deceased wife's sister, it was altered some years ago by Parliament, it is the law of the country now, but there has been no suggestion made on the part of the people or of the Government of Canada that we should indicate in any way to the Imperial Government the propriety of asking the people of England to alter their law upon the subject.* The same feeling which actuated us† in altering our law induces us to respect the feeling of England, and if Canada ever does desire to make any such request no doubt it will be put forward in a legitimate way. Mr. Fleming and myself, who are here from Canada, are not here to represent to the Imperial Government that we desire any change in the law in this respect. We altered our law to suit our position in conformity with the desire of the people, and we are quite willing that the people of England should retain their laws until they see a necessity for changing them.

Mr. WISDOM‡: I think, Sir, Mr. Downer was rather misunderstood, we do not ask the English people to change the laws with regard to marriage, we simply ask them to recognise to the fullest extent the validity of our laws.

The PRESIDENT: You ask us to alter our law with regard to inheritance.

Mr. WISDOM: As Mr. Downer has pointed out, the

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* Since these words were uttered strong suggestions of the kind have been urged by the Canadian people, and, it is said, by their Government also.

† Sir Alexander was among those who, in the Canadian Senate, voted for the change.

‡ Now Sir Robert Wisdom.

Imperial Government has already sanctioned our laws, and by implication given its approval to the nature of those laws.

The PRESIDENT: So far as the Colonies are concerned which have passed such laws.

Mr. WISDOM: In all points but one they recognise the validity of the marriage in the Colonies; but upon the one point, namely, that of succession to real property they refuse to alter the law of England so as to meet our case. This grievance tends more in my opinion to create a feeling of irritation than any act on the part of the Imperial Government, as tending to throw a slur upon our marriages; for this, though not directly, yet by implication does seem to throw a slur upon them, and I know causes a great feeling of irritation. In a great many Colonies, in all the Australian Colonies except New Zealand,* marriage with a deceased wife's sister is valid, and some of the Colonies go a little beyond that. As Mr. Downer has said, we do not ask the English people to change their law, so far as marriage itself is concerned, we simply ask them as an indication of that good feeling which should and does exist between the Colonies and the mother country, to so far alter the law with regard to inheritance as to recognise to the fullest extent the validity of these marriages. Considering the concessions which have been made hitherto, I do not think that is asking very much.

Mr. UPINGTON†: I fail to see how we can fairly ask the Imperial Government to introduce a measure interfering with the law of inheritance or succession to pro-

* A Bill to legalise such marriages was passed by the New Zealand Legislature in 1880, but it was refused ratification by the Crown on the ground that, as drafted, it was *ultra vires*.

† Now Sir Thomas Upington.

perty in this country. If persons marrying in the Colonies acquire property in England, they acquire it subject to the existing laws of this country, and with full knowledge ; and I do not think we can ask fairly that any change should be made in the law ; but I do think it very hard that a slur should be cast upon these Colonial marriages in England, as I understand it is cast upon them. If the Queen sanctions an Act relating to marriage in a Colony, I think that marriage ought to be looked upon as a perfectly legal marriage in England, without affecting inheritance or anything of that sort.

Sir WILLIAM FITZHERBERT: I cannot concur in any proposal which by a side wind should have the effect of tending to alter the law of England in any respect. We are jealous of the privileges which have been granted to us by the Imperial Legislature, and I think we ought not to ask in consequence that the law of England should by any indirect procedure be altered.

Mr. DEAKIN: The Colony of Victoria, as Mr. Downer has stated in his summary, passed an Act legalising marriage with a deceased wife's sister; and I am sure that the Colony would hail with pleasure any movement on the part of the Imperial Government to not only give sanction to the marriage, but to give all the consequences that follow from a legal marriage; I am quite certain that this would be hailed with the greatest satisfaction in the Colonies. I do not think that we are entitled to say any more at present. Although the marriage is legally sanctioned, it still lacks one very important element, it is not merely as a matter of property it lacks the fulness of sanction which we all desire to see given, but it places the marriages contracted in the Colonies on a different level from the marriages contracted in England, or

from marriages contracted in the Colonies which are not within those prohibited relations; so that it becomes an inferior description of union, and this inferiority of course we desire to see removed, especially as it is in connection with a contract of such pre-eminent and profound importance as marriage is.

