Chapter 7

Marriage

I. Engagement to Marry

No American case seems to be in point. We have to deal, therefore, with foreign conflicts rules only.

1. Groups of Conflicts Rules

Until recently the problems arising out of an engagement to marry have received little attention in the conflict of laws. Insofar as they have been dealt with at all, their treatment has suffered from divergency of classification in the various municipal laws.

Numerous countries treat a betrothal as a contract pertaining to the field of family relations and similar to the contract of marriage itself. Where this notion prevails, as for instance, in England, Germany, Switzerland, the Netherlands, and the Scandinavian countries, the choice of law rules concerning the subject matter have been developed by analogy to those relating to marriage. Formal requirements are accordingly treated as being determined by the law of the place of celebrat—


2 In the United States also, the action for breach of promise is recognized as being “in form at least ex contractu,” although damages are awarded as in tort matters. See Daggett, Legal Essays 44, 78.

In Italy the contract theory has been defended by Funaioli, 9 Annuario Dir. Comp. (1934) 3, 383; 5 Giur. Comp. Dir. Civ. 55.
tion, whereas the intrinsic validity of an engagement to marry is determined in accordance with the personal law of the parties. Sometimes, however, an old view is still followed, according to which engagement and marriage are treated like ordinary contracts; consequently the conflicts rule concerning rescission of contracts is applied.

The personal law is also applied for the determination of the consequences of a breach of engagement. In this respect the difficulties that arise wherever the parties have different personal laws are particularly noticeable, for the various national laws attach widely different consequences to a breach of promise to marry. Nowhere, it is true, will a promise to marry be enforced by a decree of specific performance, but with respect to the duty to pay damages the laws vary from non-recognition of any such duty to recognition of a duty to pay compensatory damages for special injury, damages for mental pain and suffering, or even punitive damages. In this wide variety of domestic laws, the two solutions most frequently advocated are to determine the extent of either party's liability (1) by his own personal law and (2) as limited to

3 Germany: the rule has been applied in all cases; for particular applications see footnotes infra n. 6 and n. 7.
4 Switzerland: the law of the place of performance, identified with the common domicil of the parties and, in the absence of such, the intended first marital domicil; see BECK, NAG. I77 no. 76, followed by App. Luzern (Oct. 19, 1938) 36 SJZ. (1938-1939) 219 no. 150.
5 Even the mere unenforceable obligation to marry has disappeared from the canon law, still in force in several countries in Latin America and Eastern Europe, under the Codex Juris Canonici, c. 1017 § 3, which instead grants damages for rescission of an engagement without just cause.
6 OLG. Köln (Dec. 4, 1925) Leipz.Z.1926, 602, IPRspr. 1926-1927, no. 63; KG. (Feb. 23, 1933) IPRspr. 1934, no. 41; particularly KG. (Feb. 7, 1938) JW.1938, 1715; Nouv. Revue 1939, 260; KG. (Jan. 11, 1939) Dt. Recht 1939, 1012. See also 2 ZITELMANN 801; RAAP 266, 270.
the extent to which liability is recognized by the personal laws of both.\(^7\) Both opinions are influenced largely by a regard for the law of the forum, for in most cases the personal law of the defendant is that of the forum.\(^8\)

The majority of the countries following the French system, consider liability for breach of promise to marry to pertain to tort law. Consequently, in conflicts cases the law of the place of the wrong is held to be applicable,\(^9\) but no clear rules exist for the determination of the place of the wrong in such instances.\(^10\)

The *Código Bustamante*\(^{11}\) and other recent codifications\(^{12}\) simply declare the law of the forum to be applicable.

2. Cases

The functioning of the various choice of law rules may be illustrated by the following cases, one hypothetical and one real.

(a) A Frenchman, engaged to marry a French girl, repudiates his promise, while both he and his fiancée are temporarily residing in Germany.

If an action for breach of promise is brought against him in a French court, German municipal law, as the law of the place of the wrong, would have to be applied. The fact, however,

\(^7\) OLG. München (March 13, 1929) IPRspr. 1929, no. 69; KG. (May 2, 1932) IPRspr. 1932, no. 66; see also Neumeyer, IPR. (ed. 1) 19; M. Wolff, Familienrecht (1928) § 73; also M. Wolff, IPR. II5; Lewald 77; 2 Streit-Vallindas 272 n. 8.

\(^8\) Cf. the dicta quoted by 3 Frankenstein 46 n. 34; ibid. 47 n. 42. The Kammergericht, however, in its decision of Feb. 23, 1933, supra n. 6, applied the personal law of the Turkish defendant without regard to the law of the forum.


\(^10\) In France receipt of a "letter of rupture" by the fiancée regarded as decisive: Trib. civ. Seine (June 16, 1936) Gaz. Pal. 1936.2.744.

\(^{11}\) Código Bustamante art. 39.

\(^{12}\) Finland: Law of Dec. 5, 1929, on certain family relations of international character, § 46. In the English case of Hansen v. Dixon (1906) 23 T. L. R. 56, English law was applied with scant justification.
that the German law treats liability for breach of promise to marry in the fourth book of the Civil Code, which is entitled “Family Law,” has led a text writer\(^{13}\) to believe that French courts, in view of their treatment of breach of promise to marry as a tort, would apply not the rules applicable under the German classification, but rather the German rules on torts. Strange consequences would result from this view. The defendant could be held liable, only if shown to have been aware that his conduct would cause pecuniary damage to his fiancée and, furthermore, his behavior constituted a violation of good morals. Then the additional question might be raised whether this is to be determined by German or French standards. Obviously, the French court would do better to apply the rules of family law provided for the case in the German Civil Code.

If the case arose in a German court, the German judge would have to apply French law as the personal law of the parties; but inasmuch as the French law would regard the question as one of tort and refer it to the German law as the law of the place of the wrong, the German court would accept the renvoi so as to apply the provisions of the fourth book of the German Civil Code. Thus, although the courts in France and Germany would start from different premises, the decision would be the same in both.\(^{14}\)

(b) An American citizen domiciled in New York, while temporarily residing in Germany, seduced a German girl by

\(^{13}\) RAAPÉ 267.

\(^{14}\) Decisions, subjecting one party to a law recognizing liability and the other to one which does not, are considered inequitable, by M. WOLFF, IPR. 115; \textit{contra}, RAAPÉ, \textit{loc. cit.} This latter author's more recent book (2 Deutsches Internationales Privatrecht 168, 170) proposes use of the choice of law rule applicable to obligations neither contractual nor delictual, i.e., roughly the quasi-contractual obligations of the common law, as once used by the Reichsgericht, (Oct. 21, 1887) 20 RGZ. 333 and (Feb. 28, 1889) 23 RGZ. 172, and by the Trib. Baselstadt (Sept. 9, 1891) 11 Z. Schweiz.R. N.F.64. There is, however, no choice of law rule generally recognized that can be used for the purpose. RAAPÉ'S own suggestion is to apply the domiciliary law of the innocent or, alternatively, the female party. This, indeed, would be a universal rule.
promising to marry her and subsequently repudiated his promise. The German court denied the girl's action, holding that the German conflict of laws rules referred to the law of New York as the personal law of the defendant, under which actions for breach of promise to marry are not recognized.  

3. Public Policy

In those countries where choice of law rules refer the courts to some foreign law, the *lex fori* is frequently resorted to in order to prevent the enforcement of liabilities regarded as contrary to the public policy of the forum. In the Netherlands, for instance, damages allowed by German law for breach of the contract to marry could not be recovered unless the marriage banns, a prerequisite to such suits in the Netherlands, had been published.  

16 Enforcement of penalties agreed upon in the contract of engagement is generally denied.  

17 Some countries consider damages for breach of promise to marry, whether based on domestic or foreign law, as contrary to public policy.  

Even where public policy is resorted to more sparingly, doubts have been expressed with respect to such enormously high claims as are allowed in England and in some American states.  

18 A recent Finnish statute expressly limits the amount


16 Dutch BW. art. 113 par. 2. See Hof s'Hertogenbosch (Jan. 5, 1932) W. 12416, 11 Z.ausl.PR. (1937) 204; Rb. Rotterdam (May 12, 1922) W.10996 and (July 27, 1932) W.12584, 11 Z. ausl.PR. (1937) 204. These decisions were criticized by VAN DER FLIER, Grotius 1927, 108; *ibid.* 1924, 123, at 125 and OFFERHAUS, Gedenkboek 1838–1938, 713, but recommended for Italian law by FEDOZZI 401.  

17 Penalties are still used in Greece; see 2 STREIT–VALLINDAS 274. They are considered contrary to public policy by the German KG. (Jan. 23, 1901) 2 ROLG. 132, 11 Z. int.R. (1902) 99, Clunet 1902, 629 and by most other courts.  

*Contra:* 3 FRANKENSTEIN 45.  

18 Norway: see LUNDH in 4 Leske–Loewenfeld I 717.  

More often it is alleged that the law of the forum fixes the maximum damages that can be awarded, e.g.:  

Italy: FEDOZZI 401.  

Iceland: EYJÓLFSSON in 4 Leske–Loewenfeld I 761.  

19 Against awarding: NUSBAUM, D. IPR. 131 n. 2; 2 STREIT–VALLINDAS 274 n. 15; *contra:* DEMERTZES, Family Law 91, § 24, cited by STREIT–VALLINDAS; RAAPE 271.
recoverable to that allowed by both the plaintiff's personal law and the law of Finland. On the other hand, a foreign law occasionally has been denied application because it failed to recognize a claim for damages for breach of promise to marry, to that extent frustrating the elimination of such suits by the so-called "heart balm" statutes. Almost all these applications of public policy are obviously arbitrary.

4. Conclusion

An Anglo-American writer recently suggested application of the foreign characterization of a breach of promise where the foreign systems of law applicable to the situation concur in characterizing it (as breach of contract or as tort), but where the engagement and the breach occur in two foreign jurisdictions having different characterizations, that the forum should apply its own characterization. This exception to the author's theory of lex fori characterization is inconsistent with any general theory, nor does it help in the more important cases.

It would be preferable for the conflicts rule to be free from interfering substantive law; the rule should simply refer the rights and obligations flowing from an engagement to the law of the place regarded under the circumstances as the center of the social relation between the parties at the time of engagement.

