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Marriage in the Conflict of Laws

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MARRIAGE IN THE CONFLICT OF LAWS*

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I. General Principles

It must first be recognized that three different types of problems are raised in this field by what purport to be marriages: problems concerning the creation of the relationship of man and wife; those concerning the method whereby the parties signify their consents to the assumption of the relationship; and those concerning the legal protection accorded to claims arising therefrom. These involve, respectively, the status, the ceremony, and the incidents[1] of marriage.

It has often been said or assumed in the past that the laws of the domicile or domiciles of the parties at the time of the ceremony govern the creation of the status, except that it will not be created if the laws of the state where the ceremony takes place—*lex loci celebrationis*[2]—refuse to create it; that the *lex loci celebrationis* governs the ceremony; and that the laws of the state in which the enjoyment of an incident is claimed determine whether the claim to it is legally protected.

There are three possible approaches to the concrete problems: (1) It would be possible to treat all cases as involving claims to incidents. (2) It would be possible to determine *in vacuo* that the status does or does not exist and to decide that, if it does, all incidents inevitably flow from it; and that, if not, there is nothing from which incidents can flow. (3) It would be possible to decide that the status exists, and to make an independent decision that a claimed incident is or is not protected. There is no evidence that any court uses the first approach and it is often difficult to determine which of the others is being used in a case.

The usual method seems to be that of (2) *supra,* (3) having been used only in extreme cases, those involving claims to the incident of

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* This article will be devoted almost entirely to re-examination of the conclusions which I reached after study of the field about twenty years ago and to consideration of the cases which have since then been decided. The results of the aforesaid research and the conclusions will be found in my articles: *Effect of Extra-State Marriage Ceremonies,* 10 Miss. L.J. 105 (1938), and *What Law Governs the Ceremony, Incidents and Status of Marriage,* 19 B.U.L. Rev. 353 (1939). These articles will, hereinafter, be cited to the review and page, only.

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1. Examples are cohabitation, property rights, the production of legitimate children.

2. The words "ceremony" and "*celebratio*" do not refer to formal celebration of a marriage by authorized persons, though many states require it: the reference is equally to an informal exchange of consents to marriage, usually called "common-law marriage."

sexual intercourse between persons who were closely related by blood, or were of different races, or were parties to a polygamous union, or those in which the court felt that the law of the state had been insulted by the extra-state marriage.[3] There are, however, a few cases in which the nature of a claimed incident was probably influential in causing the decision that the marriage was valid or void.[4]

1. *Form of Ceremony*

One of the usual statements of a rule of the conflict of laws of marriage is: A marriage which is void under the laws of the *lex loci celebrationis* is void.

This statement is, in the main, correct insofar as the requirements as to the form of exchange of consents are concerned. Since marriage is a status founded on a civil contract[5]—a contract in the sense that mutual consent is essential—the celebration, the contractual element thereof, the method of exchanging consents, should normally comply with the laws of the state in which that exchange takes place.[6] In

3. These denied: the normal incident of marriage, turning an infant spouse into a person of full age; a divorce *a mensa et thoro;* a divorce *a vinculo matrimonii.* These will be discussed, *infra,* under the heading, "Incidents."

4. In Incuria v. Incuria, 155 Misc. 755, 280 N.Y. Supp. 716 (Dom. Rel. Ct. 1935), Campione v. Campione, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct. 1951), and *In re* May's Estate, 280 App. Div. 647, 117 N.Y.S.2d 345 (3d Dep't 1952), *aff'd,* 305 N.Y. 486, 114 N.E.2d 4 (1953), an uncle married his niece, or an aunt, her nephew. In none of them, was the incident, the enjoyment of which might be shocking to the moral sense of the people of New York, sexual intercourse, directly involved. In *Incuria,* however, in which the marriage was declared void, the court seemed to suspect that at least one reason for the marriage was to facilitate the immigration of the Italian party. In the others, in which the marriages were held valid, there was no such reason for the marriage.

In Lederkremer v. Lederkremer, 173 Misc. 587, 18 N.Y.S.2d 725 (Sup. Ct. 1940), the court assumed that the marriage of a New Yorker in Poland was not annullable for fraud under the Polish law but applied the law of New York to annul it for the man's fraud in intending the marriage to serve solely as the basis for his admissibility to this country as the spouse of a citizen and intending never to live with the woman as her "husband."

In Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948), the court properly recognized the extra-state, miscegenous marriage of nondomiciliaries where the wife claimed intestate rights in the husband's immovables in Mississippi as his "widow." The court indicated, however, that it would have held the marriage void, if the parties had gone to Mississippi and cohabitated there.

5. It is sometimes said that marriage is a "civil contract." Insofar as this is true, it applies to the exchange of consents, the method of "contracting" the status. Insofar as it applies to the status, it is true only in a limited sense: while the contract *to* marry is a contract, like any other, the contract *of* marriage is a contract *sui generis:* no action for damages lies for breach of the promises involved, the parties cannot rescind it of their own motion. See S.D. CODE § 14.0102 (1939): "The provisions of other portions of this Code in relation to contracts, and the capacity of persons to enter into them have no application to the contract of marriage."

Care must, therefore, be taken to distinguish between the contractual and the static elements of marriage.

6. The possibility that a man and woman may wish to marry each other in some place where there is no state—*e.g.,* castaways on some unclaimed island—or in a place where there are no civilized laws, must be considered. In such cases, the exchange of consents which is essential to common-law marriage

most states, licenses are required and the conditions precedent to the issuance of a license vary among the states. In most states, some form of ceremony is required. The persons who issue licenses and the persons authorized to celebrate marriages are, normally, local people. Minor state or municipal officials usually issue licenses and they probably do and can properly be required to know and comply with their own laws, but not to know and comply with those of other states. Indeed, neither the license-issuing officials, nor the celebrants, are at all likely to be conscious of the possibility that any other law might be applicable.

It must be understood, however, that the rule—*lex loci celebrationis* governs the form of the ceremony of marriage—is a rule in the field of choice of law, not of legislative jurisdiction. Since the ultimate control of the creation of the status of marriage is in some domicile, there is no reason why that state should not permit persons who rely on its laws for the creation of the status to employ any method of exchanging consents which it deems appropriate:[7] the important matter is the exchange, not the manner thereof.

There is a good analogy in cases concerning the legitimation of illegitimate children. The law of the domicile prescribes the nature of the legitimating act, *e.g.,* marriage to the other natural parent or recognition of the child and taking it into the parent's family, but the locus of the act is immaterial.[8]

The assertion of control of the permissible form of ceremony is exemplified by the few recent cases in which the domiciliary courts have refused to recognize the effectiveness of extra-state common-law marriages, and by dicta in *Apt v. Apt.*[9] The American cases are reported, not approved. Each contains an obvious error,[10] or an odd

should be effective, *jure gentium.* This seems to have been the position of Lord Merriman, P., in Wolfenden v. Wolfenden, [1946] P. 61. The ceremony was performed in a mission in China by a minister who was neither episcopally ordained nor authorized to perform marriages under the *Foreign Marriage Act,* 1892, 55 & 56 VICT., c. 23. Lord Merriman said that he could not consider the law of China as applicable, and upheld the marriage as a common-law marriage.

7. The *Foreign Marriages Acts,* 1892 and 1947, 55 & 56 VICT. c. 23 and 10 & 11 GEO. 6, c. 33, have prescribed forms effective for the marriage of subjects outside of the realm. See also note 62 *infra,* for an American view.

8. See Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws,* 18 CAN. B. REV. 589, 614-15 (1940).

9. [1947] P. 127. Lord Merriman, P., upholding the validity of a foreign proxy marriage, adverted to arguments that recognition of such marriages of subjects might facilitate marriages of minors and those in which the sole purpose was to make it possible for the foreign spouse to enter on the British proxy giver's passport, and said: "It may well be that the problem should be subdivided into categories and the test of public policy be applied, if at all, to each category separately." *Id.* at 141.

10. Ray v. Ray, 193 Misc. 131, 83 N.Y.S.2d 126 (Sup. Ct. 1948), involved a marriage by correspondence, in which the man, while "serving in a foreign land," executed the contract wherever he was. The court said that all civil agreements made by a soldier would ordinarily be deemed to be made at his

construction of a statute.[11]

While a state can deny validity to foreign forms of marriages of those who depend on it for the creation of the status, the courts should not infer such a denial, but should wait for an express statutory provision which would, itself, be unwise.

2. *Status*

The standard statement—a marriage which is void under the *lex loci celebrationis* is void—is correct on authority,[12] though erroneous on principle. Cheshire says: "Obviously no system of law can allow the use of its procedure for the contracting of unions which it considers to be void owing to nonage, incest, or for any other reason."[13]

This seems to me to overglorify the doctrine, *locus regit actum,* and to fail to take into account the very minor nature of the interest of the *locus celebrationis* in the existence of the status. It seems clear that that state is little affected by marriages of persons who intend to leave the state promptly, and to live elsewhere as man and wife: what interest it has is in the form of celebration, not in the existence of the status. The highest court of New Hampshire[14] and a Surrogate's

domicile, the only state where, on the assumed facts, they could not have been made; and, apparently as a second ground for the decision, indulged in the presumption that "the law" of a foreign state would be presumed to be the same as that of the forum. As to the propriety of this presumption, see Cosulich Societa Triestina Di Navigazione v. Elting, 66 F.2d 534, 536 (2d Cir. 1933).