Mr. DODDS: Was that Colonial Bill limited to the recognition of Colonial marriages as regards the law of inheritance only, or was it a Bill to alter the law altogether as regards England?*

The PRESIDENT: I could not answer that question off hand; but I do not myself quite see what kind of Act could be drawn to say, this marriage shall be valid and recognised as valid in England, and at the same time to say that the issue of it shall not inherit land. Mr. Upington's suggestion was something in that direction, that with a view of making it absolutely certain that the marriage should be recognised as valid, except for one purpose, namely inheritance, some Act of that kind should be passed.

Mr. UPINGTON: My proposal would be that something to this effect should be done: that marriages lawfully entered into in the United Kingdom and in the Colonies should be looked upon as valid marriages in every portion of Her Majesty's dominions: but that nothing contained in this proposal should be taken to affect the existing law of the United Kingdom or of any Colony with reference to property situated within the United Kingdom or such Colony.

Mr. DODDS: I do not see what you gain by that.

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* It was a Bill to make Colonial marriages legal in England in every respect, and was substantially, though with some verbal alterations, the same as quoted by Sir Henry Holland. See next page.

Mr. DEAKIN : You gain a good deal.

Mr. HOFMEYR* : You gain social standing.

Mr. DODDS : I think not. The law of England now recognises the marriage contract. The capacity to contract depends upon the law of domicile. The contract of marriage is governed by that law as well as any other contract ; and a contract of marriage being governed by that law must be recognised as legal. It is only with regard to the inheritance of property that there could be any difficulty.

Mr. LORIMER† : There is the question of legacy duty.

Mr. DODDS : The difficulty is only with reference to the inheritance of land, and I do not see that the proposal which Mr. Upington makes would alter the position at all.

The PRESIDENT : In answer to your question I may say that I have not a copy of the Bill, but this is a draft of the Bill which was introduced by Sir Thomas Chambers, who took up this question first, and it is extremely probable that the Bill of 1878 would follow the same lines. That Bill is, "Be it enacted that from and after the passing of this Act, marriages which have been or which shall be hereafter contracted shall be deemed to be good and valid to all intents and purposes in the United Kingdom, and the issue of such marriages shall have all rights of succession, inheritance, and otherwise as if they had been the children of parents legally married in the United Kingdom."

Mr. DODDS : That Bill was confined, so far as inheritance is concerned, to the recognition of Colonial marriages ; it did not propose to alter the law of England as to marriage.

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* Now the Hon. Mr. Justice Hofmeyr.

† Now Sir James Lorimer.

The PRESIDENT: Yes, but Mr. Upington's proposal was rather a modification of that; his proposal would rather run in this way, that from and after the passing of this Act, marriages which have been or shall hereafter be contracted shall be deemed to be good and valid to all intents and purposes as in the United Kingdom, but that they shall not affect the succession to land, or some words of that kind.

Mr. DODDS: I think the real object of that Bill was to alter the law of inheritance as regards Colonial marriages.* On the main question I do not desire to offer any opinion.

Sir JAMES GARRICK: Sir Samuel Griffith has left with me this proposed clause :—

"Every marriage which has been heretofore or shall be hereafter lawfully solemnised in any part of Her Majesty's Dominions between persons who at the time of the solemnisation of the marriage were domiciled in that part of Her Majesty's dominions, and were competent according to the laws of that part of Her Majesty's dominions to marry one another, shall throughout† Her Majesty's dominions be deemed and held to be and to have been a valid marriage to all intents and purposes: Provided, nevertheless, that this Act shall not render valid any marriage in any case in which either of the parties to the marriage has afterwards, and before the passing of this Act, lawfully intermarried with another person; nor shall this Act be construed to deprive any person of any land or other property which he has lawfully inherited, or to

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* The promoters of the Bill were not specially concerned about inheritance, but desired that these marriages should be as complete in England as in the Colonies.