II. The Concept of Marriage in the Conflict of Laws

Experience has shown that marriage must be defined in the conflict of laws in broader terms than those in which it is

21 OGL. Köln, cit. supra n. 6; contra: M. Wolff, IPR. 115 n. 4. The decision of the Kammergericht of 1939 (supra n. 6), declares expressly that the American statute denying a claim for seduction of a betrothed woman is not contrary to the international public policy of the court, though contrary to the German Civil Code.
22 Robertson, Characterization 76-78, 177.
understood, legally and sociologically, in the several systems of municipal law. Two groups of cases have been given practical consideration.

1. Soviet Marriage

In 1929 a man was sued in the Probate Division of the English High Court for separate maintenance by a woman with whom he had entered into an agreement of marriage in the Soviet Union. The defendant contended that this so-called marriage did not correspond with the English notion of marriage because, under the Soviet law at the time in question, such a marriage could be dissolved by the simple unilateral act of either party without the necessity of any reason being specified. Following this argument, Hill, J., held that the relation existing between the parties was not such as to constitute a marriage and, therefore, that the plaintiff was not entitled to recover. The Court of Appeals reversed this decision on the grounds that, although Soviet law may thus permit the relation to be voluntarily dissolved, the parties may be presumed to have intended it to be permanent. Thus, the relation created in the Soviet Union was not considered to be fundamentally different from the English notion of marriage.24 The Supreme Court of Hungary, on the contrary, declared a Soviet marriage not in accord with humanity and ethics, constituting nothing more than concubinage.25

22 On the relation between the sociological and the legal concept of marriage and the function of law with respect to the regulation of sex relations, see Llewellyn, "Behind the Law of Divorce," 32 Col. L. Rev. (1932) 1281, 33 Col. L. Rev. (1933) 249.
In virtual agreement with the English Court of Appeals, the Reichsgericht recognized first a "recorded" and later a "non-recorded" Soviet marriage, considering it essential that, although the Soviet law does not recognize any mutual rights and duties between the spouses, yet they have intended to unite themselves for a life to be lived in common. The court, indeed, has felt it impossible to deny validity to all Russian marital unions.

The possibility that a marriage of non-Russians, and especially of persons subject to the law of the forum, might occur without formalities, was not at issue. This matter and the common law marriage will be discussed in connection with the formalities requisite for marriage.

2. Polygamous Marriage

Polygamous marriages formerly were absolutely excluded from recognition, inasmuch as English doctrine limits the notion of marriage to "Christian marriage," which is necessarily monogamous. On numerous occasions, however, British courts have had to concern themselves with the polygamous marriages of Mohammedans, Hindus, Chinese, and other peoples not belonging to the realm of Western civilization, while in the United States Indian tribal marriages and those formerly practiced by the Mormons have been recognized. Whereas the celebration of such unions within the forum is rigidly prohibited, it is neither workable nor convenient to deny that foreign marriages of such a nature function within the territories of the peoples concerned. Moreover, there is not sufficient public interest to do so in cases where the existence or nonexistence of a foreign marriage is only a consideration preliminary to the decision of a problem of property law, tax


27 RG. (April 7, 1938) 157 RGZ. 257, 262, 265.

28 For details see 2 BEALE § 121.1 and CHEATHAM, Cases 871 no. 5.

29 See the basic exposition by KAHN, 1 Abhandl. 161 ff.
III. Formal Requirements of Marriage

I. Survey of Problems: Requirements of Form and Intrinsic Validity Distinguished

It has been customary from old times to permit foreigners to marry; the churches have not made distinction on account of nationality in the administration of marriage ceremonies. It is a singular exception to this usage that the French decree of 1938, mentioned earlier, disallows the marriage of foreigners unless they possess a police permit of sojourn for more than a year. On the other hand, nationals may marry abroad, although they may have to observe certain prescriptions of their national laws.

In legal systems outside of the United States, conflict rules distinguish the form and the intrinsic validity of marriage. The former is referred to the law of the place of celebration and the latter to the personal law of the parties. This difference is steadily gaining in favor in the literature of the United States.

Generally defined, the terms "formal requirements" and "formalities" of marriage mean the external conduct required of the parties or of third persons, especially public officers, necessary to the formation of a legally valid marriage. These formal requirements are distinguished from the substantive


conditions for validity such as age, race, religious affiliation, or health of the parties.

The purpose of the distinction in the conflict of laws is obvious. On the one hand, the personal law of the parties leaves the determination of formalities to the law of the place of celebration but reserves to itself the determination of the intrinsic conditions of marriage. On the other hand, the law of the place of celebration scrupulously takes into consideration the requirements of the personal law as to intrinsic conditions but disregards its prescriptions as to form.

The borderline between the two categories, however, is not traced uniformly in the various systems of municipal law. Although differences of such classification in the conflict of laws systems are not accentuated, there is sometimes a tendency to classify certain conditions precedent as substantive merely for the purpose of giving these conditions extraterritorial effect. This is a natural tendency where social policies or ecclesiastical conceptions are regarded as too important to be sacrificed in any instance, irrespective of where the marriage may be celebrated. Internationally relevant rules, however, should be expressed in an adequate common language. To deal with such divergences in classification, two methods are available. One is to let each court accept as formality what internal law regards as such; the ensuing chaos evoked criticism long ago.32 The other is to define the notion of formalities in a universally acceptable sense. As a matter of fact, although there seem to be four principal points which have occasioned difficulties for an international understanding, it does not appear that agreement to eliminate them would be impossible. These are controversial matters:

(a) Proclamation of banns and similar proceedings preliminary to the celebration of a marriage were occasionally

32 Niemeyer in 26 Z.int.R. (1916) 3, Mendelssohn Bartholdy, 22 Z.int.R. (1912) 364, and 3 Frankenstein 130, who attempt various other solutions. Niboyet 732, however, follows the lex fori, though he is exclusively concerned with the point mentioned, infra p. 214.
classified in early times as substantive requirements. But it is now generally agreed that they are to be regarded as mere formalities. The same opinion prevails with respect to recordation and similar acts required under some laws when parties have married abroad.

(b) Except in England, the requirement of parental consent to the marriage of a minor is universally characterized as closely connected with the intrinsic requirement of consent of the party. The English qualification itself is open to criticism.\(^\text{33}\)

(c) Classification of the requirement of freedom from mistake has caused some writers difficulty.\(^\text{34}\) Their doubts can be resolved easily when two different situations are kept separate. On the one hand, due form requires that the parties make their declarations at the time and in the words or by the conduct demanded by the applicable law. If, for instance, A says "no" but is understood to have said "yes," the law governing "formalities" should be resorted to in order to determine whether there exists a validly declared consent. On the other hand, whether a declaration of intention must be supported by an intention in fact or whether the declaration is to be considered valid even where the intention of the party does not coincide with his expression, is a matter which concerns the essentials rather than the formalities of the contract. Thus, if both parties use the correct ceremony but have secretly agreed to be married only nominally (simulation), the law governing substantial requirements should determine whether or not they are bound in marriage. This has been denied by canon and English law but affirmed by Italian law and the German Code before its amendment.\(^\text{35}\)

\(^{33}\text{See below, p. 267.}\)

\(^{34}\text{CHESHIRE 346 classifies a "fundamental mistake" as pertaining to formalities and hence refers it to the law of the place of celebration, while he classifies "capacity" only as personal law. This reasoning neglects the essential distinction between intention and declaration of intention. In accordance with the text, e.g., JEMOLO, Matrimonio 97.}\)

\(^{35}\text{See infra p. 272.}\)
(d) The last and most discussed problem concerns the requirement made in some, but not all, of the states which still regard marriage as an essentially religious institution: that their subjects observe the religious ceremony even when they celebrate marriages abroad. In these countries, dependence on the religious rites is considered to affect the capacity of the parties and, hence, to be properly a matter of the personal law. In the rest of the world, comprising by far the majority of states, the religious celebration, whether indispensable or not, is treated as a formality. This point will be examined later.  

The domain of formality as distinguished from that of procedure has been considered with respect to the rebuttable presumption of British law that a man and a woman having cohabited and having enjoyed the reputation of being married are deemed to have been duly married. A presumption of this kind has been characterized as relating merely to the manner of proof and therefore as a rule of procedure of the forum. A contrary decision of British Columbia, however, has been defended and seems to be the right answer. If the core of a law suit depends on whether a man and woman have been merely regarded as married in the eyes of their community or whether they were, by being so regarded or otherwise, legally married, then the essential elements constituting marriage are involved. Moreover, it would be impractical to try to submit to different conflicts rules the existence of a marriage by repute and the choice of facts determining the existence of such a marriage.

2. Locus Regit Actum

Formalities of marriage have been, from the middle ages, a particularly important field for the application of the maxim

37 See particularly Falconbridge, 3 Giur. Comp. DIP. 214.
locus regit actum, a maxim not everywhere understood in quite the same sense nor applied with entire consistency. We may distinguish in the following survey three types of provisions:

(a) Compulsory rule. In one group of countries, including the United States, England, Denmark, and Japan, the law of the place where a marriage is celebrated is decisive, irrespective of whether the marriage be concluded within or without the territory of the forum. No other law is allowed any influence on the formalities of marriage. The personal laws of the parties are irrelevant, and the parties have no choice other than to select the place of celebration. In countries following this principle, the marriage ceremonies of their own countries or churches are not available to the parties, unless these formalities happen to coincide with those permitted at the place where they are being married.

Illustration: Under Danish matrimonial law a marriage may be celebrated before a minister of some religious denomination. But a marriage of two Danish subjects before a minister of their church in Berlin will not be recognized in Denmark because in Germany civil marriage is compulsory.

(b) Optional rule. Most countries adhere to a double system: parties celebrating a marriage within the forum must comply with the domestic formalities; parties marrying

39 For the state statutes see I VERNIER § 32; for the cases 2 BEALE 671ff.
Denmark: BORUM and MEYER, 6 Répert. 218 no. 38; MUNCH–PETERSEN, 4 Leske–Loewenfeld I 745 n. 78.
Japan: Law of 1898, art. 13 par. 1 sentence 2.