11. The decision in *In re* Vetas' Estate, 110 Utah 192, 170 P.2d 183 (1946), was based on the conclusion that an extra-state common-law marriage was ineffective because it was not "solemnized," the legislature having enacted: "The following marriages are prohibited and declared void: . . . (3) When not solemnized by an authorized person . . .," and "Marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here." UTAH CODE ANN. §§ 40-1-2, 40-1-4 (1953). Wade, J., in dissent said that the word "solemnized" did not necessarily refer to formal ceremonies, only.

The statutes of other states, of the same general import as Utah's § 30-1-4, use the word "contracted," "celebrated," or "solemnized." No other case holds that the word used is material, but, rather, that this sort of statute merely enacts the general rule of the conflict of laws. The judgment of the Appellate Division in Shea v. Shea, 268 App. Div. 677, 52 N.Y.S.2d 756 (2d Dep't 1945) which relied on the word "solemnized" in the statute (N.Y. DOM. REL. §11) was reversed by the Court of Appeals, 294 N.Y. 909, 63 N.E.2d 113 (1945) on the dissenting opinion of Johnston, J., below. He said that this matter was not like incest and polygamy and that such a marriage is valid, even "where both parties domiciled in this State, leave it for the purpose of evading its laws . . . and then immediately return to this State . . ." 52 N.Y.S.2d at 763.

In *In re* Van Schaick's Estate, 256 Wis. 214, 40 N.W.2d 588 (1949), the court applied the first section of the Uniform Marriage Evasion Act to invalidate an extra-state common-law marriage. The courts of Illinois and Massachusetts have recently upheld the validity of such marriages, though each has enacted the Uniform Act. Pierce v. Pierce, 379 Ill. 185, 39 N.E.2d 990 (1942); Boltz v. Boltz, 325 Mass. 726, 92 N.E.2d 365 (1950).

12. The notion may be that a state will not permit the use of the ceremonial part of its law of marriage to contract unions which be void for a vice of substance, if attempted by its own people in the state: there may be an idea that the *locus celebrationis* is insulted by such efforts of persons foreign to it.

13. CHESHIRE, PRIVATE INTERNATIONAL LAW 301 (4th ed. 1952) (hereinafter cited as CHESHIRE).

14. See Sirois v. Sirois, 94 N.H. 215, 50 A.2d 88 (1946) (Marble, J., quoting 19 B.U.L. REV. at 367).

court of New York[15] have recognized the erroneous nature of the standard rule.

The standard statement—a marriage which is valid under the *lex loci celebrationis* is valid, unless contrary to some strong public policy of the domicile or domiciles of the parties—is correct, at most, with respect to only a few cases, those in which the parties have, at the time of the ceremony, no intention to live as man and wife in any particular state.

The situations in which states refuse to create the status on extra-state ceremonies involve fraud, duress, polygamy, miscegenation, insanity, incest, remarriage too soon after divorce, and nonage. It seems clear that the public policy which dictates the refusal to create the status is based on the interest of a state to protect itself against odious marriages (polygamy, "progressive polygamy" through remarriage too soon after divorce, incest, miscegenation), from those which are feared to be the source of children who will be undesirable future citizens (incest, miscegenation, insanity), from those which are less likely than usual to be peaceful, prosperous and lasting (fraud, duress, insanity, nonage).[16]

Therefore, the state whose laws should be looked to in order to discover a public policy strong enough to require a declaration that a particular marriage is void for a vice of substance is that in which the parties will live as man and wife—the intended family domicile.[17] No domicile at the time of the ceremony has, as such, a sufficiently

15. See *In re* Palmer's Estate, 192 Misc. 388, 79 N.Y.S.2d 404, 408 (Surr. Ct. 1948), wherein Witmer, S., said with respect to the remarriage in Pennsylvania of the guilty party in a New York divorce who was forbidden to remarry by a New York statute: "Apparently no court in Pennsylvania has had occasion to pass upon this point. That is only natural since the parties to such a marriage are only in Pennsylvania long enough to be married . . . . This fact . . . emphasizes that . . . the domestic policy of the State of Pennsylvania is not an important factor." The conflict of laws rule of New York was applied to hold the marriage valid.

This case is to be compared with Wagner v. Wagner, 58 Mont. Co. L. Rep. 18 (Pa. C.P. 1941), wherein the court erroneously identified the Pennsylvania policy, forbidding remarriage between the libellee in a divorce for adultery and the paramour, with that of New York forbidding the remarriage, for a time, of the guilty party in such a divorce. This resulted in giving to New York a protection which it does not want: its prohibition of remarriage is given no extra-territorial effect in its courts.

16. Problems of marriages of infants and insane persons and those induced by a fraud or duress might call for the application of the law of the domicile of the *de cujus* at the time of the ceremony, on the theory that that state best knows when a child reaches years of sufficient discretion for marriage, whether a person lacks the mentality to comprehend the nature of marriage, which persons are sufficiently astute to recognize the fraud, and which are sufficiently courageous to resist the duress. In no case have these possible considerations been discussed. See the discussion, *infra,* under the appropriate heading.

17. Cheshire speaks of the "matrimonial domicile" and of the "intended family home." CHESHIRE 291, 297.

strong interest to justify the application of its laws to determine whether or not the parties are of such qualities, or in such relationship, that their marriage should be declared void, nor to determine that their marriage should be declared valid if the status is one which offends a strong public policy of the intended family domicile.

There is support for this doctrine in the juristic writings. Speaking of the doctrine which requires that a marriage be held to be void if it is void under the marriage law of the domicile of either party, Cheshire says:

> A rule of choice of law, such as that imposed by the dual domicil doctrine commands little respect if it is framed without regard to its impact upon the social life of the community which will be most intimately affected by its operation.[18]

Beale says:

> If the purpose of the law in securing the domestic relations is successful, it will in fact result in a home and domicil in some particular state. The state chiefly interested in the maintenance of the domestic relations is this state of domicil in which the home is to be established and the relations exercised.[19]

It may be objected that there is no present contact between the parties to a purported marriage and the intended family domicile, and that some present contact is necessary as a foundation for jurisdiction. One answer may be that, in cases of ordinary contracts, the conflict of laws rules of some states point to the law of the place of performance or to the "proper" law, and the only present contact between the transaction, or the parties, and that state may be in their minds. Another and better answer is that the asserted jurisdiction of the actual domiciles is founded on a legal concept and not necessarily on a close factual contact between persons and a state: one may have a domicile, though he has no present home, no present close contact with a state. His connection with his domicile, then, may be much more tenuous

18. *Id.* at 297. He speaks even more strongly on the subject: "If, however, 'the law of the domicil' means, as in practice it is in this context taken to mean, the internal law of the country concerned, the application of the dual domicile doctrine may produce a result that is calculated to shock the conscience of all save the most obstinate doctrinaires." *Id.* at 295.

19. BEALE, CONFLICT OF LAWS § 120.15 (1935). See also COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 447-51 (1949).

Beale, *op. cit. supra*, and in Beale *et al.*, *Marriage and the Domicil*, 44 HARV. L. REV. 501 (1931), and GOODRICH, CONFLICT OF LAWS § 115 at 348-49 (3d ed. 1949), have expressed the opinion that the domicile of each party at the time of the ceremony controls the creation of the status, in the sense that if either state refuses to create the status upon an extra-state ceremony, the marriage is void. Their arguments are that each such state has an interest in the status of its domiciliaries. This is undoubtedly true; but it seems that these interests are minor when compared to that of the intended family domicile.

The most that happens to either of the domiciles is that it loses a domiciliary, while the intended family domicile will gain domiciliaries and, most important, will gain or refuse to accept a new family unit, the relationship of the parties to which is of paramount importance to the state.

than that with the state in which he intends to make his home.

Those who insist that there must be a present connection between the parties and the state which is relied on for the creation of the status, may treat the intended family domicile rule as one which operates in the field of choice of law, a rule which is adopted by states because it produces better social results than the dual domicile rule. The indubitable urge to support marriages founded on extra-state ceremonies unless they violently conflict with some public policy, is not forwarded by that rule.

Problems may arise in cases in which it is impossible to produce any direct evidence of an intention to establish a family home in a particular state. Such cases might seem to call for the application of the dual domicile rule. Even in such cases, this is wrong. The factual probability that the parties will make their home in the state of the man's domicile at the time of the ceremony is great enough to justify and to call for a decision that the marriage is valid, unless contrary to some strong public policy of that state.

There is some indication that courts are prepared to apply the intended family domicile rule. In *Meisenhelder v. Chicago & N. W. Ry.*,[20] the court applied the law of Illinois, the domicile of the parties to which they intended to return and did return a few days after an extra-state ceremony, but seemed prepared to look to the law of Minnesota if it had been shown that they intended to live in that state.[21] *Apt v. Apt*[22] expressly held effective the proxy of an English domiciliary where the intended family domicile was the state in which the proxy acted, but indicated that the result might have been different if that domicile had been England.