† This proposal justly goes beyond the Bill of 1877, which claimed for the marriage valid in the colony recognition, not throughout Her Majesty's dominions, but in the United Kingdom.

which he has become lawfully entitled before the passing of this Act." His view is that there cannot be an uniform law for the whole Empire, but that a marriage legally made in any one part of Her Majesty's dominions by persons domiciled there should be recognised as valid in every other part of Her Majesty's dominions.

The PRESIDENT: This goes further. Is it to carry all the consequences of succession and inheritance?

Sir JAMES GARRICK: It is to be recognised as a valid marriage, and I have no doubt Sir Samuel Griffith intends that all the consequences of a valid marriage shall follow. Although in Scotland the law of inheritance of real estate has not been changed by the recognition of children born before wedlock, I think that there is some difference between the position in Scotland and our position. Of course we cannot press upon this country, and we do not seek to press upon this country, a point of this kind. We can only point out to them how undesirable it is, having sanctioned such marriages, and having validated these contracts, to say with regard to the most important element of them that they are not valid. The position is, it strikes me, an inconsistent one. The result is that persons validly married abroad according to our law, when they come here are looked upon in some senses in a social light almost as persons who are not married at all.

Mr. ADYE DOUGLAS: There is no doubt that the position taken up by Mr. Wisdom is the position taken up in the Colonies—that the sanction of the Imperial Government has been given to marriages of this description, and that the results of those marriages have not been in any shape or way recognised by the Imperial Parliament.

The PRESIDENT: That is not quite so as to personal property.

Mr. AYDE DOUGLAS: Just so, Sir; but it only shows the absurdity of the law as it now stands. The child of one of these marriages can take the personalty,* but he cannot take the realty. There is no doubt that this feeling obtains in the Colonies, particularly at a time when everything is being done to unite the Colonies to the Mother Country. There is nothing that would unite the Colonies to the Mother Country more than the feeling that marriages which were valid out there should be recognised as valid in England, and that the results of those marriages should be recognised in England as they are recognised in the Colonies. Now persons marrying in the Colonies are many of them not aware what would be the result of the law in England, because they are not supposed to be acquainted with all the laws of inheritance, and so forth. They marry, and they come home here; they desire to purchase property and settle down here; and then after a time they are informed that their children cannot inherit English property. Why not? How does it interfere fundamentally with the principles of English law? It does not interfere with the principles of English law, because we know that the law of inheritance is continually altered here, and it will inconvenience nobody in England if it simply enacted that a marriage which is valid and recognised by the law of England should be recognised in the some way as regards property, both realty and personalty;†

* But, after all, this is an inference only, not founded upon any decision, but arising out of mere *obiter dicta* in the case of Brook *v.* Brook. See p. 23.

† The present Lord Chancellor (Halsbury) himself has conceded the very principle contended for. The Bill which he introduced during the Session of 1877 proposed compulsory registration, the abolition of primogeniture and entail, and the application of the same rules to realty as to personalty. If any change could be described as fundamental these surely were of that class,

