MARRIAGE: Marriage between a man and his niece, although valid in Austria where contracted, is void in the State of Missouri and the parties are subject to criminal prosecution if they return to live as husband and wife in Kansas City, Mo.

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September 5, 1936.

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Honorable Cordell Hull,
Secretary of State,
Washington, D.C.

Dear Mr. Secretary:

This department is in receipt of your letter of August 29, 1936, to the Honorable Guy B. Park, Governor of the State of Missouri, requesting an opinion as to the following:

> "The Department has before it for consideration the case of an American citizen, a resident of Kansas City, Missouri, who proceeded to Vienna, Austria, and there was lawfully married to his sister's daughter, whom he now desires to bring into the United States as his wife in order that they may cohabit in the State of Missouri.
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> "I should like to be advised whether such a marriage between an uncle and his niece would be recognized as valid in the State of Missouri. If the marriage should be recognized as valid in Missouri, it may be presumed that the parties thereto may lawfully cohabit in the State. On the other hand, if the marriage should not be recognized as valid in Missouri, would the parties thereto be subject to imprisonment in Missouri for incestuous cohabitation as unmarried persons, or as persons whose marriage is invalid in Missouri?"

Section 2974, Revised Statutes of Missouri, 1929, provides:

> "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and negroes or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock."

It may thus be seen that by reason of this section of our laws, a marriage contract between an uncle and his niece is absolutely void. The policy of this State, as declared by the legislative enactment, specifically prohibits such marriages, and any violation of said statute would subject the guilty parties to imprisonment in the state penitentiary, as provided in Section 4261, Revised Statutes of Missouri, 1929, which provides:

> "Persons within the following degrees of consanguinity, to-wit, parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews, who shall intermarry with each other, or who shall commit adultery or fornication with each

> other, or who shall lewdly and lasciviously cohabit with each other, shall be adjudged guilty of incest, and be punished by imprisonment in the penitentiary not exceeding seven years."

Since the marriage between an uncle and his niece contracted in Missouri would be absolutely void, the question remaining for discussion is as to the validity of such a marriage contracted in Austria and valid according to the laws of Austria. In the first place, it is the general rule that the validity of a marriage is determined by the law of the place where it was contracted. If valid there, it is valid everywhere. However, the courts of this land have held a general exception to this rule in the case of marriages repugnant to the public policy of the domicile of the parties. As for an example, an incestuous marriage contrary to the positive laws of the state of domicile. 33 C.J. 1276.

Before proceeding further, we wish to refer briefly to the case of Fensterwald v. Burke, 129 Md. 131, 3 A.L.R. 1562. In that case it was held that the union of uncle and niece was not one of the relationships which is regarded by the general opinion of Christendom as so offensive that the court of the domicile would refuse to recognize the status if the contract was made at a place where the marriage was valid. We have studied this opinion and decline to follow its authority, as the law in that case declared is, in our opinion, unsound and we prefer to base our opinion on later decisions to which we shall presently refer.

Perhaps the leading case on the subject of incest is the case of Brook v. Brook, 9 H.L. Cas. 193. In that case Brook and a sister of his deceased wife, both domiciled in England, went to Denmark where they went through the ceremony of marriage. The Danish law permitted the marriage. The English statute had expressly declared that marriages between those related by affinity were forbidden by the law of God in exactly the same order as relationships by consanguinity, and by that law, therefore, Brooks' second wife was regarded as his sister (Beale, Vol. II, Conflict of Laws). The Lord Chancellor, Lord Campbell, said:

> "If the contract of marriage is * * * contrary to the law of the country of domicile, it is to be regarded as void * * * though not contrary to the law of the country in which it was celebrated. * * * It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary

> visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to the religion or morality, or to any of its fundamental institutions."