This much is clear: no American court has applied its state's law of marriage to declare an extra-state ceremony ineffective, where the party did not intend to and did not return to live in the state.

Most of the statutes either enact the orthodox rule—marriages valid where contracted are valid here[23]—or enact the substance of the first section of the Uniform Marriage Evasion Act—persons who reside and intend to reside in the state do not effectively marry out of it if their marriages are declared void by its laws.[24] In Arizona and Georgia, the statutes apply to marriages of all persons who intend to reside in the state.

My suggestion is that the limited statutes do not represent denial of more extensive jurisdiction to control the creation of the status,

20. 170 Minn. 317, 213 N.W. 32, 34 (1927); it was there said: "There is evidence that they intended moving later to Minnesota, but it is indefinite, and their removal was entirely contingent."
21. Other cases are cited in 19 B.U.L. REV. 372-74.
22. [1947] P. 127, 141.
23. Twelve States.
24. Fourteen States.

but, rather, legislative failure to extend that jurisdiction as far as is permissible and would be desirable in cases of extremely odious marriages.[25] If a man and woman, one white and the other Negro, being both domiciled in Virginia[26] or in Oklahoma,[27] leave their domiciles for a marriage ceremony in one of the northeastern states, intending to return and live in the state of their domicile, their marriage is void. Surely, if these persons leave one of these states for such a ceremony, intending to go to live in the other, the public policy of the latter, the intended family domicile, is as much offended as if they were returning to it. Moreover, this policy is equally offended no matter where the parties are domiciled at the time of the ceremony.

The general policy of upholding marriages requires, however, that states be chary of declaring void any extra-state marriage which is not offensive to some very strong public policy, and there may well be situations in which the prompt return of domiciliaries after such a marriage is more offensive than the moving into the state of persons who, before the ceremony, were domiciled in another state.[28]

3. *Incidents*

The state which is most vitally, indeed that which is alone, interested in the incidents of marriage, *qua* incidents, is that in which the enjoyment thereof is claimed. It seems clear that state *A* cannot permit enjoyment, within its boundaries, of an incident attaching to the status under the law of state *B* which created it, if enjoyment of the same incident is not permitted by *A* to persons who marry under its own laws. If polygamy is permissible in *B*, but not in *A*, a man married

25. The opinion in Montgomery v. Gable, 61 Ga. App. 859, 7 S.E.2d 426 (1940), seems to contain an error. The court said: "The first sentence in Code § 53-214, 'all marriages solemnized in another State by parties intending at the time to reside in this State . . .' can have no extra-territorial application to a citizen of another State who in good faith contracts marriage in that State with a resident of Georgia who is laboring under the disability of not being allowed to marry again in Georgia."

If this had been a construction of legislative intent, it might make sense—on the groud that unilateral prohibitions of the remarriage of the libellee in a divorce do not express a strong public policy, and that the legislature did not intend, by the enactment of a general "evasion" statute, to state such a policy. But the words "*can have no* extra-territorial application" are too strong; and attribute to the legislature an intention to enact an inoperative statute. The second sentence of the above section of the Code covers marriages of persons who leave Georgia to evade its marriage laws with the intention to return.

26. Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

27. Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Baker v. Carter, 180 Okla. 71, 68 P.2d 85 (1937).

28. For example, it may be that the neighbors of a person who is divorced in Pennsylvania for adultery would be shocked by the spectacle of that person living in the state with the paramour, for adultery with whom he was divorced, but not shocked by a similar cohabitation of the same two persons if they were strangers who had had no prior contact with the community. Such domiciliaries, who leave the state for the ceremony and intend to and do return to live in the state, do not succeed in getting married. *In re* Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1898).

under the laws of *B* cannot be permitted to marry again in *A*. If polygamy is permissible in *B*, a man cannot be permitted to live with all of his wives in *A*. If a man lawfully marries his sister nnder the laws of *B*, he cannot be permitted the incident of sexual intercourse with her in *A*.

I have found only one American case, decided since the publication of my earlier article,[29] which involves the simple denial of an incident to a foreign marriage which was recognized as valid. Recent cases in England do involve such denials: they are cases of polygamous marriages which were valid under the law governing their validity.

In the American case,[30] the man married a woman in India in a potentially polygamous marriage. He went to New York, became a Christian and, apparently believing that the orthodox statement that a marriage which is contrary to the law of nature as generally recognized in Christian countries will not be recognized as marriage in such a country, really expressed the law of New York, applied for a license to marry another woman. The court held that he was properly denied the license. In the English cases, the facts with respect to the marriage were the same: the judgments in the trial court and in the Court of Appeal were for a decree of nullity of a second marriage in England[31] and an affirmance of such a decree.[32]

It must be recognized, however, that denial of a normal incident to a valid marriage is a harsh measure. For that reason, no incident should be denied unless its enjoyment in the state where that enjoyment is clainned violently offends the moral sense of the community. Sexual intercourse between two persons, whether married or not, if they are of different races[33] or too closely related by blood,[34] may so offend the moral sense of the people of a state and may, therefore, properly be denied. It seems, however, that this can hardly be true of emancipation from tutelage, administration of the decedent estate of the spouse, intestate succession to such an estate as a surviving spouse,

29. 19 B.U.L. REV. 353. In Stevens v. United States, 146 F.2d 120 (10th Cir. 1944), the court held that an extra-state ceremony was not effective, where the union was miscegenous, to work a revocation of the woman's will by a marriage which was not a marriage. The court said: "But *in respect of the acquisition of property* in Oklahoma by descent and distribution, persons domiciled in that state, . . . cannot elude the laws of the state by going into another state and being married there . . ." (*Id.* at 123) (Emphasis added). In Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948), the court showed itself willing to declare that a valid foreign miscegenous marriage was void, if enjoyment of the incident of sexual intercourse was claimed in the state.

30. Application of Sood, 142 N.Y.S.2d 591 (Sup. Ct. 1955).

31. Srini Vasan v. Srini Vasan, [1946] P. 67.

32. Baindail v. Baindail, [1946] P. 122 (C.A.).

33. *Ex parte* Kinney, 14 Fed. Cas. 602, No. 7, 825 (C.C.E.D. Va. 1879); State v. Bell, 66 Tenn. 9 (1872). See State v. Ross, 76 N.C. 242, 249 (1877), and Miller v. Lucks, 203 Miss. 824, 36 So. 2d. 140 (1948).

34. State v. Brown, 47 Ohio St. 102, 23 N.E. 747 (1890).

annulment of the marriage, or divorce from it.[35]

Modern judicial recognition of this principle is found in English, Canadian and American cases. In *Srini Vasan v. Srini Vasan*,[36] Barnard, J., quoted with approval language of Lord Maugham to the effect that Hindu polygamous marriages would "properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, . . . and some other exceptional cases."[37] In *Lee Sheck Yew v. Attorney General*,[38] the court held that the two wives of a Chinese, were entitled to the widows' exemption from death duties under the law of British Columbia, he having died while temporarily resident there and testate as to movables there. McDonald, C.J.A., said:[39] "It is no crime in this country for a domiciled Chinese subject to marry two wives in China. We are not asked to enforce a contract repugnant to our policy but merely to recognize a status created by foreign law."[40]

A difficult problem might have arisen if the husband had become domiciled in British Columbia, or had owned immovables there. What shares would the widows have taken, particularly if there were children as well? The problem seems, however, not impossible of solution: treat all the widows as one widow and distribute the widow's share equally among them.[41]

In *Miller v. Lucks*,[42] a case of foreign miscegenous marriage, the court of Mississippi permitted the husband to take immovables in that state as a surviving husband. Sidney Smith, C.J., speaking of the statutes concerning miscegenations, said that they were intended to prevent white and Negro from living in the state as husband and wife and: "Where, as here, this did not occur, to permit one of the parties to . . . inherit property in this state from the other does no violence to the purpose[thereof]."[43]

35. On the cases which denied these incidents as well as the older cases denying sexual intercourse, see 19 B.U.L. REV. 357-66.

36. See [1946] P. 67, 69. The quotation is from Sinha Peerage Claim, 171 H. LORDS J. 350 (1939).

37. The reference may be to the English court's refusal to decree divorce from a polygamous marriage. Hyde v. Hyde, L.R. 1 P. & D. 130 (1866).

38. [1924] 1 W.W.R. 753, 756 (Brit. Col. Ct. App. 1923).

39. [1924] 1 W.W.R. at 756.

40. Compare Seedat's Ex'r v. The Master, (Natal), [1917] App. Div. 302 (So. Afr. Sup. Ct.), wherein the sole surviving wife—the plural marriage having been valid and the husband and one wife having changed domicile to South Africa after the death of the other wife—was charged death duties at the rate applicable to strangers, while their children were charged at the rate applicable to "children."

41. This was the solution of the California Court of Appeal in *In re* Dalip Singh Bir's Estate, 83 Cal. App. 2d 256, 188 P.2d 499 (1948).

42. 203 Miss. 824, 36 So. 2d 140 (1948).

43. *Id.*, 36 So. 2d at 142.