and I am quite sure that as these marriages go on in the Colonies this feeling will grow and grow very strongly, unless there is something more than the mere question of altering the law with regard to real property. The children of such marriages, as was pointed out by Sir Samuel Griffith, should enjoy all the privileges of an English marriage. Otherwise it is not an equal law as regards marriage. If we are to be merely looked upon as foreigners in the Colonies, be it so; but if we are to be looked upon as an united people, we ought as far as possible to have our laws recognised here. I should question very much whether, supposing the marriage to be contracted in a part of Europe where such marriages are recognised, the children of persons contracting such a marriage and possessing property here would not inherit landed estate here. Supposing that a marriage of this kind were contracted in Denmark, where such marriages are recognised, between people naturalised here and domiciled here, and that they purchased property here, it is a question whether that property would not pass to the children of the marriage. The question has never yet been decided what is the position of offspring of marriages of this character. I do not think that the law of Europe would be read in the way in which it is proposed to read the Colonial law; that is to say, that the marriage in one respect is good, and in another respect is bad. I think it is of vast importance now we are drawing closer and closer together, and I am sure it would be recognised in the Colonies as one of the greatest boons that could be granted, that these marriages should be recognised in all their perfection, that is to say, that landed property as well as personal estate should pass to the children; and that does not apply simply to personalty, because in the case of many

other things I presume it is the same. With regard to personalty, I do not know whether it has been decided in what way it would go.

The PRESIDENT: No; it has not been decided.

Mr. ADYE DOUGLAS: In the case of Brook *v.* Brook, a very old case, what took place was only incidental to it.

The PRESIDENT: But there have been cases since the case of Brook *v.* Brook.*

Mr. ADYE DOUGLAS: There can be no doubt that such a law if passed in Australia would be recognised as one of very strong union and feeling; and I am quite sure that the feeling will grow and grow so long as these laws are not identical.

Sir F. DILLON BELL†: The argument is not concealed

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* Since the decision of Brook and Brook there have been two important cases, neither of which, however, settles the present question, but makes it still more confused and perplexing, the judges in both being equally divided in favour of contradictory principles of law. The reader is referred to the comments of *The Times*, August 6th, 1879, on Sottomayor *v.* De Barros, and to an article in the same newspaper, April 15th, 1881, *in re* Goodman's Trusts. From the latter we extract the following:—"To Lords Justices James and Cotton (differing from Lord Justice Lush and the Master of the Rolls) legitimacy or illegitimacy is not an incident which can be separated from a person according to the law of the Court in which he is suing. Hannah Pieret's legitimacy by Scotch law they consider an inherent quality of Hannah Pieret; she necessarily brings it with her into the English Court which had to allot her aunt's goods. An apparent objection to this view is the admitted refusal of English Courts to accept a foreign certificate of legitimacy in favour of a claimant to English land. Lord Justice James concedes the inconsistency. He is satisfied to pass it by as an English eccentricity which he would range under other 'barbarous irregularities' and narrownesses of local law. In truth, when the rule began to operate, aliens could not have inherited English land. . . . The wisdom of the Law Lords, though it may settle the law as it shall be, can hardly clear it as it is."

† It is violating no confidence to state that Sir F. Dillon Bell is entirely agreed as to the propriety of permitting marriage with a deceased wife's sister in general.

that the Colonial law would then have the effect of changing the law of another country. With regard to the proposal which has just been made on the part of Sir Samuel Griffith, look what the effect of it would be. Supposing that in some Colony the Parliament of that Colony declined to pass a Deceased Wife's Sister Bill, so that marriage with a deceased wife's sister was not legal in that particular Colony, the Bill that is proposed in the memorandum just read would govern the succession of property in the recusant Colony, although it had refused to pass the Act.

Mr. ADYE DOUGLAS: No, it would not.

Sir F. DILLON BELL: Yes, it would, in this way. Suppose the cases of a Colony which said, "We will not allow marriage with a deceased wife's sister," and of another Colony which said, "We will allow it;" and suppose a person who was domiciled in the Colony that did allow it, contracted such a marriage and came and lived in the Colony that did not allow it, and created property there (which is the exact argument). Then, merely because the marriage had been legalised in the first-named Colony, the children would inherit the property in the second Colony, although the Act was not in force there, and although the children of such marriage contracted in the second Colony would not inherit. This would undoubtedly be the effect of saying that a marriage which was recognised in a Colony should be good all over Her Majesty's dominions.

The PRESIDENT: Clearly the second Colony would be exactly in the same position as England is now,* and that must be recognised of course fully.