The Austrian Supreme Court has held the same way beginning with a decision of March 11, 1913, 50 GIU. NF. no. 6345; see decisions of Sept. 20, 1927, 9 SZ. no. 127; Oct. 24, 1934, Zentralblatt 1935, no. 1; May 21, 1937, 66 J. Bl. (1937) 296; even after the conclusion of the Austrian Concordat with the Holy See, a marriage celebrated before a Catholic clergyman in a country where civil marriage ceremony is compulsory, is invalid in Austria; this decision, however, adds: "at least if one party is a foreign national." Cf. WALKER 666.

Presumably Liechtenstein, where Austrian marriage law is still in force, follows the same doctrine, but it has been ranged within the group described under (b) by an official German handbook; see BERGMANN, Der Ausländer im Deutschen Recht (1934) 66 n. 70.
41 See BORUM and MEYER in 6 Répert. 219 no. 40. See another example under (b).
abroad must observe either the formalities prescribed at the place of contracting or those of the personal law or laws.\textsuperscript{42}

This system also is adopted in article 7 of the Hague Convention on Marriage. Where the parties are of different nationalities, in accordance with the opinion prevailing in most countries,\textsuperscript{43} the Convention provides, however, that a marriage not complying with the formal requirements in the country of celebration must satisfy the national laws of both parties in order to be recognized by other participant states.\textsuperscript{44}

The practical difference between the two systems described so far may be illustrated by a case decided a few years ago by the Privy Council. Two Catholics domiciled in the Province of Quebec participated in a marriage ceremony before a Catholic priest in Paris. The marriage was void in France but would have been good if performed in Quebec. The Judicial Committee of the Privy Council, speaking as the final appellate court of Canada, felt itself compelled to hold the marriage invalid.\textsuperscript{45} If, however, the parties had been Swedes marrying in Paris before a minister of the Swedish Established Church, their marriage would have been held valid in Sweden.\textsuperscript{46}

An analogous question is apt to arise when a marriage by mere consent is invalid under the local law but may or may

\textsuperscript{42} Instead of the personal law, a former system had the law of the place of “performance,” which was understood as the intended matrimonial domicil, as an alternative to the local law. In this sense the Law of the Baltic Prov., introd. art. XXXVI was applied in 1928 in Latvia; cf. BERENT in 4 Leske–Loewenfeld I 576 n. 211.

\textsuperscript{43} See e.g., Austrian OGH. (May 21, 1937) 19 SZ. no. 166 (Austria was not a participant in the Hague Convention).

\textsuperscript{44} An illustration of the difficulties arising from this rule is the decision of the German Reichsgericht (April 6, 1919) 88 RGZ. 191.


\textsuperscript{46} For the same reason Italian courts and writers consider a religious marriage of Italian Catholics in France invalid, even after the Concordat; see BALLADORE–PALLIERI, Dir. Int. Eccles. 211 against an isolated decision of Trib. Milano (April 27, 1938) cited by him.
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not be recognized by a personal law which admits such marriages.47

(c) Rule modified by religious requirements. The principle, *locus regit actum*, compulsory in every case under the first system described above, (a), and optional in foreign marriages under the second system described above, (b), is profoundly modified in a group of countries emphasizing the importance of religious rites. This group of countries, which is characterized by strong ties between the state and an established church, formerly included Turkey, Czarist Russia, and after the Russian Revolution the parts of Poland and Lithuania formerly in Russia. Today it embraces Palestine in part, Bulgaria, Greece, parts of pre-war Yugoslavia,48 Egypt,49 Malta, Cyprus,50 Iran, and after 1938 with respect to Catholics also Spain.51

Since in these countries a religious ceremony is required, a marriage celebrated abroad by civil ceremony is not recognized. In Greece it was doubted whether this rule applied to citizens other than those of the Greek Orthodox faith, but it is now agreed that it includes Roman Catholics, Moslems,

47 A third case where a marriage invalid under the local law could satisfy the requirements of the personal law is construed, quite hypothetically it seems, by Beck, NAG. art. 7f no. 36, and Raape 251 (b) par. 3.
48 For details of the very complex legal situations, see the reports in 4 Leske-Loewenfeld I: on Serbia, by Péritch at 982, (see also Péritch in 40 Bull. Inst. Int. (1939) 1, 186, 41 Bull. Inst. Int. (1940) 1); on Croatia-Slavonia, by Lovrić at 1034; on Bosnia-Herzegovina, by Eisner at 1050; on Montenegro, by Eisner at 1056.
49 Under their own law however, Moslems and Oriental Jews may marry simply before witnesses of their people without any religious ceremony; see Goadby 148.
50 For Cyprus see the facts in the English case of Papadopoulos [1930] P. 55 (infra n. 68); where only one party, however, is of the Greek Orthodox faith and the other a member of another church, certain difficulties have been cleared away by the Marriage (Validation and Amendment) Law, No. 3 of 1937, s.4 and s.5 (c).
51 Law of March 12, 1938; C. C. art. 42 allows marriage before the municipal judge to non-Catholic and such Catholic parties who declare not to practice the Roman Catholic religion.
and Jews. Moreover, it is held sufficient that one of the parties be of the Orthodox creed in order to necessitate the attendance of a priest (pope) of this denomination.

Grave complications are bound to occur when a national of a country where such an imperative rule is in force attempts to marry in a country where observance of a civil ceremony is indispensable. The only certain way for the parties in such case to effect a valid marriage is to go through both ceremonies, the civil one prescribed by the local law and the religious rite required by the personal law.

It is noteworthy that this conflict is often designated by theorists as an insoluble conflict of qualifications. In connection with the idea that marriage is a sacrament to be administered in the proper way and with the attendance of the persons required by the particular denomination, it has been denied that these religious conditions of marriage can be treated like other forms of contract; rather must they be considered part of the personal status of the party concerned. This position was once taken by the Czarist Russian Church, and it is so firmly rooted in Greece that in the new Civil Code the

52 See 2 Streit-Vallindas 319 n. 36, who quotes the former opinions (317 n. 32).

The rule was generally applied in former Russia too; see Makarov in 4 Leske-Loewenfeld 488, as well as under the Marriage Law of 1836 of the Kingdom of Poland until 1926. See infra n. 56.

On Lithuania see Z.fo.Ostrecht 1931, 65; Rutenberg in 4 Leske-Loewenfeld I 505.


For Bulgaria see KG. (Jan. 19, 1934) IPRspr. 1934, no. 16.

54 See infra p. 232ff.

55 Civil officials are required so to advise the parties in Prussia; see Bergmann, Der Ausländer im Deutschen Recht (1934) 66 n. 70.

In Switzerland the parties must even give assurance that the religious ceremony will follow; see GmüR, Familienrecht art. 118 n. 6.

56 Decision of the Civil Department of Cassation (April 15, 1898) Decisions 1899, no. 39. This conception was maintained in Eastern Poland until the Polish Law on international private law of 1926, which made the law of the place of celebration govern the form of foreign marriages. But it took a decision of the Polish Supreme Court in Plenary Meeting on April 12, 1929 (Z.fo.Ostrecht 1930, 512) to state that "forms" include the ecclesiastical manner of marriage; for details see Ostrowicz, 4 Leske-Loewenfeld I 445 n. 252; Werminski, Note, 6 Giur. Comp. DIP. no. 106.
necessity of a religious ceremony was not formulated as an exception to the maxim *locus regit actum*, since this maxim, applying to formalities only, does not include the necessity of a religious ceremony regarded as a substantive condition. Formerly as well as recently, some Western writers, too, have been greatly impressed by this characterization. For a time, French courts considered a civil marriage celebrated in France by a Greek Orthodox or Catholic foreigner, if not recognized in his homeland, invalid even under French law. But no such concessions to foreign laws are made any longer by any country requiring its own subjects to observe a civil marriage ceremony. The true reason for this attitude is not, or at least should not be, any method of characterization. By classification as "mere" form, the secular ceremony is not degraded but, on the contrary, is emphasized as the objective of an intransigent public policy, quite as cogent as the mandatory requirement of a religious ceremony. Indeed, those countries that regard ecclesiastical acts either of marriage or divorce, even in the case of foreigners, as private transactions without legal effect so far as the state is concerned, have been accused of intolerance. Nevertheless, while, on the one hand, the dominant American conflict rules concerning marriage minimize the personal law of the parties, it certainly is not clear, on the other hand, why the forum should yield to the pretensions of foreign countries to regulate local marriage ceremonies.

The problem of classification in this case is not more than a mere question of terminology. For the purpose of technical

57 MARIDAKIS, 11 Z.ausl.PR. (1937) 121. For complete literature see 2 STREIT-VALLINDAS 318.
58 UNGER, 1 System 210; 2 Fiore no. 528; PERROUD, Clunet 1922, 53; 1 FRANKENSTEIN 524; 3 *ibid.* 133; RAAPE 253. *Contra:* 1 BAE § 169; WALKER 662 n. 55, and in I KLANG'S Kommentar 337; NEUMANN-ETTENREICH and SATTER in 4 Leske-Loewenfeld I 206 and particularly BALOGH, 57 Recueil 1936 III 685-702.
59 See *infra* p. 218, n. 69.
60 NIBOYET 731 no. 623, applies this very method.
61 3 FRANKENSTEIN 137.
understanding in matters of international law, it is submitted, religious marriage, including the participation or mere presence of an ecclesiastical officer, like any secular solemnization, constitutes a formality in which the contract is "clothed." This conception is traditional in almost the whole world and has been confirmed for the Catholic Church by the *Codex Juris Canonici*, which clearly distinguishes form of celebration (c.1094–1103) from impediments (c.1035–1080) and defects of consent (c.1081–1093). For international terminology, such a common denominator of formalities is the only convenient one. Formalities have more than one function—among others, those of guaranteeing the finality and seriousness of the solemnized act, of publicizing the marriage, and of furnishing trustworthy evidence of its occurrence. All such purposes are common to any kind of marriage ceremony. Furthermore, the fact that an omission of the prescribed words or acts may adversely affect the validity of the transaction is not peculiar to religious marriage. At any rate, the policy of Greece, Bulgaria, and the other countries enumerated above on page 213, is sufficiently summarized by saying that these countries regard the religious form as essential for all marriages of their nationals.

