CHAPTER 8

Substantive Requirements for Marriage

I. Survey

1. Terminology

In the traditional language of the canon law and most modern codifications, marriage requirements not concerned with formalities are labeled "impediments (obstacles) to marriage." According to their effect upon the validity of the marriage, they are divided into impediments merely capable of postponing its celebration—impedimenta impedientia, directory requirements—and those rendering the marriage void or voidable—impedimenta dirimentia, mandatory requirements. This division is well known in every law. (Cf. Restatement §§ 9, 122.)

The term "requirements," which is frequently used today, is more convenient and more correct, because it includes the conditions of consent to marry, while "impediments" fails to include defects of consent.

"Capacity" to marry far from covers the whole concept. It denotes the general ability of a person to marry at all, for instance as defined by requirements of age and parental consent, but it does not refer clearly to an individual's being permitted to marry a specific person or a person of a determinate class. Nor does the term, capacity, include the requirement of sufficient consent of the parties; for this reason, in the text of the Hague Convention on Marriage, article 1, the words "The capacity to contract marriage" were replaced by "The right to contract marriage." ¹ As short terms, however, both terms are and may be used.

¹ For this discussion see decision of the German RG. (Dec. 15, 1930) IPRspr. 1931, no. 58 at 119.
2. Two Rival Basic Principles

Not only are the municipal rules on intrinsic requirements of marriage extremely different, but also the rules relating to the conflict of municipal laws are confusingly varied. A few observations may help us to find our way.

There are two main principles, both coming from the statutists:

(a) One principle, represented in its purest form by the dominant conflicts law of the United States, points to the law of the place of celebration; a marriage good where contracted is good everywhere, and vice versa. The practice of applying this maxim, which clearly originated in the ordinary contract theory, to the substantive requirements of a contract creating a status, was in defiance of the traditional doctrine of status. The reason for this custom is perhaps that the machinery of marriage licensing has seemed inadequate to meet the unknown laws of the respective domicils of the parties. And an avowed purpose of the principle has always been to make marriage possible for persons who could not marry under their domiciliary laws.

(b) In the European systems, the personal law of the parties controls the intrinsic requirements. Under this system the personal law may be determined either by the domicil or by the nationality of the parties, as the status rule may be.

Illustration: A sixteen-year-old girl of Serbo-Yugoslavian nationality is married in Michigan. She has capacity to marry under rule (a) and also according to English law based on domicil (under rule b) but is incapable according to her national law applied under rule b.

By certain regulations, however, both these points of contact, and sometimes even that of the place of celebration as a

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2 ULRICH HUBER, De conflictu legum in diversis imperiis, no. 8 (GUTHRIE, translation of SAVIGNY 512) "Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit."

3 See JOHANN STEPHAN PÜTTER, 3 Auserlesene Rechtsfälle, part r (Göttingen, 1777) §§ 11-15.
third element, are combined with each other, with obscure complexities resulting from the combination. Other serious complications are bound to arise under this system when the personal laws of the parties are different.

3. Influence of Public Policy

Both basic principles have proved one-sided, each being closely limited by numerous exceptions. Whatever principle a country may have adopted, there will be a marked tendency not to apply a foreign marriage rule which conflicts with the matrimonial law of the forum. Marriage is one of the favorite objects of tenacious local custom and of more or less singular enactments. Once almost every town in Central Europe had its own law of marriage. Although centralizing states have always succeeded in unifying a multitude of matrimonial systems with almost no resistance except for the claims of churches, still each existing international private law is influenced (and if we except the United States, even greatly influenced) by the idea that its domestic rules alone are morally justified and form an indispensable gift to its own subjects. If we observe how varied marriage laws are and how antiquated or arbitrary many of them appear, we understand the reluctance of states to recognize each other’s laws.