A somewhat analogous question is presented in the case of People v. Kay, 252 N.Y.S. 518. In that case, Mary Kay instituted divorce proceedings against one Colonel Reigelman in the St. Peterburg Consistory. The divorce proceedings, however, were never completed and the marriage between the parties never dissolved. Later, Mary Kay married Constantine Kay in Turkey. The Court, in holding this second marriage to be a nullity, said:

> "The Riegelman marriage subsisted and was valid in 1922, when the parties herein attempted marriage in Turkey. Polyandry is not recognized by Turkish law, and hence this complainant could not have been wedded to this defendant. But even assuming this marriage might have been valid in Turkey, we cannot accept its validity in this jurisdiction. The doctrine of comity must yield to the positive law of the land. Foreign law will not be given effect when to do so would be contrary to the settled public policy of the Forum. Marshall v. Sherman, 148 N.Y. 9, 42 N.E. 419, 34 L.R.A. 757, 51 Am. St. Rep. 654.
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> "Marriages consummated in foreign countries which are within prohibited limits of consanguinity must therefore be held invalid in domestic jurisdiction.
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> "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there, it will be held valid everywhere, and conversely, if invalid by the lex loci contractus, it will be held invalid wherever the question might arise. 38 C.J. 1276. Where, however, the marriage in question

> is repugnant to the public policy in respect of polyandry, incest, miscegenation, polygamy, or contrary to its positive laws, the general rules will not apply."

The Supreme Court of the United States in the case of Loughran v. Loughran, 78 L. Ed. 1219, recognizes the exception with respect to incest, to the rule that a marriage valid in the lex loci contractus is valid everywhere, and said:

> "Marriages not polygamous or incestuous or otherwise declared void by statute will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."

Our Supreme Court, in the case of Henderson v. Henderson, 265 Mo. 718, l.c. 732, said:

> "The view to which we here lend our concurrence is likewise approved in Ruling Case Law, wherein the rule is thus stated:
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> 'There are expressions in the opinions in some of the cases which seem to favor the very questionable doctrine that, while the lex loci governs with respect to matters affecting the manner or mode of solemnization of the marriage and the preliminaries thereof, the question of matrimonial capacity is to be determined by the lex domicilii; and some of the decisions seem to be the result of the application of that doctrine. This is particularly true in the case of the English decisions. But most of these cases can readily be classified into one of the two well recognized exceptions to the general rule--first, marriages which are polygamous, or which are incestuous according to the general view of Christendom; and secondly, marriages which the local lawmaking power has declared shall not be allowed any validity.

> By the first exception the Christian standard of marriage is applied to every marriage, wherever celebrated and without reference to the domicile of the parties at the time of its celebration. If the marriage falls below this standard, it will be held void although it may be valid according to the lex loci and lex domicillii. In regard to the second exception the legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed or between parties who left the state of domicile for the purpose of avoiding its statute, when they come or return to the state; and some of the states have in terms legislated on the subject * * * ."

In conclusion, we refer to the case of Incuria v. Incuria, 280 N.Y.S. 716, wherein the question was presented to the Court as to the validity of a marriage between aunt and nephew. The Court said:

> "Since the marriage of the parties before me was not consummated in any of the states in the Union, the question arises whether or not the marriage, were it legal in the Kingdom of Italy, should be recognized by us in this jurisdiction.
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> "If a citizen of a foreign state, in which state polygamy is legal, would bring his half dozen or so legal wives to our country, the marriage of the six spouses to the one spouse would not be considered legal or valid by us. The reason for that is that there is a positive

law against polygamy. Equally so, there is a positive law against marriage between nephew and aunt. Is the latter less positive than the former? Is the latter more to be condemned than the former? Either is as bad as the other."

CONCLUSION

The laws of the State of Missouri specifically prohibit a marriage between an uncle and niece and declare all such marriages entirely void. This prohibition was enacted for the benefit of the public health and the perpetuation of the human race. Incestuous marriages in Missouri are crimes, and it is our opinion that a marriage between a man and his niece, though valid where contracted--in this case, Austria--is nevertheless void in the State of Missouri, and if the parties in question return to the State of Missouri and live as husband and wife, they are subject to imprisonment under Section 4261, Revised Statutes of Missouri, 1929.

Respectfully submitted,

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APPROVED:

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