II. Particular Problems

1. *Form of Ceremony*

The technique of British judges—to divide the problems into those of "form" and "essence" and then to assign a given question, *e.g.*, consent of parents, to one or the other, apparently more or less *in vacuo*—puts the cart before the horse.[44] The technique of Lord Merriman, P., in *Apt v. Apt*,[45] is another matter. His technique, as I see it, was to inquire whether a given type of marriage, by proxy, is "positively prohibited" by the law of England or not. If it is, it falls into the category, "essence"; if not, it is in the category, "form." This looks at first things first, and the words are used merely as convenient tags to express the result. The discussion herein will be solely of the form of ceremony, the methods used by the parties to signify their consents to becoming married.

The matters which are considered by the courts as involving requirements as to the form of ceremony of marriage include: the necessity of a formal ceremony, the identity of the persons authorized to perform such ceremonies, the necessity of a license, the conditions precedent to the issuance of a license, marriage by proxy, the exchange of promises of marriage without a formal ceremony whether face to face or by correspondence. Questions concerning these matters are, except in rare cases, held to be for the law of the state in which the exchange of consents takes place.

Almost all of the recent cases[46] have been concerned with proxy marriages and common-law marriages and almost all of them have held the ceremony effective,[47] if such marriages were in proper form under the *lex loci celebrationis*.[48] Holding these extra-state forms ef-

44. See, *e.g.*, the treatment of the requirement of consent of parents in Stewart v. Stewart, 56 Ont. L.R. 57 (1924), [1925] D.L.R. 1, and the critical annotation thereto, [1925] D.L.R. at 6-7.

45. [1947] P. 127.

46. In Boysen v. Boysen, 301 Ill. App. 573, 23 N.E.2d 231 (1939), the Illinois statute, Ill. Ann. Stat. c. 89, §§ 6a, 19 (Smith-Hurd 1956), required premarital examination for veneral disease as a condition precedent to the issuance of a license to marry: the extra-state ceremony was effective.

In *In re* Kinkead's Estate, 239 Minn. 27, 57 N.W.2d 628 (1953), under the *lex loci celebrationis*, a false affidavit was not a ground for nullity of marriage where the license was issued in reliance thereon: the ceremony was effective.

In Rynn v. Rynn, 63 Pa. D. & C. 143 (C.P. 1948), the marriage was valid; although the *lex loci celebrationis* did not permit marriages to be performed by a justice of the peace, it did not make such marriages void.

In *In re* Campbell's Estate, 260 Wis. 625, 51 N.W.2d 709 (1952), the parties left Wisconsin for the purpose of evading its requirement of a premarital examination for venereal disease as a condition precedent to the issuance of a license to marry. Moreover, Wisconsin required two witnesses to a marriage and the *locus celebrationis* did not. Neither the intention to evade, nor the absence of witnesses, made the varriage void.

47. See notes 10, 11 *supra*.

48. In Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951), it was held that no effect could be given to an attempted common-law marriage in England where the institution does not exist.

fective is correct. It accords with the idea that where persons believe themselves to be married, they should be held to be married, unless their union is very offensive to the law of the intended family domicile. This policy is well put by Taylor, C.J., in *Madewell v. United States*:[49] "The public policy of Tennessee and, this Court believes, the public policy of the civilized world, is to sustain marriages, not to upset them."

Several recent cases have considered the validity of proxy marriages, all but one holding that form of ceremony effective. In the earlier leading case of *Ex parte Suzanna*,[50] Lowell, J., expressed the opinion that such a ceremony was effective only if permitted by the law of the domicile of the proxy-giver, as well as that of the state in which the proxy acted. The validity of this doctrine was denied by Morton, J., sitting two years later in the same district.[51] His opinion was that Massachusetts, though common-law marriage was not there valid, "does not forbid an alien resident here from marrying by proxy in a manner valid according to the laws of his country." He indicated, moreover, that, even if Massachusetts should refuse to recognize the validity of proxy marriages, its refusal would be immaterial under the circumstances there involved. The woman sought admission to this country as the "wife" of the man. He said: "Questions of this character are essentially federal, and ought, if possible, to be decided on principles of law uniformly applicable throughout the country."[52]

In the recent cases, no emphasis on the laws of the domicile of either party appears, and the solution of the problem is found in the content of the *lex loci celebrationis*.[53] One case holds the form ineffective

In Miko Jung v. Novaya, 47 N.Y.S.2d 48 (Dom. Rel. Ct. 1944), it was held that the marriage of two Japanese in the Japanese consulate in New York under the forms of Japanese law was not a valid marriage. The court's position was that Japan has no extra-territorial rights in this country and could not impose its marriage forms on New York as proper ceremonial forms. This result seems wrong, if the Japanese law makes such marriages valid for its own people abroad. If Japan would recognize this as a valid marriage, the reverence of New York for its own forms should not block its validity.

49. See 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

50. See 295 Fed. 713, 717 (D. Mass. 1924).

51. See Kane v. Johnson, 13 F.2d 432 (D. Mass. 1926).

52. *Ibid.* It may be that this approach was adopted in Silva v. Tillinghast, 36 F.2d 801 (D. Mass. 1929), in which the foreign proxy marriage was regarded as undoubtedly valid: no mention was made of the identity of the domicile of the American party. In Cosulich Societa Triestina Di Navigazione v. Elting, 66 F.2d 534 (2d Cir. 1933), it was assumed that a proxy marriage was effective if it was valid under the *lex loci celebrationis*.

53. No mention of the identity of the domicile of either party was made in United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946), Fernandes v. Fernandes, 275 App. Div. 777, 87 N.Y.S.2d 707 (2d Dep't 1949), Ferraro v. Ferraro, 77 N.Y.S.2d 246 (Dom. Rel. Ct. 1948) (highly probable that the parties were domiciled in New York, which does not permit common-law marriages within its borders).

In Globus' Petition, 60 Pa. D. & C. 55 (C.P. 1947), the opinion of Lowell, J., in the *Suzanna* case, *supra* note 50, was quoted, but the court also said: "The

under that law;[54] the others hold it valid.[55] The courts have had a little difficulty in deciding whether such a marriage is a formally celebrated or a common-law marriage. It has been said to be valid under the law of the District of Columbia both as a "common law marriage and a marriage by proxy,"[56] and invalid as a common-law marriage but valid as a ceremonial marriage under that law.[57] It has been said that such a marriage is regarded as a valid ceremonial one in Nevada and as a common-law marriage in other states.[58] Of course, those proxy marriages wherein the proxy acts in a civil law state are ceremonial marriages under its law.[59]

The few cases concerning marriage by correspondence hold[60] or assume[61] that they are valid if valid under the law of the place where an ordinary contract would be made by mail—normally the state in which the instrument containing the second party's signification of consent is put in the mail. There is no good reason why any state which recognizes the validity of marriages within its boundaries by an exchange of consents without cohabitation should object to marriage by correspondence contracted therein, nor should the genuineness of the intention to become married be doubted: the writing is much better evidence than is parol evidence of the exchange of oral consents.[62]

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general rule is that a marriage valid where contracted is valid everywhere [unless repugnant to the public policy of the domicile]." 60 Pa. D. & C. at 57. This was the approach in Apt v. Apt, 176 T.L.R. 359 (P.D.A. 1947).

54. Respole v. Respole, 70 N.E.2d 465 (Ohio C.P. 1946). The court was of the opinion that nature of the marriage ceremony requires the presence of both parties. With respect to this error, see the expressly contrary opinion in the *Ferraro* and *Layton* cases, *supra* note 53, and Lorenzen, *Proxy Marriage and the Conflict of Laws*, 32 HARV. L. REV. 473, 475 (1919); and consider the cases of marriage by correspondence, notes 60-62 *infra*.

55. Cases cited notes 50-53 *supra*.

56. See Fernandes v. Fernandes, 275 App. Div. 777, 87 N.Y.S.2d 707 (2d) Dep't 1949).

57. Validity as a common-law marriage was denied on the ground that the District requires cohabitation in such cases and there was none. See Ferraro v. Ferraro, 77 N.Y.S.2d 246, 249 (Dom. Rel. Ct. 1948).

58. See Barrons v. United States, 191 F.2d 92, 97 (9th Cir. 1951).

59. See Kane v. Johnson, 13 F.2d 432 (D. Mass. 1926): "Moreover, the marriage here in question was formally entered into before a public official."

60. Great Northern Ry. v. Johnson, 254 Fed. 683 (8th Cir. 1918); Commonwealth v. Amann, 58 Pa. D. & C. 699 (Q.S. 1947). In this case, the court met the argument that, since the man wrote at another time his words could not be considered *verba de presenti*, by characterizing them as containing a continuing offer.

61. Ray v. Ray, 193 Misc. 131, 83 N.Y.S.2d 126 (Sup. Ct. 1948). This is an astounding case: the judgment purported to bastardize the child of the union "as between the parties, but expressly not affecting the child who is absent from the action." See also the odd technique used by the court to identify the *lex loci celebrationis*, note 10 *supra*.

62. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 488 n.62 (1919), reports that the Judge Advocate General rendered an opinion, as the article was going to press, that such marriages were valid. Manton, J., in United States *ex rel.* Aznar v. Commissioner of Immigration, 298 Fed. 103, 105 (S.D. N.Y. 1924), reports the same opinion and adds that it

The recent cases of marriages in the traditional common-law forms—by exchanges of consents or by such exchanges followed by cohabitation[63]—have, except for the few aberrant cases reported, *supra*,[64] examined only the *lex loci celebrationis* to discover whether or not the form was effective.[65] It is not entirely clear whether the courts think that they must give full faith and credit to that law, or whether this should be done through comity,[66] or for some other reason. It seems clear that full faith and credit is not required and that the rule does not rest on comity, but that it is simply a rule of the conflict of laws.[67]

The modern problems have been: whether the parties must be domiciled or resident in the state in which they hold themselves out as man and wife; whether some less permanent, or even casual, contact with that state will do; and whether cohabitation in another state, which does not permit common-law marriage, can be considered as corroboratory of the asserted exchange of consents.

There seems to be no valid reason why an exchange of promises in a state which permits this type of common-law marriage should not

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further states "that this method might properly be facilitated by the military authorities in France."

63. In Ferraro v. Ferraro, 77 N.Y.S.2d 246, 249 (Dom. Rel. Ct. 1948), the court was of the opinion that a proxy marriage in the District of Columbia could not be supported as a common-law marriage there because the District requires cohabitation as well as an exchange of consents.

64. See note 10 *supra*. State *ex rel.* Superior Court, 23 Wash. 2d 357, 161 P.2d 199 (1945), may be a case of control of the form of ceremony by the domicile to which the parties intend to return. It was held that Washington domiciliaries, who live there in a meretricious relationship, cannot establish a common-law marriage by merely holding themselves out as man and wife in another state in which they temporarily sojourn. (The only case cited for the presumption of continuation of the meretricious relationship was a Washington case.) *Semble*, however, that if there had been evidence of new promises made in that state of temporary sojourn, the marriage would have been held valid.

65. Gradias v. Gradias, 74 P.2d 53 (Ariz. 1937); Pierce v. Pierce, 379 Ill. 185, 39 N.E.2d 990 (1942); Abbott v. Industrial Comm'n, 80 Ohio App. 7, 74 N.E.2d 625 (1946); Wagner v. Wagner, 152 Pa. Super. 4, 30 A.2d 659 (1943); and cases cited, notes 66-73 *infra*.

66. In Osburn v. Graves, 210 S.W.2d 496 (Ark. 1948), the court was of the opinion that the effectiveness of the ceremony was entitled to full faith and credit, but it was thought to be a matter of comity in Shea v. Shea, 268 App. Div. 677, 52 N.Y.S.2d 756, 759 (2d Dep't 1945), *rev'd on other grounds*, 294 N.Y. 909, 63 N.E.2d 113 (1945), on the dissenting opinion of Johnston, J.

67. The opinion of Johnston, J., in the *Shea* case, *supra* note 66, contains no mention of either comity or full faith and credit, his talk being about the conflict of laws rules of New York. Barrons v. United States, 191 F.2d 92 (9th Cir. 1951), a case of proxy marriage, also makes it clear that only choice of law is involved. It was held that where the validity of a marriage, under 38 C.F.R. § 3.49(a) (1949), was to be determined "according to the laws of the place where the parties resided . . .," the whole law of the place of residence was to be consulted, including its conflict of laws rules.

In *In re* Pierce's state, 310 Ill. App. 481, 34 N.E.2d 564 (1941), it was held that the common-law marriage of Illinois domiciliaries in Nevada was ineffective. Huffman, J., said: "Such a situation would fail to show any governmental interest that was superior to that of the sister state. Therefore, we shall consider the sanction of common-law marriages by Nevada to be intended to apply only to its own citizens." *Id.*, 34 N.E.2d at 566.

be wholly effective as a form of ceremony and, if the evidence of such an exchange is sufficiently clear, casual presence in the state at the time of that exchange should be enough. The courts have had no difficulty with this situation.[68]

Where, however, cohabitation and repute are needed, either as corroboration of the assertion of the exchange or as the basis for an inference that there was such an exchange, the courts have not been unanimous. Where the cohabitation and repute were in the state of the parties' domicile, the marriages have been valid.[69] Where the law of a state requires both express exchange of consents and cohabitation as man and wife, if the cohabitation is an essential part of the form both the exchange and the cohabitation must be in a state which recognizes the validity of common-law marriages.[70] On the other hand, if the cohabitation and repute is merely corroboratory of the exchange of consents there appears to be no valid reason why the locus of the former should be material, it is merely evidentiary.[71] Where the cohabitation and repute is the sole foundation for a conclusion that the parties did actually consent to marriage, the holding out must occur in a state which recognizes such consent, without an exchange of express consents, as a sufficient form.[72] The fact that it is difficult to determine whether the holding out constitutes the common-law marriage or is evidentiary of an express exchange of consents may account for the cases in which it has been held that a quite casual contact with a state was sufficient.[73]

68. Gilbert v. Gilbert, 275 Ky. 559, 122 S.W.2d 137 (1938); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945). *In re* Foster, 287 P.2d 282 (Idaho 1955) (*semble*). In Tetterton v. Arctic Tankers, Inc., 116 F. Supp. 429, (E.D. Pa. 1953), the court considered the law of Virginia where the parties "visited his relatives," but found no marriage under that law. In State *ex rel.* Smith v. Superior Court, 23 Wash. 2d 357, 161 P.2d 188 (1945), the court found no evidence of new promises in the state where the parties "temporarily sojourned."

In *In re* McKanna's Estate, 234 P.2d 673 (Cal. App. 1951), it was said that, where the relationship was meretricious in its inception in another state, Texas requires new promises made therein, unless the parties become domiciled in Texas, in which case consent to a new marriage will be inferred from the original intent to marry coupled with cohabitation and holding out in Texas.

69. *In re* McKanna's Estate, 234 P.2d 673 (Cal. App. 1951); *In re* Foster, 287 P.2d 282 (Idaho 1955); Boltz v. Boltz, 325 Mass. 726, 92 N.E.2d 365 (1950); Craddock's Case, 310 Mass. 116, 37 N.E.2d 508 (1941).

70. See Ferraro v. Ferraro, 77 N.Y.S.2d 246 (Dom. Rel. Ct. 1948).

71. Brown's Adm'r v. Brown, 308 Ky. 796, 215 S.W.2d 971 (1948); Franzen v. Equitable Life Assur. Soc'y, 130 N.J.L. 457, 33 A.2d 599 (Sup. Ct. 1943); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945).

It is reported in *In re* McKanna's Estate, 234 P.2d 673 (Cal. App. 1951), that the Attorney General's Department of Texas ruled in 1946 "It can make no difference where such act or acts of assumption or holding out take place." *Id.* at 676.

72. Rittgers v. United States, 154 F.2d 768 (8th Cir. 1946); *In re* Foster, 287 P.2d 282 (Idaho 1955).

73. In the following cases, the various contacts with the state in which the holding out occurred were or would have been considered sufficient. Tetterton v. Arctic Tankers, Inc., 116 F. Supp. 429 (E.D. Pa. 1953) (visiting his relatives); Madewell v. United States, 84 F. Supp. 329 (E.D. Tenn. 1949) (living for

2. *Status: Particular Vices*

A. Fraud. In all of the recent cases concerning fraud in inducing the marriage, at least one of the parties left the domicile and returned to it. In one case, the court assumed that the particular fraud was not a ground for annulment under the *lex loci celebrationis* but gave a decree on its own law.[74] In two others, the court refused a decree on its own law, though the fraud was probably a sufficient ground under the *lex loci celebrationis*.[75] In the other two, one court refused a decree because it would not have been granted under the other law,[76] and one gave a decree, consulting only the *lex loci celebrationis*.[77]

Fraud in these marriage cases cannot properly be called a vice of form: what is induced by the fraud is not an ordinary contract, but consent to assuming a status in which the domiciliary state has an overwhelming interest. If the domiciliary state regards the fraud as a fatal vice, it should protect itself and its domiciliary from an undesirable union, no matter what the other law is. If the former regards the fraud as not a sufficient vice, it sees no evil against which it or its domiciliary needs protection. This is especially true where, in the state to which the parties go for the ceremony, annulments are very easy, while the domiciliary state deems only fraud going to the "very essentials of the marriage relation" sufficient.[78]

B. Consent of Parents and Nonage. In none of the recent cases, in all of which the parties promptly returned to their domicile, has lack of consent of the parents or guardian been considered a sufficient reason for declaring that an extra-state ceremony was ineffective, even though the parties left their domicile for the purpose of avoiding its requirement.[79] The reasons have varied: courts have relied on the

several months); Stilley v. Stilley, 219 Ark. 813, 244 S.W.2d 958 (1952) (living); Kennedy v. Damron, 268 S.W.2d 22 (Ky. 1954) (an established place of abode); Gilbert v. Gilbert, 275 Ky. 559, 122 S.W.2d 137 (1938) (short visit); Riddle v. Peters Trust Co., 147 Neb. 578, 24 N.W.2d 434 (1946) (sojourning "they being of the theatrical profession"); Jordan v. Mohan, 15 N.J. Super. 513, 83 A.2d 614 (App. Div. 1951) (residence); *In re* Singer's Estate, 138 N.Y.S.2d 740 (Surr. Ct. 1955) (honeymooning); Dibble v. Dibble, 88 Ohio App. 490, 100 N.E.2d 451 (1950) (the community in which they reside); *In re* Warren, 40 Wash. 2d 342, 243 P.2d 632 (1952) (residence). But sojourning was not enough where the original cohabitation was meretricious. State *ex rel.* Smith v. Superior Court, 23 Wash. 2d 357, 161 P.2d 188 (1945).