The matter is further complicated because more than one country may be involved, and in consequence different countries may apply their own public policies. There is the country where the parties intend to marry, the country which considers one or both of the spouses its subjects, the country where a lawsuit for annulment is brought, the country where recognition of the marriage or recognition or execution of an annulment is sought, and there may be other countries interested in the status of children.
The question of public policy depends on which of the two basic principles mentioned is adopted.

Under the main principle accepted in the United States, the substantive requirements for marriage are determined by the law of the state where the marriage is to be or has been celebrated. But apart from certain elementary exceptions, such as the rejection of polygamous and incestuous bonds, there has appeared a "substantial" and "growing" body of cases to protect the law of the domicil of the parties. Moreover, important legislative attempts have been initiated to curb "evasions" of the domiciliary policy of marriage.

In various other countries on the American continent, where the same basic principle prevails, the influence of the personal law has made itself felt even more pronouncedly.

Conversely, in a country allowing foreigners to marry only if the marriage is not prohibited by their domiciliary or national laws, additional requirements are established to satisfy local public policy (prohibitory public policy) and certain foreign prohibitions are disregarded as offending the local order (permissive public policy).

The phenomena mentioned above will be treated in the following pages. The situation arising when the validity of a marriage is examined in a lawsuit or when a foreign judgment on its validity or invalidity is presented for recognition, will be dealt with separately, since the problem is essentially the same for intrinsic and formal requirements.

4. Ecclesiastical Courts

A particular position is taken by ecclesiastical courts of all faiths. As the churches claim universal efficacy for their rulings, the tribunals constituted by them apply their own laws

4 See Note, 26 Harv. L. Rev. (1913) 536 and Goodrich 356; Beale and others, "Marriage and the Domicil," 44 Harv. L. Rev. (1931) 501, 527, n. 85, notice "a growing consciousness of the power of the domicil."
exclusively, irrespective of whether the marriage is celebrated in one country or another. Conflicts rules are lacking, and in some parts of the world the resultant confusions are considerable. 5

II. LAW OF THE PLACE OF CELEBRATION

1. The Principle

The United States. In the United States, 6 the law of the place of celebration has greater influence on the substantive requirements of marriage than in any other country. In this country, this law is applied by the marriage officials and judges of the state where the marriage is to be or has been celebrated, by the courts of the state or states where the parties had their domicils at the time of the marriage, and finally by the courts of any other state. In other words, from the standpoint of the domiciliary state or the standpoint of the state of celebration, the rule is the same for domestic and foreign marriages and for domiciliaries as well as for foreigners.

Philippines. The Civil Code of 1949 (art. 71), under strong American influence, provides for the validity of all marriages if valid where contracted abroad. However, foreigners celebrating marriage in the Philippines have to comply with the requirements of their national law. 6 a

Argentina and others. The law of the place of celebration has also been adopted in a group of Latin-American countries but its application is greatly restricted, as each of these countries requires those persons whom it regards as its sub-


6 Restatement § 121. Cf. Bishop, 1 New Commentaries on Marriage §§ 841 ff.; 1 Wharton § 165a; Minor § 73; 2 Beale §§ 121.2, 121.6, 121.7; Kessler, 1 Z. ausl. PR. (1927) 358 n. 5.

6a C. C. (1949) art. 66 implicitly by requiring a certificate of legal capacity to marry by the respective diplomatic or consular official before a marriage license can be issued; cf. Salonga 239.
jects (by domicile or nationality, respectively) when marrying abroad to observe all its prescriptions or a large number of them. This group includes Argentina, Guatemala, Paraguay, Peru, and Costa Rica. In this spirit the Treaty of Montevideo of 1889 (art. 11), recast in 1940 (art. 13 par. 1), formulates the principle as follows:

The capacity of persons to contract marriage, the form and the existence and the validity of the marriage act, are determined by the law of the place where it is celebrated.

The article enumerates a number of essential defects on account of which annulment may be sought, provisions with which we shall deal later. The main rule for substantive requirements seems, however, unqualified with respect to the marriage of two foreigners. In this case, the rule is applied regardless of whether the marriage takes place within or without the country. The same result was implicitly adopted by the Civil Code of Mexico for the Federal District but has not been repeated in the Code of 1932.