3. The Law of the Place of Celebration as Applied to Domestic Marriages

*General rule.* In spite of doubts occasionally expressed, the almost general rule is that a marriage celebrated within the

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62 The same classification has, quite naturally, now been confirmed by the Italian writers on the Catholic marriage with civil effects, established by the Concordat of 1929 with the Holy See, Bosco, "Le Nuove leggi sul matrimonio," 22 Rivista 1939, 363, 372: Fedozzi 418 n. 2. To the same effect in other Catholic countries, see in 6 Répert.; for Austria: Kunz, 110 nos. 199–201; for Belgium: Janne 149 nos. 46–48; for Brazil: Bevilquq 166 no. 39. This means that a purely ecclesiastical ceremony of Austrian Catholics in Italy was invalid in Austria, despite canon marriage being the prescribed form in the Austrian Allg. BGB.; see for instance OGH. (May 21, 1937) 66 J.Bl. (1937) 296, and below, p. 233, n. 137.
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territory of the forum is invalid, unless the formalities prescribed by the matrimonial law of the forum are satisfied. The forms of marriage which a state places at the disposition of the parties are available to foreigners and citizens alike, but no other forms are allowed. If the law of the place of celebration leaves the parties free to choose between solemnization by a minister of the gospel or a priest and solemnization by a civil officer, a judge, or a civil commissioner, as is done in almost all Anglo-American countries, Sweden, Italy, and others, foreigners can easily satisfy both the local and the personal law by choosing that ceremony which will be recognized by their personal laws. Hardships may arise where civil marriage is compulsory at the place of celebration.

The rule that the domestic formalities are exclusive is expressly contained in the following statutes, among others:

- Germany, EG. art. 13 par. 3.
- Italy, C.C. (1865) art. 103; C.C. (1942) art. 116.
- Poland, Law of 1926, art. 13 par. 1.
- Sweden, Law of 1904, c. 1 § 4 par. 1.
- Switzerland, NAG. art. 7c par. 2.
- Brazil: Introductory Law of 1942, art. 7 § 1.
- Soviet Union, Family laws of 1926 of Russian Soviet Republic, art. 136; of Ukraine, art. 107 par. 2.

Ordinarily the rule is treated as unquestionable and justified as being required by elementary public policy. Every

63 The form of marriage ceremony provided for by the Italian Concordat with the Holy See, viz., and ecclesiastical marriage recorded by the state civil registrar, is available to foreigners, according to the general opinion, which is contested, however, by BALLADORE-PALLIERI, Dir. Int. Eccles. 220.
64 To this effect BG. (Oct. 6, 1883) 9 BGE. 449, 453; Just. Dep. April 30, 1924, BBl. 1924, II 253; BBl. 1940, 1462 no. 9 (no marriage by proxy for foreigners prevented from entering Switzerland); HUBER-MUTZNER 434; contra: STAUFFER, NAG. art. 7c no. 26.
65 FREUND in 4 Leske-Loewenfeld I 366; MAKAROV, Précis 331ff.
66 Cf. 2 Fiore no. 541; ROLIN, Principes 79ff. nos. 576, 578, 581; TRÍAS DE BES, 6 Répert. 252 no. 101; 1 RESTREPO HERNÁNDEZ 109 no. 196.
state is said to have decided, after careful deliberation, whether marriages shall be solemnized in religious or temporal form, or parties shall be permitted to marry without any formality at all. From this point of view, it is understandable that states should not wish to see exceptions made within their territories in favor of aliens. Not quite so obvious, however, is the necessity of permitting foreigners to avail themselves of local ceremonies which are at variance with their personal laws. Doubtless, it is believed appropriate to render marriage possible for alien residents.

An exception to the general rule requiring marriages celebrated within the country to comply with the prescribed formalities is that of foreigners in Greece who are permitted, according to an old doctrine, to availing themselves of all public solemnizations provided for by their personal laws. This rule permits all sorts of religious and consular marriages, excluding, however, simple consensual contracts of the common law or Soviet type. 67

Illustrations:
(a) **Validity of marriage in municipal form:** In the English case of *Papadopoulos v. Papadopoulos*, P., domiciled in Cyprus and belonging to the Greek Orthodox church, married a woman of French nationality before a registrar in London in compliance with the formalities of English law. His marriage was held valid in England, although it was not recognized in Cyprus because not celebrated in a church by a priest of the Orthodox church. 68

There is abundant authority to the same effect in other countries. 69

67 Cf. 2 Streit-Vallindas 306, 315.
69 Belgium: Cass. (Jan. 19, 1852) Pasicrisie 1852, 1, 85; Antwerp (July 3, 1939) 9 Rechtsk. Wkbl. 1939, 44.

France: In a series of decisions beginning with App. Douai (Nov. 18, 1903) Clunet 1904, 394, down to a particularly objectionable decision of the Trib. of Metz (Oct. 30, 1929) StAZ. 1930, 198, the marriage has been held invalid if the formalities of the personal law were not observed. More recently, however, the trend favoring territoriality rather than the personal law has won the upper hand, and it is now well established that a marriage celebrated in France in ac-
(b) Invalidity of religious marriages not provided for by the municipal law: Thus, in a German case, Jewish subjects of Czarist Russia went through a religious ceremony in Germany before a rabbi. Although good in Russia, the marriage was held nonexistent in Germany, as no ceremony was performed before a civil officer. Similarly, a marriage was celebrated in Germany according to religious formalities by a Greek and a Serbian subject. Although valid in both Greece and Serbia, the marriage was held nonexistent in Germany.

(c) Invalidity of common law marriage: Two American citizens from New York live together as husband and wife in Belgium without a marriage ceremony. Belgian courts will hold the marriage invalid.

Apparent exceptions. Obviously, it is not inconsistent with the rule of compliance with local formalities for France and Spain to authorize or compel their nationals in their respective colonies to marry in compliance with the formalities of the mother country.

Neither is it an exception, when a French court applies Spanish law in deciding whether or not a French woman has accordance with the French formalities is valid, while a marriage celebrated in France in accordance with religious formalities is invalid. See Trib. civ. Seine (Nov. 20, 1912), aff’d Cour Paris (Dec. 22, 1921) in Clunet, 1922, 135; Trib. civ. Seine (Jan. 7, 1922), aff’d Cour Paris (Nov. 17, 1922) Clunet 1923, 85; Trib. civ. Nice (June 26, 1923) Clunet 1924, 670. All writers agree.

Germany: RG. (Dec. 17, 1908) 70 RGZ. 139; RG. (Nov. 16, 1922) 105 RGZ. 363; OLG. Dresden (March 13, 1911) 7 Sächs. Arch. (1912) 272 and OLG. Dresden (Nov. 9, 1933) IPRspr. 1934, no. 46.

Switzerland: BG. (Oct. 6, 1883) 9 BGE. 449, 453.

70 OLG. München (March 10, 1921) 42 ROLG. 98. To the same effect: RG. (2d criminal section, Dec. 10, 1912) 18 DJZ. 1913, 588; Bay. ObLG. (March 22, 1924) 23 Bay. ObLGZ. 56.


Switzerland: BECK, NAG. art. 76 no. 86.


72 Belgium: POULLET 469 no. 365.

In French Morocco, the Dahirs of 11–13 of August, 1913, declared that Frenchmen and foreigners are unable to marry except in accordance with the formalities permitted by their national law or those which will eventually be determined for l’État civil in the French Protectorate. The latter formalities have been determined by the Dahirs of Sept. 4, 1915, and Sept. 13, 1922, to be identical with those of the Civil Code. Since then, the French form of marriage is compulsory for French nationals, as the Court of Cassation held in two decisions of March 3, 1937, Revue Crit. 1938, 86, 88.
acquired Spanish nationality by marrying a Spanish citizen in France. The court may find that the marriage is invalid under Spanish law because the religious ceremony was not observed and that therefore the wife has not become a Spanish citizen, although it is certain that the marriage is valid in France.  

The Japanese Civil Code limits its own provision to the marriage of nationals without mentioning the marriage of foreigners. Probably, foreign parties may use any formalities agreeing with their national law or laws.

**Consular marriages performed within the forum.** Where a consular or diplomatic agent is endowed by the state represented by him—the sending state—with the power of officiating at marriages, a marriage performed before him is valid in the receiving state only if the latter state has agreed to his acting in this capacity. Numerous marriages celebrated in an embassy or consulate have been declared invalid by the courts of the countries involved, because this function of the diplomatic agent or a priest officiating in a legation was not recognized. Hence, for instance, a marriage celebrated by two British subjects before a British consul in Germany is

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75 See Baty, "The Private International Law of Japan," in 1 Mélanges Streit (1939) 103 at 106.

76 Where a marriage was celebrated before the consul of Guatemala in Paris and it appeared that, according to the law of Guatemala, representatives of that state had no authority to officiate at marriages, the act was declared null also under French law. Trib. civ. Seine (March 15, 1933) Revue Crit. 1935, 436.

77 Austria (one party Austrian): OGH. (Aug. 17, 1880) 18 GIU. no. 8066, Clunet 1881, 171.

Belgium (one party Belgian): Trib. Antwerp (Aug. 4, 1877) Clunet 1881, 84.

France (one party French): Trib. civ. Seine (July 2, 1872) S.1872.2.248, Clunet 1874, 71; Trib. civ. Seine (Sept. 2, 1920) Revue 1921, 165 n.2; (June 21, 1873) Clunet 1874, 73; cf. infra n. 83, and Note Audinet, S.1924.2.65. See also the case of Hay v. Northcote [1900] 2 Ch. 262, 69 L. J. (Ch.) 586, where the English court, though referring to a French judgment which had declared the marriage void, held it valid under English law.

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held nonexistent in Germany, though it is considered good in England.

Although some states are unwilling to consent to this function of diplomatic agents, numerous treaties embody agreements to recognize consular marriages performed within territory of the forum. In some countries, consent is deemed to be given even without any express declaration. This is the case in Belgium, Bolivia, Brazil, Bulgaria, Greece, Peru, Rumania, Spain, Turkey, and elsewhere, particularly in France, where by "traditional customary law" foreigners belonging to the same country are permitted to marry before their consul. This liberal exception to the French system does not extend, however, to religious marriages before a priest or chaplain attached to a diplomatic mission, sanctioned in former times by the so-called freedom of the Chapel. Hence, French courts

American man and an Italian woman at an American consulate); see also Trib. Roma (May 6, 1936) Giur. Ital. 1936, I, 2, 465.