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* Yes; but since the Colony has, as regards marriage, no independent power of legislation there would be no invasion of its rights. No Colony is

Mr. THORBURN*: With respect to the matter before the Chair, I could hardly acquiesce in the propriety of bringing any pressure to bear upon Her Majesty's Government suggesting legislation upon this matter, which has been so often and so prominently before the legislature of this country. There is no difficulty in any of the Colonial legislatures passing a Bill giving effect to marriage with a deceased wife's sister, or not, as they please.† In the Colony that I have the honour to represent, I think the matter has never come up, and probably if it did, as there are a very large number of Roman Catholics in the country (a persuasion to which I may say I do not belong) I think they would probably oppose the Bill; ‡ and between them and the Church of England, which would probably represent two-thirds of the legislature, they would probably not pass the Bill, and we should then practically be in the same position as the people of England are. So when we Colonists come over here I think we ought to be satisfied to take the law as we find it in this country. A man if he does marry his deceased wife's sister can always protect his property by the operation of his will; and I think, with all due deference to other members of the Conference, it would be rather out of place for us to suggest legislation to the

known to object to these marriages *per se*, though some hesitate to give them legislative recognition until they have been declared legal by the Mother Country. See also the remarks of Mr. Upington, p. 27.

* Now Sir Robert Thorburn.

† No, except this: that some are deterred from altering their law solely because they cannot get these marriages recognised in England.

‡ This is an assumption scarcely warranted by observed facts. The Bill passed in Canada was introduced by a Catholic, and had the almost universal support of Catholics throughout the Dominion, from the Metropolitan of Quebec downwards. In Mauritius, where a similar Bill has been passed, the Catholic population is to the Protestant in the proportion of 13 to one. Under dispensation these marriages are fully recognised by Catholics everywhere.

Imperial Government on a question which has been so often and so prominently debated in both Houses of Parliament. I may be a little singular in my view, but as the matter has never come before our local Parliament I should not feel justified in committing the Colony to an opinion on the subject.

Mr. DODDS: A parent could not protect his children.

Mr. THORBURN: He could do so by will.

Mr. DODDS: But that is only so far as his own property is concerned. Children might be entitled to property coming in from other sources and not be able to inherit it.

The PRESIDENT: That is the only point.

Mr. ROBINSON: I should like to say that in the case of my particular Colony our experience is rather a hard one. Our Legislature has passed a law validating these marriages, but that law has not received Her Majesty's assent.* I wish also to say that I concur in all that has been said by Mr. Adye Douglas. There is a good deal of sentiment, perhaps, connected with this qnestion, but there is a feeling that it is a very great hardship that marriages that are valid in the Colonies should not be fully recognised as such out of the Colonies. In the case of Natal under the Roman-Dutch law of the Colony these marriages were considered as valid; but it has been necessary to introduce legislation to give full effect to them. I know that, practically speaking, very great hardships have occurred in the Colony where those marriages were entered into in former years through their not being recognised as such in this country; and it would be a very great advantage to us in that Colony if Her Majesty's Government should not

* One ground of refusal was, that as a prospect existed of a confederation of the South African provinces, it was desirable to postpone questions of this nature for discussion by the Federal Parliament.

only assent to that legislation, but should also give a more general assent to the recognition of the fact that engagements legally entered into in any particular Colony should be fully recognised as such by the mother country.

The PRESIDENT: And by other Colonies, I presume?

Mr. ROBINSON: And by other Colonies.

The PRESIDENT: I think I am right in understanding, am I not, that in Natal the reason why the assent was refused by Sir Michael Hicks Beach was that the measure was carried by a very small majority?*

Mr. ROBINSON: It was carried by a very small majority. As a matter of fact the law has been passed again since that time. A certain amount of irritation exists with regard to its not being sanctioned.

Mr. UPINGTON: We have not got the law in Cape Colony; it has been brought in but never carried; but I am perfectly certain that Cape Colony would be prepared to sanction such marriages if they were solemnised in a Colony where the law did prevail.