Chile and others. In another group of Latin-American countries, a formula has been adopted similar to that of Chile, as follows:

Marriage celebrated in a foreign country in conformity with the laws thereof, or with the Chilean laws, shall have in Chile the same effects as if it had been celebrated on Chilean territory. (C.C. art. 119 par. 1.)

Apparently, an option is granted between local and national law with respect to formalities as well as other requirements.

7 Argentine Civil Marriage Law of 1888, art. 2, relating not merely to formalities as some writers have suggested; see ALCORTE, 2 Der. Int. Priv. 99; 2 VICO no. 13; ROMERO DEL PRADO, Der. Int. Priv. 277 and 2 Manual 30.
8 Guatemala: Law on Foreigners (1936) art. 36. See MATOS no. 228 at 342, 343.
9 Paraguay: Marriage Law (1898) art. 2; Peru: C. C. Tit. Prel. art. V, par. 2; Costa Rica: C. C. art. 9 (by implication); see ORTIZ 294.
10 C. C. (1884) art. 174; (1928) art. 161.
But the more recent Chilean Law on Civil Marriage, of January 10, 1884 (art. 15 par. 1), simply states:

Marriage celebrated in a foreign country in conformity with the laws thereof shall have in Chile the same effects as if it had been celebrated on Chilean territory.

This text seems to indicate that requirements, both formal and substantive, are controlled by the local law alone, whereas Chilean subjects, according to an additional paragraph, must in addition obey the "prescriptions" or (in a more recent wording) the "prohibitions" of the Chilean marriage law.

This group of countries, therefore, seems to join the group discussed above.

Brazil's recent law (1942), going over to the domiciliary principle, contains two provisions: In the case of any marriage celebrated in Brazil, Brazilian law is applicable to mandatory requirements (impedimentos dirimentes) and formalities. In case the parties have different domicils, the validity of the marriage is governed by the law of the first marital domicil. In the light of the foregoing parallels the language suggests that marriages celebrated in Brazil are exclusively governed by Brazilian law—correspondingly with the rule in this country—but that capacity to marry in foreign countries is determined according to the common domicil of the parties rather than to the place of celebration. The only available comment by a Brazilian author, however, transfers from the system of the Hague Convention to the

11 Ecuador: C. C. art. 104 par. 1 is similar to the older Chilean text; it is added, as it was formerly in the Argentine C. C. art. 164, that any annulment of a foreign marriage by an ecclesiastical authority must be respected.

Uruguay: C. C. (1868 as amended 1893 and 1914) art. 101, par. 1 and Act of May 22, 1885, are certainly to the same effect, as Uruguay is a participant in the Montevideo Treaty.

12 Lei de Introdução (1942) art. 7 §§ 1 and 3.
new rules the consideration of the impediments established by the national laws.\(^\text{13}\)

The obscurity of drafting in all these enactments is regrettable.

**Denmark.** In Denmark, likewise, the primary rule refers to the law of the place of celebration. This rule is not exclusive, however, since a marriage official may not preside at the marriage of two nonresident foreigners, if some impediment established by one of the domiciliary laws is proved to him.\(^\text{14}\) But where a person domiciled in Denmark enters upon a marriage in a foreign country, the Danish law does not claim any influence, unless a strong public policy, such as that regarding bigamy or incest, requires attention.\(^\text{15}\)

**Código Bustamante.** A singular application of the law of the place of celebration is made by article 48 of the **Código Bustamante**. While this code invokes as a general principle the personal law of the parties, article 48 provides that coercion, fear, and abduction as causes of nullity of marriage are governed by the law of the place of celebration.