Switzerland: Just. Dep. BBl. 1924, II 25, no. 53; Answer of Federal Council to the British Legation, BBl. 1911, I 431, no. 12, where it is added that the British Legation in a note showed its willingness to make British consuls in Switzerland conform to the Swiss conception.

Spain: Trib. Supr. (July 12, 1899) 66 Sent. 169 (Frenchman at the Anglican Church of Puerto Rico, then a Spanish colony).

See, furthermore, Rb. Rotterdam (June 17, 1935) W. 1936, no. 633 (Egyptian consul). Decisions relating to Portuguese, Turkish, and Russian consulates; cf. 3 FRANKENSTEIN 170 n. 176.

78 German EG, art. 13 par. 3.

79 British Foreign Marriage Act, 1892, § 1.

80 See infra p. 238; see also the Colombian Law, No. 266, of Dec. 21, 1938.

81 Belgium: Cour Bruxelles (May 29, 1852) Pasicrisie 1852.2.237; Note, Clunet 1907, 335, 339; POULLET 470 no. 366.

The Bolivian Law of December 15, 1939; continues to recognize marriages celebrated by diplomatic or consular agents of foreign powers, but requires recording in the register of civil status.

Brazil: Lei de Introdução (1942) art. 7 § 2.

Bulgaria: GHÉNOV, 6 Répert. 191 no. 63.

Greece: 2 STREIT-VALLINDAS 315.

Peru: customary law for Catholics and Congressional Act of Dec. 23, 1897, art. 7 for non-Catholics (on the condition of subsequent registration).

Roumania: Trib. Ilfov (March 21, 1890); see PLASTARA, 7 Répert. 66 no. 183.

Spain: Trib. Supr. (Feb. 21, 1935) 217 Sent. 567 implicitly; see TRÍAS DE BES 85 no. 118.

Turkey: see SALEM, 7 Répert. 267 no. 218.

82 WEISS, 3 Traité 563.
have invalidated a marriage celebrated before an Orthodox priest of the Greek legation in Paris and a marriage celebrated before a Protestant minister authorized by the King of Sweden. 83

The validity of consular marriages as determined by the law of the sending state will be discussed in connection with other foreign marriages. 84

4. The Law of the Place of Celebration as Applied to Foreign Marriages

In general. All states, except those which require a religious marriage for their nationals abroad and, to a certain extent, Spain, recognize as valid a foreign marriage celebrated in compliance with the formalities prescribed by the local law. 85 Such compliance is compulsory according to the English and American conflicts rules but optional under the laws of most other countries.


Spain: Trib. Supr. (July 12, 1889) 66 Sent. 169 (French parties in the Anglican chapel of Puerto Rico).

84 Infra pp. 236-240.

85 In most countries this rule is not questioned.

In Soviet Russia the statutes are interpreted to the same effect by Freund in 4 Leske-Loewenfeld I 366, with some reservations, however.

In Spain the Supreme Court held on May 1, 1919, 146 Sent. 176 and again on April 26, 1929, 188 Sent. 1286 concerning Spanish couples having married in Argentina and Habana respectively, that non-Catholic Spaniards may marry only in accordance with Spanish formalities before a Spanish consul or vice-consul; Lasala Llanas 107 and Trías de Bes, in 31 Recueil 1930 I 654, 673, and in his Sistema español de derecho civil internacional, nos. 111, 112 state this to be the actual law, but restrict the unwelcome rule to the cases where both parties are of Spanish nationality, or the man is a Spaniard and the woman is not a national of the country of celebration. Moreover, in a country prohibiting consular marriage the parties are believed to be free to choose the local ceremony.

For Eastern Poland, see supra n. 56, and for Turkey, Salem, 7 Répét. 268 no. 221; but cf. Goulé, Mariage, 8 Répét. nos. 41, 288, and 382.
The local form, including the proper officer and the proper ceremony, must be observed in its entirety as determined by the law of the place of celebration. In Morocco, Egypt, and parts of China, religious ceremonies are customary but dependent on certain conditions with which foreigners accordingly have to comply in order to satisfy their national laws. On the other hand, Swiss authorities recognize a Japanese temporary marriage (the famous Madame Butterfly marriage), entered into by a Swiss national, as valid without time restriction, the Swiss law disapproving such restriction.

Under the Concordat of 1929 between Italy and the Holy See, Italians may marry in Italy either in accordance with the Civil Code or in accordance with the ecclesiastical ("canonic") formalities, provided, however, that the ecclesiastical marriage is recorded by an Italian civil officer. Since this alternative does not exist outside of Italy, a marriage of Italian nationals abroad before a Catholic priest is not valid, even under the Italian conflicts law, unless it has been performed in accordance with the formalities established by the forum.

Special problems: (a) Common law marriages. Since some formal marriage ceremony is required in almost every European country, the question has been presented whether the principle of locus regit actum could be extended to a common law marriage of nationals of a European country cele-

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86 Where a French Catholic woman married an orthodox Serb in a Catholic church in Yugoslavia, the marriage was held invalid in France, because according to the local law it should have been celebrated before an orthodox priest; see Trib. civ. Seine (Feb. 22, 1937) Revue Crit. 1937, 650.

87 See BEALE § 121.4; § 122.1.

88 Just. Dep., BBl. 1925, II 143.

89 Hence, an unrecorded religious ceremony performed in Italy will not be considered sufficient by a foreign court; cf. Austrian OGH. (May 21, 1937) 19 SZ. no. 166.

90 See Bosco, 22 Rivista (1930) 469ff.; FEDOZZI 419ff.

91 Except in Soviet Russia and until recently in Scotland.
brated in a jurisdiction where common law marriage has not been abolished. Despite objections, the validity of common law marriages celebrated in the United States has been upheld not only by English courts \(^\text{92}\) but also for their respective nationals by the courts of Belgium, France, Germany, and Italy.\(^{93}\) Gretna Green marriages, too, have been recognized in England \(^{94}\) and other countries.\(^{95}\)

Furthermore, recorded marriages entered into by non-Russians in Soviet Russia have been recognized in other jurisdictions,\(^{96}\) and even non-recorded marriages have been declared valid by the German Reichsgericht on the ground that it was often difficult for German parties resident in Russia to reach a German consulate.\(^{97}\) The court stated, however, that

\(^{92}\) Rooker v. Rooker (1863) 3 Sw. & Tr. 526; In re Green, Noyes v. Pitkin (1909) 25 T. L. R. 222.1 JOHNSON 299, however, has express doubts concerning the validity of such marriages celebrated by domiciliaries of Quebec who go abroad for this purpose.


Italy: Trib. Ariano (Feb. 4, 1898) and App. Napoli (March 31, 1898) cited by FEDOZZI at 426 n. 1, who himself requires that the conclusion of the marriage be proved by an act of consent, excluding inference from the subsequent conduct of the parties.


\(^{96}\) Czechoslovakia: S. Ct. (1931) no. V. 10.644, 6 Zauls.PR. (1932) 448.

France: Trib. civ. Seine (June 17, 1927) Revue 1928, 332 (Spanish man and Russian woman.)


Switzerland: see BECK, NAG. 222 no. 12.

\(^{97}\) RG. (April 7, 1938) 157 RGZ. 262 at 265.
strict proof that the marriage was a true marriage and intended to be permanent was necessary in each case.\footnote{138 RGZ. at 218; 157 RGZ. at 266.}

(b) \textit{Tribal marriage}. As a rule, marriages of white persons, in accordance with the formalities of uncivilized native tribes, are not recognized.\footnote{In re Bethell, Bethell v. Hildyard (1888) 38 Ch.D. 220. \textit{Contra}: Cour Paris (April 24, 1926) D.1927.2.9 held void a marriage of a French explorer in Mongolia and an American girl before a Belgian Catholic missionary, as Mongols do not use religious marriages. This was, however, an unusual case due to the remote place, see Escarra, \textit{ibid.}; \textit{infra} n. 179.} Colonial practice has, however, recognized various exceptions.\footnote{On French practice in Indo-China and Tunisia, \textit{cf.} J. Donnedieu de Vabres 447. On marriages of white persons and Indians in the United States and Canada see Goodrich 319; Johnson 320–327. On the very precarious position of a white woman marrying a native in the British Empire or even a member of an Oriental religion or of a Hindu caste, \textit{cf.} memorandum of the British Foreign Office transmitted by the British Consul in Berlin, printed in StAZ. 1923, 31; see also 2 Bergmann, 75.}

(c) \textit{Marriage by proxy}. Marriage by proxy, where permitted by the law of the place where the proxy participates in the marriage ceremony, has been recognized in the United States.\footnote{See Restatement § 124. See Lorenzen, \textit{“Marriage by Proxy and the Conflict of Laws,”} 32 Harv. L. Rev. (1919) 473, 484.} A Turkish immigrant to the United States, for instance, was allowed to marry by proxy a woman living in his native country, thus enabling her to join him in this country.\footnote{Cf. Goodrich 303; United States \textit{ex rel.} Modanos v. Tuttle (1926) 12 F. (2d) 927; see also Clunet 1929, 205. It is true that according to s. 28 (n.) of the Immigration Act of May 26, 1924, the terms \textit{“wife”} and \textit{“husband”} do not refer to a proxy or picture marriage, but on the interpretation see Hackworth, 2 Digest of International Law (1941) 367 s. 164. On the contrary, Canadian federal and province authorities do not recognize any marriage by proxy for the purpose of immigration; see note of the Canadian Government to the German Government, 2 Bergmann 78.} A similar case was that of a German prisoner of war in Morocco who married by proxy an Austrian woman in Austria.\footnote{Opinion of the Saxon Government of May 24, 1916, cited by Lewald 86 no. 117.} Although section 124 of the Restatement requires only that the absent party consent to the marriage, Continental courts seem to require also that this consent be expressed in...
advance in an instrument in writing, stating the name of the other party. Provisions to this effect are contained in some codes, as for instance the Austrian and the Cuban and, for soldiers, in the new Italian Code.

If these precautions are taken, there is no room for the objection that marriage by proxy does not fulfill the requirement of consent. The party for whom the proxy acts must observe the regular form of consent. The proxy himself is no more than a messenger, and whether or not a party may express his consent by messenger is clearly a matter of formality.