74. Lederkremer v. Lederkremer, 173 Misc. 587, 18 N.Y.S.2d 725 (Sup. Ct. 1940).

75. Anonymous v. Anonymous, 85 A.2d 706 (Del. Super. 1951), *aff'd on other grounds sub nom.* Du Pont v. Du Pont, 90 A.2d 468 (Del. 1952); Levy v. Levy, 309 Mass. 230, 34 N.E.2d 650 (1941).

76. McConnell v. McConnell, 99 F. Supp. 493 (D.D.C. 1951).

77. Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766 (1950).

78. See Anonymous v. Anonymous, *supra* note 75.

79. An interesting, though doubtfully valid, reason for denying an annulment appears in Carr v. Carr, 104 N.Y.S.2d 269, 272 (Sup. Ct. 1951), in which the infant sought the annulment. Hinkley, Official Referee, said that, moreover, the infant did not come into court with clean hands as he "deliberately sought to and did circumvent the laws of this State."

fact that statutes requiring consent are usually regarded as directory only;[80] on the existence at the domicile of a statute enacting the "common law" rule of the conflict of laws;[81] and on comparison of the public policy involved in cases of other possible vices of substance.[82]

As in the "consent" cases, the parties to marriages attacked for the possible vice of nonage all went from their domicile for the ceremony and promptly returned. In all but two of the cases, the marriages were held valid, the reasons given showing variations similar to those in the "consent" cases.[83] In New Hampshire it was held that the trial court had jurisdiction to entertain a suit for annulment as such a marriage might be repugnant to public policy. The emphasis was on the interest in the status of the domicile, *qua* intended family domicile.[84] In Minnesota the court held that the marriage was voidable under its own law and the other, as well; but actually applied its own law.[85]

Decisions holding that extra-state marriages of persons below the ages permitted under the law of the intended family domicile are not void may well reflect the policy stated in *Boehm v. Rohlfs*:[86]

> As was wisely said by the able trial court: "Because young people sometimes indiscreetly get married before they reach the legal age, it is not the policy of the law to impose upon them, and especially their in-

80. Castor v. United States, 78 F. Supp. 750 (W.D. Mo. 1948).

81. McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163 (1936); Cross v. Cross, 40 Mont. 300, 102 P.2d 829 (1940).

82. Hitchens v. Hitchens, 47 F. Supp. 73 (D.D.C. 1942); McDonald v. McDonald, *supra* note 81; Walker v. Walker, 316 Ill. App. 251, 44 N.E.2d 937 (1942); Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941); Carr v. Carr, *supra* note 79. In the *Hitchens* and *Noble* (concurring opinion, 300 N.W. at 888) cases, the court intimated that the result would have been different if a party had been under the District's statutory age of consent (18 for males, 16 for females). In *McDonald*, the court spoke of the absence of a statute "expressly and clearly regulating marriages abroad," giving the Uniform Marriage Evasion Act as an example, and of "marriage . . . regarded as odious by the common consent of nations; *e.g.*, where it is polygamous or incestuous by the laws of nature." 58 P.2d at 164. In *Carr*, the contrast was with marriages "contrary to the prohibitions of the natural law or the express provisions of a statute." 104 N.Y.S.2d at 271.

83. In Payne v. Payne, 121 Colo. 212, 214 P.2d 495 (1950), the court quoted Colorado's "common law rule" statute. In Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937), such marriages were voidable and the Uniform Marriage Evasion Act applies only to marriages which are void under the domiciliary law. In Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949), the court contrasted marriages of infants with bigamous and miscegenous marriages. In Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945), the court quoted Pennegar v. State, 87 Tenn. 244, 10 S.W. 305 (1889), to the effect that the *lex loci celebrationis* governs "matters of form, ceremony or qualification," and said that nonage is question of the party being not "qualified." It is to be noted that in *Pennegar* the marriage was void for remarriage with a paramour.

84. Sirois v. Sirois, 94 N.H. 215, 50 A.2d 88 (1946).

85. Von Felden v. Von Felden, 212 Minn. 212, 2 N.W.2d 426 (1942). A marriage below age was voidable *ab initio* under the law of the place of ceremony and voidable from the date of the decree under the Minnesota statute, STAT. 1927 § 8581, MINN. STAT. ANN. § 518.02 (1947): the latter type of decree was ordered.

86. 224 Iowa 226, 276 N.W. 104, 108 (1937).

> nocent offspring, the distressing penalties that would result if the marriage was held to be absolutely void, and it would be especially harsh and unwarranted to so hold if neither of the young people asked to have the marriage annulled after arriving at an age where either could have it set aside."[87]

It is far from clear, however, that a state should apply its law of marriage, making youthful marriage voidable, to an extra-state ceremony. This type of vice does not reach the dignity of making the marriages odious to the people of the domicile. It seems that courts should usually wait for some positive indication of legislative intent that persons relying on the laws of the state for the creation of the status should be unable to marry by an extra-state ceremony. Nor should a court deem such a ceremony in any degree ineffective unless both the laws of that state and its own make such marriage void or voidable *ab initio.*

On the other hand, even though the law of the place of ceremony makes a particular infant marriage valid, the law of the intended family domicile may well be applied to protect the state and the infant party if its procedure, whether called annulment or divorce, is such that the decree operates to dissolve the marriage only from the date of decree, or if the annulment is in the discretion of the court, or if the children born to a marriage which is voidable *ab initio* can be deemed to be begotten or born in wedlock,[88] or if a statute protects their legitimacy.

C. Remarriage after Divorce. Three types of statutes forbidding remarriage within a period after divorce must be considered: (1) those which forbid or declare void the remarriage of the guilty party; (2) those which forbid or declare void the remarriage of either party; (3) those which purport to keep the marriage alive insofar as the capacity to marry is concerned.[89]

The first type, containing unilateral prohibitions only, are uniformly held to have no effect on extra-state ceremonies,[90] unless the prohibi-

87. It may be that a recognition of this policy motivated the decision in Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945), wherein it was held that cohabitation, after reaching lawful age under the *lex loci celebrationis,* outside the place of ceremony and the domicile validated the marriage.

This somewhat startling, but highly sensible, notion that a state somehow retains control of a marriage which was invalid under its laws, and can validate it by matter *ex post facto* is also found in cases concerning marriages which are bigamous because they were made too soon after divorce. In Abramson v. Abramson, 49 F.2d 501 (D.C. Cir. 1931), a curative statute, enacted after the parties had changed domicile to another state, was held effective in the latter. Accord: Bannister v. Bannister, 181 Md. 177, 29 A.2d 287 (1942); Shippee v. Shippee, 95 N.H. 450, 66 A.2d 77 (1949).

88. See Sirois v. Sirois, 94 N.H. 215, 50 A.2d 88, 89 (1946).

89. Where the control of remarriage after divorce, is by way of decree *nisi* or interlocutory, the marriage is not dissolved until the decree has become final by the lapse of time or by entry of a final decree.

90. Bituminous Casualty Corp. v. Wacht, 84 Ga. App. 602, 66 S.E.2d 757

tion is of marriage to the paramour during the life of the innocent spouse.[91] The former are treated as statutes involving penalties which, under the standard rule, do not have extra-territorial effect. Whether this "penalty" analysis is correct or not, it is clear that such statutes do not show a strong public policy.[92]

The statutes forbidding remarriage with the paramour are treated as declaring a strong public policy and, therefore, invalidate marriages in which the parties intend to and do return to the domicile after the ceremony. The policy involved is probably two-fold. It may be directed to protecting the first marriage by removing the temptation to engage in adultery with the hope of marrying the paramour if divorced for the adultery; or it may be directed to protecting others from injury to the moral sense by their seeing the cohabitation of the parties to the second marriage; or, obviously, it may be directed to both. Whichever alternative is correct, it seems that the state which should be protected is that of the domicile to which the parties return to live and that, therefore, the law of no other intended family domicile should regard such marriages as void.

Where bilateral prohibitions are involved, the "penalty" approach is not followed: the question is—how strong a policy against "progressive polygamy"[93] is shown? Where the statute merely "forbids," "prohibits" or declares "unlawful" such remarriage, the policy is not strong,[94] and where such marriages are declared "void" there is a difference of opinion.

In an earlier article,[95] I stated the conclusions: that the word "void" in the prohibitory statute shows a strong enough public policy to require the inference that it makes extra-state ceremonies ineffective and, *a fortiori,* that the result should be the same where the prohibitory period is coterminous with the period for appellate procedure in the divorce suit. I see no reason to depart from either of these.

The word "void," when compared with those in such statutes of other states, is a strong word.[96] Moreover, grave problems are raised by remarriages during the prohibitory period, and if that period is the

(1951); *In re* Palmer's Estate, 79 N.Y.S.2d 404 (Surr. Ct. 1948). Compare Wagner v. Wagner, 58 Mont. Co. L.R. 18 (Pa. C.P. 1941), discussed note 15 *supra.*

91. 10 Miss. L.J. at 112-13.

