“Affinity” - The Philosophy Of Law [:] An Encyclopedia

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Gray, Christopher Berry, Ed. (London: Garland Publishing Inc., 1999), Pages 21-24

Affinity

As a legal term, “affinity” is, not infrequently, mentioned in conjunction with “consanguinity”. In colloquial usage, according to *Black’s Law Dictionary*, “affinity" sometimes embraces "consanguinity" in describing kindred relationships. Both "affinity” and "consanguinity" are, in juridical parlance, descriptive of human relationships.

According to *Wharton’s Law Lexicon* and *Black’s Law Dictionary*, “affinity” means, essentially, the “relationship by marriage between the husband and the blood relations of the (husband’s) wife, and between the wife and the blood relations of the (wife’s) husband.” In contrast, consanguinity describes the “relation of persons descended from the same stock or common ancestor." A consanguine relationship may be lineal (ad infinitum), that is, either ascendant, between son and father and grandfather, or descendant, between son and grandson and great-grandson. A consanguine relationship may, instead, be collateral, such as subsists between a person descendant from the same stock or ancestor (uncle and nephew, for example) but not from each other, as obtains in lineal consanguine relationships.

Affinity and the permutations – that is, degrees – of affinity derive, according to *Dejardin v. Dejardin*, 2 W.W.R. 237 (1932) (Man. K.B., Macdonald C.J.K.B.), from "ancient origins," specifically, *Leviticus* in the Old Testament Scriptures. As subsequently developed in canon law (sometimes described as Christian and Judaic "ecclesiastical" or "church" law), the degrees of affinity assumed at least three personalities. First, there evolved "direct" affinity. This is the basic affinity concept and involves the relationship between (1) a husband and (2) his wife's blood relations, for example, between a husband and his wife's sister (who, by marriage of husband and wife, becomes the husband's sister-in-law). Second, there is "'secondary" affinity, such as the relationship between (1) the sister of the wife (that is, a wife's relation) and (2) the brother of the husband (that is, a husband's relation), or vice versa. The third kind of affinity, "collateral" affinity, includes the relationship between (1) the wife, of the one part, and (2) relations of the husband's relations, of the other part, for example, between the wife and the wife of the husband's brother, or vice versa.

The degrees of affinity (like the degrees of consanguinity) eventually found expression in Archbishop Parker's Table of 1563, published, ever since, in the *Book of Common Prayer* of the Church of England. Moreover, the degrees of affinity (and of consanguinity) were recognized,

interpreted, and applied as part of England's common law. Whether commencement of the recognition of the degrees, at common law, antedated or followed 1563, is unclear. Certain, however, is the enactment, both before and after 1563, in England of statutes addressing the impact of the prohibited degrees, particularly as pertained to matrimony.

Justification for most of the degrees of affinity (and consanguinity) are obscure. They apparently derived from taboos and beliefs that marriage within the degrees was a recipe for inbreeding of physically and/or mentally defective issue. In the context of contemporary scientific knowledge, these justifications are largely invalid.

The most significant legal impact of the degrees was on marriage. The degrees of affinity (and consanguinity) were regarded under canon law and, subsequently, common law, as representing relationships within which marriage was, at least in theory, prohibited. Thus, the degrees came to be known as the "prohibited degrees of marriage." Judicially, however, if persons were married (under canon law, or subsequently, under common law) within prohibited degrees, the marriage ceremony nonetheless created a valid – although voidable – marriage. A voidable marriage is a marriage that could, at the option of either spouse, be declared a nullity from the date a judicial declaration to that effect is made, as noted in *Elliott v. Gurr*, 2 Phill. Ecc. 16 (1812).

The *Marriage Act* (also known as *Lord Lyndhurst's Act*) enacted in England in 1835 altered the judicial interpretation of the impact of the prohibited degrees under canon and, subsequently, common law. The act provided that "all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

Solicitor B.L. Johnson summarizes in *Family Law* some of the common law and statutory consequences in England of the application of the prohibited degrees of affinity (and consanguinity):

> If the parries are within the prohibited degrees, the marriage will be void in law, whatever ceremonies have been performed, and even though the parties were quite ignorant of their relationship. In some cases, if, after discovering their relationship, they continued living together, they would be guilty of the criminal offence of incest [in Canada, incest is an offence under *Criminal Code* s. 155]; but even if there were no breach of the criminal law, their marriage would be void, and both would be quite free at any time to contract a valid marriage with someone else. It might even be that the facts of the relationship only came to light after the death of one of them, and in that case, the survivor could not claim the rights of the surviving spouse on an intestacy, and the property of the one who had died would be distributed on the assumption that he had never married.

Comparable are the consequences under (public) criminal law and, affecting marriage and inheritance, under private law, in Canada, other Commonwealth countries, the United States, and elsewhere.

A relationship constituting affinity does not result per se from sexual relations or a conjugal relationship (a euphemism for "common law" marriage). A formal purported marriage between persons within the prohibited degrees is required to constitute affinity, as noted in *Restall (otherwise Love) v. Restall*, 45 T.L.R. 518 (1929).

The geographical and substantive extent to which the English common law and statute law on prohibited degrees of marriage settled in Canada's common law jurisdictions, or in other jurisdictions based on common law, is not entirely clear.

Because they affect capacity for, rather than procedural solemnization requirements of, marriage, the subject of prohibited degrees is the legislative responsibility of Parliament instead of the legislatures or legislative councils of the provinces or territories.

Capacity to marry between persons too closely related by marriage or blood has to a lesser or greater extent been proscribed by custom or law in most cultures. However, the "probitition in our country," opines Fodden, “is wide-ranging …” Based on Archbishop Parker's widely embracing Table of 1563, these prohibitions were modified by Parliament by the *Marriage Act* to permit marriage with a deceased wife's sister or niece and to permit marriage with a deceased husband's brother or nephew.

On 18 December 1991, the federal *Marriage (Prohibited Degrees) Act* came into force. The act codified the law in Canada respecting the prohibited degrees of marriage; expressly repealed previous federal legislation on the subject, namely, the *Marriage Act* adopted in 1985; implicitly abrogated Archbishop Parker's Table of 1563; and provides for all "prohibitions in law in Canada against marriage by reason of the parties being related." Sections 2 to 5 of the act (in summary) provide as follows: (1) As a general rule, persons related by consanguinity, affinity, or adoption are not, by reason only of their relationship, prohibited from contracting a legally valid marriage with one another. (2) This general rule is subject to the exceptions that no person shall marry another person if (a) related lineally by consanguinity or adoption, or (b) related as brother and sister by adoption. Marriage between persons marrying within these degrees is void.

Legal proceedings requesting a declaration of annulment based on the prohibited degrees of marriage have rarely been brought in Canada's provinces or territories.

In Canada’s only civil law jurisdiction, Province of Quebec, the prohibited degrees of marriage were, historically, provided for primarily by French Law received into Quebec and by local Quebec jurisprudence until 1866; by the *Civil Code of Lower Canada* from 1866 to 31 December 1993; and by the *Civil Code of Quebec* from 1 January 1994.

John Brierley and Roderick Macdonald comment that the Civil Code has "not yet been amended to accord with the new federal law. . . . This lack of uniformity could give rise to a constitutional challenge should Quebec seek to enforce its more restrictive provisions, especially since the federal act claims to contain ‘all of the prohibitions in law in Canada against marriage by reason of the parties being related.'"

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