Prevention of secret marriages. Elaborate precautions have been taken in the municipal laws of Western and Central Europe to prevent prohibited and secret marriages. Marriages may not be celebrated without prior publication of banns, and after celebration all marriages must be recorded by civil officers. These acts, both that preceding and that following the main ceremony, are regarded as formalities and, therefore, as a general principle, are governed by the law of the state of celebration.

(a) Provisions by the state of celebration. To prevent prohibited and secret marriages numerous countries endeavor to make sure that the marriage is not prohibited by the personal law of the parties. Thus, banns are required to be published not only at the place of celebration but also in the country or

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104 Allg. BGB. § 76, first sentence. Consent of government also required.
Cuba: C. C. art. 87.
In the Netherlands, BW. art. 134 requires royal permission.
105 C. C. (1942) art. 111.
See also the German war-time provisions of the period of 1914-1918.
106 Cf. RAAPE 176, 255; but also FRANKENSTEIN 154.
107 It is not true, as often alleged, that banns are considered part of the formalities only in Germany but not in France.
108 This principle is followed in Switzerland by the regulation of banns in the case of a foreign marriage of Swiss nationals; no banns are required unless the authorities at the place of celebration ask for a Swiss certificate showing no known impediment to marry, in which event banns are published for the purpose of granting the certificate. See BBl. 1899, I 361 no. 43 id. 1912, I 507 no. 15; BECK, NAG. art. 7c no. 95.
countries where the parties reside or have resided at some time prior to their marriage. Foreigners are commonly not permitted to marry unless they can show a certificate of their own country that no impediment to the marriage is known.\textsuperscript{109}

(b) \textit{Banns prescribed by the personal law}. In addition, some countries have established analogous provisions for their nationals abroad. Under the French Civil Code, which contains the prototype of all such regulations, a French national who intends to marry in a foreign land must, under certain circumstances, have banns published in France, particularly if he has resided in France in the six months preceding his marriage.\textsuperscript{110} The Code itself imposes no sanction for the performance of this duty. The courts, however, have pronounced null the marriages of parties who intended to keep their marriage a secret in France or who intended to evade the prohibitions of French law.\textsuperscript{111}

Although the provisions of the French Code have been copied by Italy, the Netherlands, and other countries, few of these countries\textsuperscript{112} have followed the French decisions directed

\textsuperscript{109} See below, p. 284.
\textsuperscript{110} C. C. arts. 170 and 63.
\textsuperscript{111} Cass. (req.) (March 28, 1854) S.1854.1.295; Cass. (req.) (Nov. 20, 1866) S.1866.1.442; Cass. (req.) (March 8, 1875) S.1875.1.171; Cass. (civ.) (June 15, 1887) S.1890.1.446; Cass. (req.) (July 5, 1905) Clunet 1906, 1145, S.1906.1.141, Revue 1905, 714; Cass (req.) (Jan. 3, 1906) Clunet 1906, 1149, Revue 1907, 211; and particularly Cass. (civ.) (July 13, 1926) S.1926.1.263. Cf. on this peculiar practice \textsc{Niboyet} 725ff. no. 616.
\textsuperscript{112} To the same effect as the French decisions:

Belgium: C. C. art. 170 as amended by law of July 12, 1931, art. 13. (Seems clearly to require observance of the local foreign formalities only.)


\textit{Contra:} Italy: C. C. (1865) art. 100 par. 2; C. C. (1942) art. 115; the consequence of omission is not nullity but only a penalty, Cass. Napoli (June 26, 1883) Legge 1884.1.14; App. Messina (Nov. 9, 1927) cited by \textsc{FedoZZi} 419 n. 2; Trib. Pesaro (June 14, 1928) 21 Rivista (1929) 420. Cass. (Aug. 2, 1935) Rivista Dir. Pubbl. 1936, II 204.

The Netherlands: BW. art. 138 requiring banns is generally understood as meaning banns in the Netherlands. Non-compliance was believed to result in a nullity but not since the decision of the H. R. (May 31, 1872) W. 3484 and the Law of July 7, 1906, S. no. 162, art. 6.

Hungary: Marriage Law of 1894, § 113 par. 2.
against *fraude à la loi*, since the French courts have interpreted these provisions in their peculiar manner and have assumed discretionary powers of doubtful validity.

In reconciling these variations, the Hague Convention on Marriage provided that the requirements of the national law concerning publication must be observed, with the proviso that omission of publication does not invalidate the marriage except in a state whose law has been violated.\(^{113}\)

(c) **Recordation prescribed by the personal law.** A French national who has married abroad, moreover, must have his marriage recorded at his French place of residence within three months after his return to France.\(^{114}\) This provision of the French Code has likewise been widely imitated.\(^{115}\) No sanction is provided,\(^{116}\) except that the Portuguese provision that a foreign marriage can be proved only if recorded in compliance with law,\(^{117}\) has had some following.\(^{118}\)

A steadily increasing number of states in this country require residents who go elsewhere to be married and who

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113 Hague Convention on Marriage of 1902, art. 5 par. 3, followed by Sweden, Law of 1904, with subsequent amendments, c. 1 § 4 par. 2.


115 Belgium: C. C. art. 171.

Haiti: C. C. art. 156.

Italy: C. C. (1865) art. 101.

Eritrea: C. C. art. 112.

Monaco: C. C. art. 139.

The Netherlands: BW. art. 139.

Neth. Indies: C. C. art. 84.

Nicaragua: C. C. arts. 106, 525.

Venezuela: C. C. (1942) art. 103.


117 Portugal: C. C. art. 2479 and Law of Dec. 25, 1910, arts. 60, 61. CUNHA GONÇALVES, 1 Direito Civil 685 explains that the marriage is considered valid as to effects in the country of celebration, and with respect to bigamy even in Portugal.

118 The similar view of the former C. C. of Peru, art. 159, has been abandoned in the C. C. of 1936; cf. APARICIO Y GOMEZ, 2 Código Civil, Concordancias 324 and 356 (14).

Mexico: C. C. art. 161 par. 2 is characteristic of laws declaring that the civil effect of the marriage is retroactive to the time of the celebration only if it is recorded within three months.
return to reside within the state, to file a certificate of their marriage with the proper officer.\textsuperscript{119}

In the Soviet Union, a circular of the Commissariat of Justice of the U.S.S.R. required all Soviet nationals marrying abroad to have their marriages recorded at the office of the diplomatic or consular representative of the U.S.S.R. But the code of only one Soviet Republic, the Ukraine, has expressly declared compliance with this provision essential for recognition of the marriage.\textsuperscript{120}

\textit{Defective celebration.} The law of the place of celebration establishes the formalities and what constitutes failure to comply with them. It is universally agreed that the same law also determines the effect of such failure of compliance on the validity or invalidity of the marriage.

It is interesting that this principle is more firmly settled than two broader principles of which it would seem to be an application.

First, it is fairly well established, although not without some opposition, that the same law determines the causes as well as the effects of the nullity of a marriage.\textsuperscript{121} This broader rule, which includes formal and substantive requirements for marriage, has been adopted by the Restatement § 136:

"The law governing the right to a decree of nullity is the law which determined the validity of the marriage with respect


\textsuperscript{120} Circular letter of July 6, 1923, no. 144, The Weekly for Soviet Justice 622; Ukrainian Family Law of 1926, art. 105; this provision seems not to apply, however, unless both parties are Soviet citizens. \textit{Cf.} FREUND, \textit{4 Leske-Loewenfeld} I 366-9. Dr. V. Gsovski states that the requirement is not in any recent Soviet code and seems not to have been enforced.

\textsuperscript{121} Germany: RG. (June 22, 1931) 133 RGZ. 161, IPRspr. 1931, no. 233; OLG. Düsseldorf (Oct. 31, 1922) JW. 1923, 191; KG. (Jan. 29, 1934) DJZ. 1934, 1158, IPRspr. 1934, no. 16.

France: Ch. civ. Douai (March 28, 1928) Clunet 1929, 400; Ch. civ. Montpellier (June 21, 1928) Clunet 1929, 1062, cited by GOULÉ, 9 Rénper. 82 no. 423.

The Netherlands: see MULDER 38, 109.

Switzerland: see GAUTSCHI, 27 SJZ. (1930-1931) 321, 325.
to the matter on account of which the marriage is alleged to be null."

In England these problems are ordinarily discussed under the heading of jurisdiction. If, however, a marriage has been celebrated abroad, English courts are prepared to respect the jurisdiction of the *forum loci actus*, and therefore the result now stated for the first time in modern form by Cheshire is the same as that in other countries. 122

Second, the results of a formally defective transaction of any kind are said to be determined by the law whose formalities have not been properly observed. 123

Although both general rules, and particularly the second, have been opposed on the ground that either the law of the forum or the *lex causae* should prevail, in the particular case of a formally defective marriage the rule is virtually unchallenged. 124 The forms of marriage vary too much, indeed, for one jurisdiction to determine the sanctions for violating the formal requirements of another.

Consequently, the law of the place of celebration determines whether or not a defect is material to the validity of the marriage and, if so, whether it renders the marriage nonexistent, void, voidable, or annulable (whatever may be meant by these terms); whether an omission can be cured by some additional act, as for instance, recording or factual cohabitation; and whether or not an annulment has retroactive effect. 125

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122 See *Salvesen v. Adm'r of Austrian Property* [1927] A. C. 641; *Cheshire* 346, 347.

123 See *Goodrich § 106; 2 Arminjon*, no. 49.

124 *Niemeyer, Das IPR. des BGB. 115, Raape 183, 1 Frankenstein 561, 3 Frankenstein 183, and Mannl, 11 Z. ausl. PR. (1937) 786, have advocated the *lex causae*. Raape 186, and Mannl, however, admit that this theory is impracticable for marriages, and it has been formally rejected "at least with respect to the conclusion of marriage" by the Reichsgericht (June 22, 1931) 133 RGZ. 161, 165. Likewise, *J. Donnedieu de Vabres* 461 seems to agree that the Court of Montpellier (*supra* n. 121) was right, although he defends the predominance of the personal law in determining sanctions for defects in marriages in general. In still another opinion, it was thought that the law more favorable to the marriage should be followed, but no decision seems to have applied this illogical thesis.