**Switzerland.** Whereas the American rule, as conceived by the Restatement, refers exclusively to the municipal law of the place of celebration, in Switzerland a parallel rule is established\(^\text{16}\) for foreign marriages of Swiss nationals, with the distinct implication that, above all, the conflict law of the place of celebration shall decide what legal order applies to the case. This rule, which indicates an unusually broad-minded policy, has not always been correctly applied by non-Swiss courts. Taking into account the diversity of conflict

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\(^\text{13}\) ESPIÑOLA, 8–B Tratado 820 no. 203. In the sense of the text apparently TENOIRO, Lei de Introdução ao Código Civil Brasileiro (ed. 2, 1955) 268 ff.

\(^\text{14}\) BORUM, Personalstatutet 424, 427, 440; see also HÖCK, Personalstatut 16; BORUM and MEYER, 6 Répert. 218 nos. 34 and 37; MUNCH–PETERSEN, 4 Leske–Loewenfeld I 746. (These writers do not entirely agree with each other.)

\(^\text{15}\) BORUM, Personalstatutet 457; 6 Répert. 218 no. 37.

\(^\text{16}\) NAG. art. 7 f.
laws, Swiss conflicts law gives way to any other conflicts rule of the foreign domicile. As a matter of fact, the draftsmen realized that in the statistical majority of cases the foreign conflicts rule would, on the basis of the nationality principle, refer the case to Swiss matrimonial law to govern the substantive requirements for Swiss nationals. The decision, however, is left to the local law, the intention being to rule out any conflict with the law applicable under the local conflicts rule. It follows that a marriage of Swiss nationals in the United States, if good at the place of celebration, is good under Swiss law too. It is immaterial whether the parties are domiciled at the foreign place of celebration.\textsuperscript{17}

There is much doubt, however, whether this rule applies only where both parties are Swiss nationals or whether the local law governs mixed marriages as well. Sometimes the courts have extended the rule to the latter case,\textsuperscript{18} but generally it is argued that only where both spouses are Swiss can the Swiss concession succeed in avoiding conflicts; where another legal order is involved, the nationality principle is preferred.\textsuperscript{19}

\textit{Soviet Russia}. Soviet Russia applies her marriage laws to all persons, including foreigners, who marry within the U.S.S.R.\textsuperscript{20}

2. Exceptions: Prohibitive Public Policy

\textit{The United States: Policy of the forum}. Exceptions to the rule that a marriage validly contracted at the place of celebration is valid everywhere are made by common law practice as well as by statute.

\textsuperscript{17} Beck, Nag. 231 no. 50, \textit{ibid}. 275 nos. 18–23.
\textsuperscript{18} BG. (Dec. 18, 1875) 1 BGE. 101; BG. (March 18, 1876) 2 BGE. 32; BG. (Oct. 28, 1881) 7 BGE. 658, 662.
\textsuperscript{19} BG. (Nov. 11, 1954) 80 BGE. I 427 (foreign husband); Beck, Nag. 220 nos. 10 and 11; Huber-Mutzner 427 n. 171.
\textsuperscript{20} See Freund in 4 Leske-Loewenfeld I 366; Makarov, Précis 327; Lunz 301.
A marriage is held invalid when it is, in the opinion of the forum, contrary to the general principles of Christendom. The only applications concern polygamous and incestuous marriages, and both are dealt with discriminately. Practical cases of polygamy are those of the so-called "progressive" sort, viz., where a party has gone through a second marriage after a divorce recognized at the place where granted but not recognized at the forum. Incest is not a characteristic of every marriage between near relatives prohibited at the forum; but such has been assumed in a few cases of marriage between nephew and aunt or even the widow of a nephew and an uncle. The decisions respecting marriages of first cousins are in conflict.

A further exception is made by common law on behalf of "a distinctive national policy of the forum." On this ground, miscegenation is considered a cause of invalidity in all Southern and some Northern and Western states.