Mr. HOFMEYR: These marriages though not legal in the Cape Colony, are valid in the neighbouring Dutch Republic of the Orange Free State. But they are not acknowledged in the Republic bordering on the Free State, viz., that of the Transvaal.†

Mr. FORREST: In Western Australia we have a law legalising marriage with a deceased wife's sister, but I think it has scarcely ever, if ever, been taken advantage of. I think myself that it is a very unfortunate thing that there should be different laws relating to marriage throughout

* Sir Michael Hicks Beach was in error. The majority on each occasion of the Bill passing was very large. The division lists show this. Sir Michael's mistake was at once pointed out in *The Times*.

† The law in the Transvaal is similar to that adopted in Holland in 1839, when such marriages were allowed under dispensation.

the Empire; and I hope, and I have no doubt that as time goes on there will be some means devised of having one law of marriage throughout the whole Empire. I take the view of my friend, Mr. Thorburn, from Newfoundland, that it is a matter that has been so thoroughly discussed and thrashed out in both Houses of the Imperial Parliament that it is scarcely wise on our part to try and bring pressure to bear upon them, as they are not likely to be very much influenced by what we say. And, besides, the people of the United Kingdom are in exactly the same position as the people of any Colony which has refused to pass this law. We have urged upon the Imperial Government to assent to this law, and I do not think that it well becomes us to turn round and say, "You sanctioned the law, and, therefore, now you must alter your law to suit it." I have no doubt that it would be a great gratification to the people of those Colonies where the law prevails that a man may marry his deceased wife's sister, to have the law of inheritance in England altered; but I think that we must be content to await the decision of the Imperial Parliament with respect to that.

APPENDIX.

The following is the list of Representatives who, with Sir Henry Holland as President, constituted the Conference :—

Newfoundland :—

Mr. ROBERT THORBURN, *Premier.*
Sir AMBROSE SHEA, K.C.M.G.

Canada :—

Sir ALEXANDER CAMPBELL, K.C.M.G., *Lieutenant-Governor of Ontario.*
Mr. SANDFORD FLEMING, C.M.G.

New South Wales :—

Sir PATRICK JENNINGS, K.C.M.G., *late Premier.*
Mr. ROBERT WISDOM, *formerly Attorney-General.*
Sir SAUL SAMUEL, K.C.M.G., C.B., *Agent-General.*

Tasmania :—

Mr. JOHN STOKELL DODDS, *late Attorney-General.*
Mr. ADYE DOUGLAS, *Agent-General.*

Cape of Good Hope :—

Mr. THOMAS UPINGTON, *Attorney-General.*
Mr. JAN. HENDRICK HOFMEYR.
Sir CHARLES MILLS, K.C.M.G., C.B., *Agent-General.*

South Australia :—

Mr. JOHN WILLIAM DOWNER, *Premier.*
Sir ARTHUR BLYTH, K.C.M.G., C.B., *Agent-General.*

New Zealand :—

Sir FRANCIS DILLON BELL, K.C.M.G., C.B., *Agent-General.*

Sir WILLIAM FITZHERBERT, K.C.M.G., *Speaker of the Legislative Council.*

Victoria :—

Mr. ALFRED DEAKIN, *Chief Secretary.*

Mr. JAMES LORIMER, *Minister of Defence.*

Sir GRAHAM BERRY, K.C.M.G., *Agent-General.*

Mr. JAMES SERVICE, *late Premier.*

Queensland :—

Sir SAMUEL GRIFFITH, K.C.M.G., Q.C., *Premier.*

Sir JAMES GARRICK, K.C.M.G., Q.C., *Agent-General.*

Western Australia :—

Mr. JOHN FORREST, C.M.G., *Commissioner of Crown Lands.*

Mr. SEPTIMUS BURT.

Natal :—

Mr. JOHN ROBINSON.

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