125 *RG.* (June 22, 1931) 133 RGZ. 161, 165.
There are, of course, exceptions to the rule. The most significant exist in Switzerland. According to article 131 of the Swiss Civil Code, no marriage may be annulled on the ground of a formal defect, if it has been celebrated before a public marriage officer. Nor may a Swiss court annul a marriage, unless the ground of nullity is also recognized by Swiss municipal law.\textsuperscript{126} Thus, a Swiss court will not annul a foreign marriage of Swiss nationals celebrated before a public officer, although a formal defect invalidates the marriage under the local law, nor will a foreign annulment in such case be recognized in Switzerland.\textsuperscript{127}

Another exception exists in France. On the theory of "possession of status" (possession d'État), article 196 of the Civil Code prohibits an annulment on the ground of formal defect, when the marriage is commonly reputed to exist and the record of celebration before a civil officer can be produced. While the Court of Cassation has refused to apply this provision to marriages celebrated abroad,\textsuperscript{128} there is a tendency to extend it to all marriages celebrated before a French civil officer and to all marriages of French nationals.\textsuperscript{129}

Where the conflicts rule of the national law makes observance of the local ceremonies optional, a celebration, defective under the law of the place of celebration, may be considered valid in the homeland.

\textit{Evasion of formalities}. Apart from the requirements of some countries concerning publication and recording by their nationals (see above at page 227), parties are generally free to choose for an intended marriage a place anywhere in the world and may thus avoid the formalities prescribed in their own country:

\textsuperscript{126} NAG. art. 7f par. 2.
\textsuperscript{127} BECK, NAG. art. 7f no. 172.
\textsuperscript{129} PILLET, 1 Traité 563 no. 265; LEREBOURS-PIGEONNIÈRE 381 n: 1.
"No exception is made to the principle even where the sole object of the parties in marrying in a foreign country has been to evade some troublesome formal requirement of their lex domicilii." \(^{130}\)

This is a rule well recognized in England and in all other countries not prescribing compulsory religious marriage.

An occasional exception exists where, as in Arkansas,\(^ {131}\) a marriage out of the state is not recognized, unless the parties actually resided in the foreign state or country at the time of the marriage.

5. Religious Ceremony Considered Essential by the Personal Law

Point of view of the personal law: (a) Foreign civil marriage. Those countries which consider marriage essentially a religious institution, such as Bulgaria, Greece, Liechtenstein, et cetera,\(^ {132}\) treat as null and void a marriage celebrated abroad by one of their own subjects in accordance with civil formalities. This rule has been expressed repeatedly by the highest authorities of Czarist Russia\(^ {133}\) as well as by the attorney general of Greece,\(^ {134}\) who in an opinion stated that such a marriage is simply nonexistent, i.e., that anyone may invoke its invalidity, no decree of nullity being necessary.

The Hague Convention on Marriage (art. 5 par. 2) expressly reserved to the states prescribing religious formalities the right to treat marriages celebrated abroad by their nationals in disregard of such prescriptions as invalid.

\(^{130}\) CHESHIRE 325.

\(^{131}\) Pope's Dig. Stat. (1937) § 9023.

\(^{132}\) See supra p. 213.

\(^{133}\) Decisions of the Cassation Departments, penal, 1889, no. 2; civil, 1899, no. 39; of the first Plenary Meeting of the Senate, Aug. 12, 1911; Circular of the Ministry of Foreign Affairs to the Russian Representatives in Germany of February 25, 1889, no. 1384; Decree of the Consistorium of St. Petersburg, May 20, 1911; cited according to MAKAROV, 4 Leske-Loewenfeld I 488 n. 105.

\(^{134}\) Opinion of Mr. GIDOPOULOS, procurator at the Areopague, to the Ministry of Justice, no. 54 (Dec. 28, 1936) Clunet 1937, 902; for the literature and cases in point see 2 STREIT-VALLINDAS 317 n. 32.
(b) **Foreign religious marriage.** Under Greek law a Greek national may marry abroad in accordance with the formalities of his church, no matter what the local law provides. 135 A similar rule was in force for subjects of Czarist Russia. 136 In other countries, such as Croatia, which is governed by the older Austrian law, a foreign marriage of Catholic nationals must comply with the formalities established by the Catholic church at the place of celebration. 137

**Point of view of the local law.** Where a Bulgarian national marries before a civil officer in Germany and does not go through an additional religious ceremony, the marriage is valid in Germany and invalid in Bulgaria. 138 This situation is apt to give rise to puzzling problems under the law of the country where the celebration took place, i.e., Germany. It has been held that such a “limping marriage” (*matrimonium claudicans*) can be dissolved by a German decree of divorce, although generally divorce presupposes a marriage valid under the personal law of the parties. 139 In this case, the grounds for divorce are fixed exclusively by German law. But many related questions are open to discussion. What happens if one of the parties marries another person in Bulgaria? Is he or she punishable for bigamy in Germany? And shall it be held that remarriage is allowed even in Germany, since German law provides that a person’s capacity to marry is determined by his national law? 140

Prevailing German opinion is to the effect that the marriage ought to be binding in Germany in every

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135 2 Streit-Vallindas 321: a Greek may marry a Bulgarian girl before an Orthodox priest in Germany.

136 Makarov, 4 Leske-Loewenfeld I 488; Makarov, Précis 325.

137 See Lovrič, 4 Leske-Loewenfeld I 1013, 1034.

138 This seems to be the rule in Colombia also, as art. 12 of Law 57 of April 15, 1887, declares that marriages celebrated according to the Catholic rites produce all civil and legal effects. Cf. 1 Restrepo Hernández 111 no. 202.

139 See supra n. 69.

140 Cf. KG. (Dec. 11, 1933) JW. 1934, 619.

140 EG. art. 13 par. 1.
respect, the personal law notwithstanding. Furthermore, if the female party to the marriage was a German national, she has, on account of the marriage, lost her German nationality, though she has not acquired that of Bulgaria.

While the same basic principle with regard to an English marriage was clearly adopted in English precedents such as the *Papadopoulos case*, a strange modification was caused by recognizing a marriage annulment pronounced at the husband's foreign domicile for the mere reason that the marriage lacks the proper ecclesiastic form. Hence, after such foreign annulment, the wife cannot obtain her rights as a spouse nor can she sue for divorce. This attitude of the English courts has been influential in Canada and Scotland.

Another problem concerns the consequences of such a marriage, valid under the law of the place of celebration and invalid under the personal law. Are marital property rights and other incidents of the marriage governed by the personal law of the parties, although this law treats the parties as not married? The more reasonable answer seems to be in the affirmative, because this is just the normal consequence of considering the parties married.

**Point of view of third countries.** What is the position of a third country when a conflict arises between the state of celebration and the national or domiciliary state of the parties?

The answer is clear when the third state adopts *locus regit actum* as the absolute binding rule, which is the case in Great Britain and the United States. A marriage celebrated by a

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141 See LEWALD 111 no. 158; NUSSBAUM, D.IPR. 162; 3 FRANKENSTEIN 214; MASSFELLER, Das grossdeutsche Ehegesetz (ed. 2, Berlin, 1939).  
Contrary: RAape 383, 400.


143 See infra p. 422.

144 Cf. EG. arts. 14 ff.

145 See RAape 1 D.IPR. 180, in conflict with KG. (May 3, 1937) JW. 1937, 2523, and several writers.
Greek citizen before a city recorder in San Francisco is certain to be recognized in England. On the other hand, a religious marriage of the same man celebrated in France would be considered invalid in the United States, because it is invalid in France.

Where, however, a court must follow the national law of the parties, ascribing to the law of the place of celebration only an optional role, it is doubtful which law is applicable when they are in conflict. Prevailing opinion favors the solution afforded by article 5 of the Hague Convention on Marriage according to which a marriage formally valid at the place of celebration is formally valid in all third countries, the national country alone being entitled to consider it void because of the lack of a religious ceremony. On the basis of this rule, the Reichsgericht recognized as valid in Germany a marriage celebrated before a civil officer in Brazil between a Turkish national of Roman Catholic faith and a stateless woman who had once been a national of Prussia, non-recognition of the marriage under existing Turkish law notwithstanding. It also upheld a marriage entered into before a Norwegian civil officer by a Greek national of Orthodox faith and a Norwegian woman. The Swedish statute and the Código Bustamante have adopted the same rule, and French and Belgian decisions are to the same effect.

146 Case of OLG. Hamburg (Nov. 15, 1926) Hans.GZ. 1927, Beibl. 4, IPRspr. 1926-1927, no. 28.
148 RG. (Oct. 1, 1925) JW. 1926, 375, IPRspr. 1926-1927, no. 27. See also OLG. Karlsruhe (April 18, 1917) 35 ROLG. 343; OLG. Hamburg (Nov. 15, 1926), supra n. 146. Contra: RAAPE, 253, 172; 3 FRANKENSTEIN 160.
149 Sweden: Law of 1904 with amendments, c. 1 § 6. Código Bustamante art. 41.
In the opposite case of a marriage invalid in form under the law of the place of celebration, article 7 of the Hague Convention provides that it "may" be recognized by third countries, if the formalities of the national law or laws of both parties are satisfied. A marriage celebrated in accordance with the religious ceremony prescribed by the personal law, but not in compliance with the civil formalities of the place of celebration, is regarded as valid in France, Germany, and the other countries following the optional rule.\(^{151}\)

Except for this instance of reference to the personal law, the few countries which require their subjects to follow a religious ceremony even when marrying abroad find themselves isolated. Their requirements are observed neither by the countries of celebration nor by third countries. The difficulties involved are illustrated by such cases as the recent sequel to the famous Papadopoulos case, which revealed a first marriage in England and a second in Greece, the man being married to two women for ten years.\(^{152}\)

6. Other Tests

*Foreign consular marriage:* (a) *In general.* We have had occasion to deal with the position of the forum as concerns marriages at which a consular or diplomatic agent of a foreign power has officiated within the territory of the forum.\(^{153}\) Con-

\(^{151}\) France: Pillet, Traité 552 no. 259; Basdevant, Revue 1908, 284 (On occasion of an Austrian decision); Audinet, Recueil 1926 I 202 ff., Lerebour-Pigeonnier 383 no. 325.


\(^{153}\) Supra pp. 220–222.
sent by the receiving country to such official action of a foreign representative is indicated either by liberal custom, as for instance, in France or Greece, or by an express clause of an international treaty. Now we are concerned with the status of a "consular" (or "diplomatic") marriage in the sending state.