Policy of domicil. Though the subject of endless controversy, a few other requirements established by the law of the domicil of a party have been enforced regardless of the local law; thus the provisions of Oklahoma and New York about nonage and certain prohibitions against remarriage. The

21 Restatement § 132 comment a; 2 Beale § 132.1.
23 Osoinach v. Watkins (1938) 235 Ala. 564, 180 So. 577.
Restatement does not hesitate to generalize in this respect; every time a state makes it clear that it regards a prohibition as arising out of a "strong public policy"—what in Europe is called extraterritorial or international public order—the prohibition limits the rule that the local law governs. If this extension of the force of the law of domicil were accepted unanimously, the situation would be somewhat clarified. Under no theory, however, would the law of the place of celebration be excluded in any jurisdiction by a domiciliary prohibition that, though of mandatory character or of public interest, is not held to be clearly of primary importance.  

Under the common law, apart from the general function of public policy, the fact that the parties attempt to elude their domiciliary prohibitions is immaterial. The law of the place of celebration is applicable, as Judge McSherry stated in *Jackson v. Jackson*, "even when they have left their own State to marry elsewhere for the purpose of avoiding the laws of the domicil." Thus, infants domiciled in Wisconsin, marrying validly in Minnesota, are considered validly mar-
ried in Iowa, although the marriage is invalid because of nonage in Wisconsin under its evasion clause. 30 In the same spirit, the Civil Code of Argentina, article 159, expressly establishes the law of the place of celebration as governing, "even where the marrying parties have left their domicil in order not to be subjected to the formalities and laws there in force."

By statute, however, specific provisions against evasion have now been introduced in seventeen states. 31 Five of these states 32 have adopted the Uniform Marriage Evasion Act of 1912, section 1 of which reads as follows:

"If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

This provision presupposes prohibitions rendering the marriage void under the home law; if it be understood as referring solely to voidness ab initio, the provision may be criticized as ineffectual. 33 At least it is not confined to single enumerated prohibitions as are some other evasion statutes; 34 hence, it would not be impossible to bring child mar-

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31 Harper, Taintor, Carnahan and Brown, Cases 258, distinguish the statutes enacting a subjective test of evasion, those enacting an objective test of evasion, including the Uniform Marriage Evasion Act, and those covering all ceremonies between persons who intend to live in the state.
32 Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin.
33 Richmond and Hall, Marriage and the State (1929) 196. As a matter of fact, it seems that not every mandatory requirement is given extraterritorial effect even in interpreting the Uniform Marriage Evasion Act; see Lyannes v. Lyannes (1920) 171 Wis. 381, 177 N. W. 683; cf. Kessler, i Z. ausl. PR. (1927) 858, 861.
34 E.g., miscegenation (Montana), capacity (Connecticut), blood relationship (West Virginia).
riages under its protection, though no such decision is known. Nor does the Uniform Act require, as three states’ enactments do, that the parties intend to evade a prohibition.

The Uniform Act has extended its scope remarkably by adding section 2, whereby an evasive marriage is prohibited by the state of celebration itself. Further repression of evasive marriages can obviously be accomplished by reciprocation among the states sharing the policy of preventing evasion; in fact, the Supreme Court of Wisconsin has declared void a marriage celebrated in Indiana in defiance of the marriage prohibition and the evasion statute of Illinois, the parties being domiciled in Illinois. And other cases seem to promote this approach, which has been properly construed as a renvoi to the conflicts rule of the domicil.

Under common law principles also, bigamy, incest, and miscegenation, when subject to a “strong” domiciliary policy, are sufficient cause for annulment in the courts of any third state having the same distinctive public policy. The Restatement again achieves a broad generalization. According to section 132, wherever a statute at the domicil makes a mar-

35 Recently all jurisdictions have established statutory rules on age. Evasion of such provisions was one of the principal purposes of marriage out of the state; cf. the enumeration of motives for such marriages by Goodrich 357. There are still marked variances among the statutes.

West Va. Code (1955) c. 48 § 4695 [17].