92. *Id.* at 111-12.

93. See Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787, 789 (1908).

94. *In re* Winder's Estate, 219 P.2d 18 (Cal. App. 1950); *In re* Kinkead's Estate, 239 Minn. 27, 57 N.W.2d 628 (1953).

95. 10 Miss. L.J. at 113-18.

96. In Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 147 (1939), the court held, however, that such a marriage was not void. The court, knowing there was no Idaho case in point, construed the Idaho statute in the light of its own statute and cases. It is interesting to note that it misunderstood those cases which, when the parties intended to return to Washington, held the marriages void, but held them valid where there was no such intent.

same as that for appellate procedure in the divorce suit, the provisions should be treated as if they provided, in effect though not in terms, for decrees *nisi*.[97]

Where the statute in the divorcing state provides that the decree does not "dissolve" the marriage, or "shall not effect the status" until the end of the stated period, it should, *a fortiori*, be construed to give to the decree of divorce the effect of a decree *nisi*. It should, therefore, make no difference whether the party intended to return to the state in which the decree was handed down or to leave there forever.

> The question here is not one of giving extra-territorial effect to the Wisconsin statute prohibiting another marriage within one year. The controlling matter is whether or not the appellant was divorced from her former husband at the time of her purported marriage to the respondent . . . and she was not then divorced from [him].[98]

D. Consanguinity. It is generally said, and undoubtedly accurately where a British or an American state is concerned, that persons who rely on the law of a state for the creation of the status do not succeed in getting married by ceremonies in another state if their marriage is incestuous by the common consent of Christian countries. This common consent extends only to unions in the direct line of ascent and descent or of brother and sister.[99]

Where more remote blood relationship or any connection by affinity is concerned, the question is whether the prohibitory statute shows a public policy on the same level as that of the abhorrence of marital unions which are incestuous by common consent.[100]

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97. A Colorado statute provided that, during the period of one year in which the divorce could be re-opened, "neither party thereto shall be permitted to marry any other person." This was held not to have been intended to have any extra-territorial effect as the Colorado court had held that this statute did not suspend the finality of the decree of divorce. *In re* Winder's Estate, 219 P.2d 18 (Cal. App. 1950).

98. See Means v. Means, 40 Cal. App. 2d 569, 104 P.2d 1066, 1068 (1940) (the divorce was decreed in Washington, the party moved to California and went to Arizona for the ceremony); *Accord: Ex parte* Soucek, 101 F.2d 405 (7th Cir. 1939); Henderson v. Henderson, 199 Md. 449, 87 A.2d 403 (1952) (applying Virginia code). *Contra:* King v. Klemp, 26 N.J. Misc. 140, 57 A.2d 530 (Ch. 1947); *In re* Peart's Estate, 277 App. Div. 61, 97 N.Y.S.2d 879 (1st Dep't 1950). In *King*, the divorce was decreed in Kansas and the party remarried in New York. The New Jersey court said that the Kansas court had held that decrees under the statute were final, and held that it merely stated a Kansas policy which would not be given extra-territorial effect by New York courts. In *Peart*, the court held that language of the Virginia court in Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316 (1923), to the effect that the marriage was not dissolved until the end of the period, was dictum; and held that the Virginia decree was final. Two out of five judges dissented, 97 N.Y.S.2d at 889-90, on grounds similar to those stated in the quotation from the *Means* case, *supra*.

99. See Commonwealth v. Lane, 113 Mass. 458, 463 (1873); STORY, CONFLICT OF LAWS § 104 (2d ed. 1841).

100. It is difficult to determine why some states abhor some of these marriages. The Wisconsin statute, WIS. STAT. § 245.03(1) (1953), makes it appear that the prohibition is based on an idea of eugenics: first cousins may marry

Only one of the 48 states, the District of Columbia, Alaska, or Hawaii, permits the marriage, within its borders, of uncle and niece or aunt and nephew.[101] The statutes of 22 of these declare such marriages "incestuous" and those of 13 others declare them "void." The others "prohibit" them, or declare them "unlawful," or provide that such persons are "incapable of contracting marriage," or "shall not marry." On the other hand, only 25 states forbid the intermarriage of first cousins, 8 declaring them incestuous and 7 declaring them void.

The unanimous disapproval of marriages of uncle-niece and aunt-nephew marriages plus the strong language used in 42[102] states with respect to them, seems to put such marriages on the level of incest by the common consent of American states if they are declared "incestuous" or "void" by the statutes and extra-state ceremonies should be held to be ineffective.[103] Where marriages of first cousins are concerned, however, the disapproval is far from unanimous and only 15 states use any strong word. It seems, therefore, that extra-state ceremonies should be effective only if such marriages are declared "incestuous" by the statutes.[104]

E. Miscegenation. The public policy against miscegenation is sectional and, except in the southern states, is not strong and even shows some tendency toward weakening. Its sectional nature is clear from the distribution of the prohibitory statutes, almost all of which are found in states below the Mason and Dixon line and in those west of the

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if the woman is 50 years old. In many of them, however, no distinction is made between consanguinity and affinity.

101. The Rhode Island statute declares the intermarriage of uncle-niece and aunt-nephew to be "null and void," but permits marriages of Jews within the degrees allowed by their religion. R.I. GEN. LAWS c. 415, §§ 1-4 (1938).

102. This total is made up of those whose statutes contain the words "incestuous" or "void" or both, plus those which use less strong language in the marriage statutes but set criminal penalties for sexual intercourse or intermarriage between persons so related.

103. Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938); Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942). In both of these cases the word "incestuous" or "void" was in the marriage statutes and the criminal statutes applied to sexual intercourse.

Compare Campione v. Campione, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct. 1951), *with In re* May's Estate, 280 App. Div. 647, 117 N.Y.S.2d 345, 347 (3d Dep't 1952). The New York statute declares such marriages "incestuous and void" and penal statutes impose penalties therefor. N.Y. DOM. REL. LAW § 5. The parties in *May* were Jews who left New York to marry in Rhode Island. The court said that such marriages were not "repugnant to our concept of natural law," calling to witness the fact that they were lawful in the state until 1893 and are still lawful under Levitical or Talmudic law. Desmond, J., dissented, substantially on the grounds stated in the text of this article. He said that New York had declared such marriages "incestuous, void and criminal," and that "we, by this decision, are denying it [the statute] its efficacy."

104. In my discussion of uncle-niece and aunt-nephew marriages, I did not intend to emphasize the use of the word "void" in a statute. My conclusion is based on cumulation of the indicia of public policy. In first cousin situation, however, there seems to be no sufficient cumulation of such indicia, nor even a sufficient number of states which use strong words.

Mississippi River.[105] This has also been recognized in the cases.[106] That it is weakening is shown by *Perez v. Lippold*,[107] which held the miscegenation statute of California unconstitutional, and by the repeal of such statutes in Montana.[108]

The emphasis in the cases has never been on the wording of the prohibitory statutes, though almost all of them contain sufficiently strong language to justify decisions that they were intended to apply to extra-state ceremonies.[109] All of the recent cases, except one,[110] have held such ceremonies ineffective:[111] all of them concerned domiciliaries who left the state for a ceremony and returned to live in the state.

It is possible that conflict of laws problems in this field will be solved by a United States Supreme Court decision in accord with *Perez v. Lippold*[112] but until that happens it must be recognized that in many states the public policy against miscegenation is a very strong one, and

105. *But see* IND. ANN. STAT. §§ 44-104, 44-105 (Burns 1952).

106. See State v. Ross, 76 N.C. 242, 246 (1877), in which there was express recognition of the sectional nature of the policy; and Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 307-08 (1889), in which the court distinguished between an earlier Tennessee case and Medway v. Needham, 16 Mass. 153 (1819), on the ground that the Tennessee prohibition represented a strong public policy, while that of Massachusetts represented only ideas of political expediency.

107. 32 Cal. 2d 711, 198 P.2d 17 (1948), wherein it was said that the statute was "not designed to meet a clear and present peril arising out of an emergency."

108. MONT. STATS. 1953, c. 4, § 1.

109. Almost all of the statutes declare such marriages "void"; a few states have constitutional prohibition; some add, and some have only criminal statutes applicable to such marriages. The exceptions are Indiana, IND. ANN. STAT. §§ 44-105 (Burns 1952), and Wyoming, WYO. COMP. STAT. ANN. §§ 50-108 (1945), (in both of which the statutes refer to marriages contracted in the state), and Colorado, *infra* note 110.

110. Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942). The statute, COLO. STAT. ANN. c. 107, § 2 (1935), declared the marriages of white and negroes or mulattoes "absolutely void. . . . provided that this section shall not be construed to prevent people from living in that portion of the state acquired from Mexico from marrying according to the custom of that country." Bock, J., dissented on the ground that this couple was not from that part of the state.

It is difficult to understand how miscegenous marriages can be odious in Colorado if people who live in one part of the state can contract such marriages, even within the state.

111. Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948) (*semble*); *In re* Shun J. Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942) (for the present law of Montana, see text at note 108, *supra*); Baker v. Carter, 180 Okla. 71, 68 P.2d 85 (1937); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955). In *In re* Monk's Estate, 48 Cal. App. 2d 209, 120 P.2d 167 (1941), the marriage of California domiciliaries in Arizona was held void under the statute of the latter state.

112. The commentators are not in agreement with respect to the supportable bases for the decision in *Perez*. See, *e.g.*, Notes: 17 GEO. WASH. L. REV. 262 (1949); 1 STAN. L. REV. 289 (1949); 58 YALE L.J. 472 (1949). In Naim v. Naim, *supra* note 111, the Virginia court cited cases in the following states holding miscegenation statutes constitutional: Arizona, Colorado, Georgia, Missouri, Montana, North Carolina, Oregon, Tennessee, Texas, and pointed out that in *Perez*, the only divergent case, there was a 4-3 decision.

that those states will continue to refuse to create the status for those persons who look to them for its creation, no matter where the ceremony takes place.[113]

F. Evasion of State Laws. The problems raised by attempts to get married in spite of various prohibitions of marriage have been solved in most cases by consideration of the strength of the public policy involved in the prohibition. In a considerable number of cases, however, the court has spoken of the intention with which the parties went out of the state for their marriage ceremony. Some of the courts have spoken of the subjective intention of the parties to evade the law, a state of mind including knowledge of the prohibition and an intention to marry in spite of it. Other courts have confined themselves to a search for an objective intention, a state of mind directed to returning to and living in the state.

In those cases in which the subjective intention to evade was held to be material, the marriage violated some strong public policy of the state.[114] In those in which it was held to be immaterial, the policy was not strong.[115]

The first section of the Uniform Marriage Evasion Act[116] provides in effect that any person who resides in the state, and intends to continue to reside[117] there, cannot contract a valid marriage by an extra-state ceremony if the marriage would have been void had it been entered into in the state. The substance of this section has been enacted in eleven states,[118] the substance of the entire Act in five

113. In Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955), the court said that holding miscegenous marriages void was the only way of maintaining the non-mongrel blood of the state's citizens. The existence of an "evasion" statute specifically applying to miscegenous marriages, VA. CODE ANN. §§ 20-58 (1950), strengthens the indicia of public policy.

114. Miscegenation: Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944); Brand v. State, 242 Ala. 15, 6 So. 2d 446, 448 (1941); Succession of Gabisso, 119 La. 704, 44 So. 438 (1907) (remarriage with paramour); *In re* Shun J. Takahashi's Estate, 113 Mont. 490, 129 P.2d 217, 220 (1942); *In re* Stull's Estate, 183 Pa. St. 625, 39 Atl. 16 (1898).

115. Health certificate condition precedent to license: *In re* Perez' Estate, 98 Cal. App. 2d 121, 219 P.2d 35 (1950). Consent of parents: Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941); Carr v. Carr, 104 N.Y.S.2d 269 (Sup. Ct. 1951). Nonage: Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945). Unilateral prohibition of remarriage after divorce: Shea v. Shea, 268 App. Div. 677, 52 N.Y.S.2d 756, 763 (2d Dep't 1945) [in the dissenting opinion of Johnston, J., adopted in the reversing judgment, 294 N.Y. 909, 63 N.E.2d 113 (1945)] *In re* Kogan's Estate, 203 Misc. 739, 118 N.Y.S.2d 705 (Surr. Ct. 1952).

116. This Act was withdrawn from the list of approved Uniform Acts in 1943. It was first approved in 1912, at which time many states had some form of "evasion" statute and was enacted in "full or in substance," in only five states between 1912 and 1915. "The Uniform Act can be effective only if it has widespread adoption; otherwise it merely tends to confuse the law." See [1943] HANDBOOK NAT'L CONF. COMM'N UNIFORM STATE LAWS 64.

117. A person resides and intends to continue to reside in the state if he is and intends to continue there domiciled. Sweeney v. Kennard, 331 Mass. 542, 120 N.E.2d 910 (1954). There is no "evasion" if the intention is to abandon the domicile in the state; the acquisition of a new domicile is not required.

118. Some of these statutes are confined to particular types of marriages,

others.[119] The effect of these statutes is to put some types of prohibited marriages on the same level as polygamy and incest by the common consent of Christian countries.[120]

It is improper for a court, unless compelled by an express statute, to give any effect to a subjective intention to avoid the application of a statute forbidding a particular kind of marriage.[121] Intention to evade may be material in a prosecution for marrying outside the state in violation of a statute, but is immaterial to a decision that the marriage is valid or void. A miscegenous, incestuous or progressively polygamous marriage is odious or not, depending on the strength of public policy. It is no less odious because the parties did not know of the prohibition and did not leave the state for their ceremony in order to get out from under the prohibition. A marriage which, without the intention to evade, is not sufficiently against public policy to demand a declaration of its nullity does not become more odious if it is entered into with the intention of avoiding the prohibition.

Finally, it is impossible to "evade" any law. One can avoid the application of one rule of law by invoking another, but he cannot evade the first.

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.[122]

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e.g., miscegenous; some of them speak of an "intention to evade" the laws of the state, but most enact an objective test for evasion—the intention to return.

119. It may be that the failure to enact the substance of the entire act is due to the content of the second section, which makes void any marriages in the state if they would have been void if contracted in the state where the party resides and intends to continue to reside. It has been applied in only a few cases, all involving New York's unilateral prohibition of the remarriage of the guilty party to a divorce for adultery. There are four of these cases, of which Canwright v. Canwright, 273 App. Div. 184, 76 N.Y.S.2d 10 (3d Dep't 1947), is the most recent. See also, note 15, *supra*. This gives New York a protection which she does not demand by her own conflict of laws rule.

120. *E.g.*, unilateral prohibition of remarriage after divorce: Sweeney v. Kennard, 331 Mass. 542, 120 N.E.2d 910 (1954). But the Evasion Act is a declaration of policy only. When combined with the unilateral prohibition of remarriage it does not give the divorce decree the effect of a decree *nisi* and make extra-state ceremonies ineffective, if the parties do not intend to return to the State: see Sweeney v. Kennard, *supra* note 117; Vital v. Vital, 319 Mass. 185, 65 N.E.2d 205 (1946).

121. The earlier Massachusetts opinions read into the first section of the Uniform Act a requirement of subjective intention to evade the marriage law. See, *e.g.*, Atwood v. Atwood, 297 Mass. 229, 8 N.E.2d 916 (1937). But the later opinions have considered only the intention to return and reside in the state. See, *e.g.*, Levanosky v. Levanosky, 311 Mass. 638, 42 N.E.2d 561 (1942).

122. Mr. Justice Holmes in Bullen v. Wisconsin, 240 U.S. 625, 630 (1916).

III. Conclusion

The laws concerning marriage are made up of two parts: the substantive part, that regulating the creation of the status; and the ceremonial part, that regulating the exchange of consents. It seems odd that any state should be unwilling to allow persons of whose union it disapproves and who rely on it for the creation of the status to get married by using its ceremonial part in conjunction with the other [intra-state ceremony ineffective], but be willing to allow persons of the same kind to get married by using its substantive part in conjunction with another state's ceremonial part [extra-state ceremony effective].

> To say that the Legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify is terms, is to make the act essentially useless and impotent, and ascribe practical imbecility to the lawmaking power.[123]

This was said of a bilateral prohibition of remarriage within a period after divorce, but it seems to apply equally cogently to any prohibition of marriage which would have the effect of making an intra-state ceremony ineffective. Yet, as we know, courts have found two categories of undesirable marriages—those which are void if celebrated in the state, and those which are void no matter where celebrated if the parties have and intend to retain their domiciles therein. Decisions recognizing the validity of extra-state marriages of the first type seem to reflect judicial deprecation of the policy shown by the prohibitory statute. To attempt to justify the decisions by reliance on the public policy in favor of upholding attempted marriages if that is reasonably possible, is in vain. The legislature has declared this marriage so undesirable that it cannot be contracted in the state.

If, however, it can be inferred that legislators know the great common-law conflict of laws rule—marriages valid where celebrated are everywhere valid . . . —it can also be inferred that the law-makers intended that the prohibition of a marriage was not to have extra-territorial effect, unless they enact a statute expressly referring to extra-state ceremonies. This argument is, of course, strengthened by the failure of a legislature to enact such a statute after the courts of the state have held that a foreign ceremony was effective in the case of certain types of persons, *e.g.*, first cousins. The argument is even better if the state's "evasion" statute applies expressly to one or more types of marital unions, miscegenous for example, but does not apply to others.

The public policy to be consulted in all cases concerning the validity

123. See Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787, 789.

of a marriage is that of the intended family domicile, not that of the domicile of either or both parties at the time of the ceremony, nor, *a fortiori,* that of the forum as such nor as the state in which an incident is claimed.

It seems, therefore, that here is a situation in which the *renvoi,* in the English sense, should be applied in a proper case. If there comes before a court of state *F* a case in which the ceremony took place in *A* and the law of *B* governed the creation of the status, *F*'s court should not look to the law of *A,* because of *F*'s stated conflict of laws rule, but should look to that of *B* to discover whether it would apply its own marriage law or that of *A.*

A marriage should be valid or void in all states, not valid in some and void in others.