Recently, the institution of consular marriage has been used primarily by Europeans and Americans marrying in Oriental countries, where marriage forms depend on the various religious denominations or national groups. Treaties allowing representatives of Western powers to exercise non-litigious jurisdiction have partly superseded the old system of capitulations. The recent increase in provisions concerning consular marriages, however, seems to indicate other needs. Switzerland, for instance, though generally prohibiting consular marriages, specially authorizes her representatives to officiate when located in remote countries or when Swiss nationals are unable to marry according to local formalities and the country of celebration is not likely to object.\textsuperscript{154} Thus, relief might be given a Swiss couple who had obtained a divorce in Switzerland and wished to remarry each other in Spain, since Spain, ignoring the divorce, could make no technical ceremony of remarriage available to them, although a form of reconciliation is in such case provided.\textsuperscript{155}

A remarkable concession for the sake of international cooperation was made by the participant states in the Hague Convention on Marriage. By article 6, paragraph 1, second sentence, the signatory powers bound themselves not to oppose a diplomatic marriage, even though it would offend their own laws on remarriage or religious impediments. Thus, if

\textsuperscript{154} Cf. Swiss Rev. Consular Regulation of Oct. 26, 1923, art. 63. This was, indeed, the situation in Peru for non-Catholics until the Law of Dec. 23, 1897.
\textsuperscript{155} Cf. German RG. (June 9, 1883) 9 RGZ. 393 at 402.
And in Turkey for parties of different religions until the Civil Code of 1926; see SALEM, 7 Répert. 268 no. 220.
\textsuperscript{155} BBl. 1919, IV. 310, no. 21.
both parties are aliens, the second marriage of a divorcé or even the marriage of an ordained Catholic priest is valid, although it would otherwise be considered repugnant to local policy. In England, also, foreign marriages of aliens, celebrated before the consul of their common country, are regarded as valid, notwithstanding their invalidity according to the law of the place of celebration. This concession to the law of nationality is masked by the fiction that the parties have met on extraterritorial territory.

(b) **Authority granted by the sending state.** As a condition of consular marriage, the solemnizing official must be empowered by his own state to officiate at marriages in general or at specific marriages. Such authority is given either by law, as in Great Britain, France, and Italy, or by administrative acts based on legislation, as in Germany. A few states do not allow their agents any such function. Consular officers of the United States are authorized to solemnize marriages if the parties are domiciliaries of the District of Columbia, a territory, Massachusetts, or Connecticut, or if they are United States citizens domiciled abroad. Other countries require either that both parties be their subjects or that at least

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156 WALKER 656, and others very inappropriately call this concession strange.
157 See FOSTER, 65 Receuil 1938 III 444, no. 25.
158 Great Britain: Foreign Marriage Act, 1892.
159 France: C. C. art. 48.
160 Former Austria was in this group; see WALKER 647 (whose mention of Sweden and Portugal, however, is wrong).
163 The Netherlands: Consular Law of July 25, 1871, as rerafted on July 15, 1887; Spain: C. C. art. 100 par. 3; Portugal: Law of Dec. 25, 1910, art. 58 § 2, etc.
one party belong to the sending state. Still others permit consular marriage even of foreign couples; Great Britain does so when the country of celebration consents and both parties are nationals of the same country.

Illustration: France, not having authorized a celebration of marriage between a French party and a Bulgarian party before a French consul in Bulgaria, declares such marriage invalid in France; it is therefore invalid in Bulgaria too.

States should not be entirely free, however, and most states do not feel free, to fix the permissibility of consular marriages. In case both parties are not nationals of the sending state or, at least, where one party is a subject of the receiving state, the consent of the latter state should be required. A satisfactory rule has been laid down by the Hague Convention on Marriage, article 6 paragraph 1, first sentence:

"In respect of formalities the marriage is to be recognized everywhere, if it is concluded before a diplomatic or consular representative in conformance with the laws of his country, provided that neither of the spouses is a citizen of the state where the marriage is celebrated and that this state does not oppose the celebration."

Section 126 of the Restatement requires more simply that the marriage should be performed "in accordance with the

163 France: C. C. art. 170 pars. 2 and 3, as completed by the Decree of March 8, 1937 (Clunet 1937, 649), listing remote non-Christian countries only; Germany: (supra n. 159) including denizens; Great Britain: Foreign Marriages Order in Council, 1913, arts 1, 2. Switzerland: Bundesrat requires as to marriages in China that the husband be a national, BECK, NAG. 223 no. 19. The Belgian law of July 12, 1931, art. 7 par. 2 permits by exception marriages between Belgian men and foreign women "in the countries where the local legislation prevents the celebration of marriages of the kind." Perhaps the idea is related to that prevailing in Switzerland (supra n. 154).


166 This provision is supplemented by arts. 6 and 7. Sweden: Law of 1904 with amendments, c.1 § 7 adopted the same solution. Great Britain and Belgium, supra n. 163; and Italy: Consular Law of Jan. 28, 1866, art. 29, take into consideration the consent of the receiving state.
law of the country where it takes place or with a treaty to which that country is a party."

Unfortunately, many states are not so considerate. 167

A peculiar feature of a few laws is that a religious minister may be authorized to officiate. 168

The treaties are as varied as the statutes or customs of the sending states. Usually they require either that both parties belong to the sending state 169 or that one be a national or domiciliary of the sending state, the other belonging to a third state. 170

(c) Law of third states. Except for article 6, paragraph 1, of the Hague Convention, courts will, according to the principle of lex loci celebrationis, follow closely the position taken by the local law. 171 In this regard, section 126 of the Restatement expresses a rule of universally settled law. But it must be borne in mind that most countries are satisfied when the marriage form agrees with their own municipal prescriptions. Hence, if both parties belong to the same state, it suffices to observe the regulations of this state and, if they are subjects of different states, to comply with the formalities of both states.

(d). Ceremony. Respecting details of the ceremony, the rules of the sending state are customarily followed in a

167 Particularly Great Britain (cf. Hay v. Northcote, supra n. 77), although Foreign Marriage Act, 1892, s. 19, instructs the officer to refuse to perform the marriage if the celebration would be contrary to the rules of international private law or to the principles of international comity.


169 See, for instance, the treaties of Germany with Italy (May 4, 1891), Soviet Union (Oct. 12, 1925), Panama (Nov. 21, 1927), Lithuania (Oct. 30, 1928), South Africa (Sept. 1, 1928), Bulgaria (June 4, 1929), Turkey (May 28, 1929), and Haiti (March 10, 1930), the treaties with Bulgaria (art. 19) and Turkey (art. 18) containing marriage regulations and the others conferring the right of the most favored nation.

170 See for instance the three consular conventions between the three Baltic States of July 12, 1921 (11 League of Nations Treaties (1922) 87, 99; 25 ibid. (1924) 299) art. 15.

171 This is the widely prevailing opinion; contra: 2 ZITELMANN 613 and LEWALD in STRUPP, 1 Wörterbuch des Völkerrechts und der Diplomatie 264.
diplomatic marriage,¹⁷² although Soviet law does not respect this custom.¹⁷³

**Marriage on the high seas.** Insofar as the law of the place of celebration is competent, marriages on board ship on the high seas are governed by the law of the flag.¹⁷⁴ This rule seems to be universally accepted. Most domestic laws, however, are reluctant to authorize such marriages on their own vessels. Great Britain allows captains of vessels to officiate, provided the parties were unable to take advantage of a local law or consular intervention.¹⁷⁵ In the United States, it is generally held that the marriage is valid, if in conformance with the law of the shipowner’s domicil.¹⁷⁶ To be sure, the law of the flag may permit marriage by mere consent.¹⁷⁷

**Marriage in remote places.** The validity of a marriage *per verba de praesenti* has been admitted where there was no means of solemnizing the marriage under some local law, e.g., in the Far East,¹⁷⁸ although there is less doubt about its validity if an ordained priest or minister is present.¹⁷⁹

**Military marriages abroad.** Soldiers serving abroad in time of peace or war, if allowed to marry at all, usually enjoy special privileges. There may be a special marriage officer, or soldiers may be allowed to marry by proxy or even by their own written declaration filed at the marriage office of the bride.¹⁸⁰

¹⁷² Código Bustamante art. 42.
¹⁷³ See MAKAROV, Précis 328.
¹⁷⁴ Restatement §§ 127 and 45.
¹⁷⁵ Foreign Marriage Act, 1892, § 12; and Foreign Marriages Order in Council, 1913, art. 20(2); R. v. Anderson (1868) L.R. 1 C.C.R. 161.
¹⁷⁶ See GOODRICH 304.
¹⁷⁸ See with respect to Japan: BATY, op. cit. supra n. 75 at 106–109.

¹⁷⁸ The method last mentioned was introduced by a recent German regulation of Nov. 4, 1939, RGBLI 2163, §§ 13, 14: marriage in the absence of the husband, which consists of separate declarations of the parties without proxy.
MARRIAGE

In France it is provided that only French soldiers with brides of French nationality may appear before a civil officer of the army, while foreigners have to comply with the local formalities. 181

IV. CONCLUSIONS

This subject has presented an excellent illustration of the thesis that a uniform conflicts rule is easily obtainable despite fundamental differences in municipal legal systems—provided that these differences do not prevent mutual tolerance. The only serious disturbance in this harmony is attributable to the attachment of a few countries to the traditional claims of certain religious denominations. In view of the general development in the last century and a half, such perseverance is hardly justifiable, although it reflects deserved gratitude for the civilizatory work of the churches during many centuries. Catholic countries such as Austria, Italy, Colombia, and Ecuador which at present have or had a short while since marriage rules largely accommodated to the conceptions of the Roman Church, nevertheless agree in the conviction that their nationals should not be prevented from using the marriage ceremonies that are legal in foreign countries. The Spanish Supreme Court criticized by the literature requires Spanish nationals to marry at the consulates, but not on the ground of religious law.

It may be hoped that the period of readjustment following the present war will stimulate reconsideration of these basic problems of international relations.

181 C. C. art. 93 par. 3, as amended by Law of Dec. 20, 1922. The British regulations do not apply to all parts of the army. E.g., the Foreign Marriages (China) Order in Council, 1938, excludes the solemnization by a marriage officer in China of marriages between parties either of whom is serving in China in His Majesty's Naval or Military Forces or the Royal Air Force.