Marriage void even though celebrated in another state, the marriage is void—not only at the domicil but also in all third states and even in the state of celebration, for section 132 says "everywhere." 39

The Uniform Marriage Evasion Act, section 3, provides the following additional precaution: the licensing official must ascertain that a party residing in another state is not prohibited from marrying by the laws of the jurisdiction where he resides. 40 Yet no independent verification of the allegations of candidates is usual. 41

The Uniform Marriage Evasion Act, section 1, prohibiting the parties from going "into another state or country," was probably intended to be applicable in any country as part of a domiciliary law. Under this assumption, the marriage, celebrated in Florida, of an American or an Englishman domiciled in Illinois with his first cousin, is invalid under the laws not only of Illinois but also of France, where the principle of nationality requires the application of the law indicated by the national law of the person. 42

It may be noted that, except for miscegenation, the notion of evasion apparently is not extended to the case of parties effectively changing their domicil, i.e., abandoning their old place of residence and establishing themselves for the time being at the foreign place where they have their wedding. If, for instance, the parties are forbidden at their domicil to marry within a certain time under the sanction of nullity, they may transfer their domicil to another state and validly

39 It has been repeatedly stated that no support can be found in the cases for this view, cf. e.g., VARTANIAN, Foreign Marriages—Recognition, 117 A. L. R. (1938) 186, 188.
41 RICHMOND and HALL, Marriage and the State (1929) 197, regretting this and other deficiencies, advocate an efficient verification of assertions, state supervision, and interstate exchange of records.
marry under its law. The marriage will be recognized even in the former jurisdiction.

**Denmark.** A foreign marriage of Danish domiciliaries is annulled when it contravenes the prohibitions against bigamous or incestuous marriages.

**Philippines.** The principle of *lex loci celebrationis* is expressly limited by a broad reservation against bigamous, polygamous or incestuous marriages, to be qualified according to Philippine law.

**Latin-American countries.** Restrictions of much greater significance are imposed on the principle *lex loci celebrationis* in the Latin-American countries mentioned above (p. 267). In some of these countries, the entire body of domestic prohibitions is declared compulsory on subjects marrying abroad. In others, a broad catalogue of requirements is similarly prescribed. The Treaty of Montevideo of 1889, article 11, recast in 1940, article 13, had the task of limiting the influence of public policy in the mutual relations of the participant states. This convention, however, still reserved to every state the right to consider void a marriage valid where celebrated, in the event of any of the following defects:

(a) Defect of age in one of the parties, the minimum required being fourteen years completed by the man and twelve by the woman;

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42 *Cf. Kessler, Z. ausl. PR.* (1927) 858, 863.
43 Fitzgerald v. Fitzgerald (1933) 210 Wis. 543, 246 N. W. 680.
44 State v. Fenn (1907) 47 Wash. 561, 92 Pac. 417; Pierce v. Pierce (1910) 58 Wash. 622, 109 Pac. 45; Goodrich 358 n. 30.
45 See *Borum, Personalstatutet* 451 and 6 Répert. 218 no. 37.
46 *C. C.* (1949) art. 71.
47 Chile: *C. C.* art. 119 par. 2.
Costa Rica: *C. C.* art. 9.
Ecuador: *C. C.* art. 104 par. 2.
Mexico: Formerly *C. C.* (1884) art. 175.
(b) Relationship between the spouses in direct line by blood or affinity, either legitimate or illegitimate;
(c) Relationship between the spouses of legitimate or illegitimate brother and sister;
(d) Having caused the death of one of the spouses of a former marriage as perpetrator or accomplice in order to marry the surviving spouse; 49
(e) A former marriage not legally dissolved.

Analogous reservations as made by some states, e.g., Argentina (C.C. art. 159), are evidently meant to apply only to their own subjects. The reservations contained in the Convention of Montevideo, on the contrary, seem to be standard requirements, common to all participant states, which may be raised by any participant state in any case of a foreign marriage. If this assumption is correct, the influence of public policy has been correspondingly unified to a considerable extent.

In Ecuador (C.C. art. 104 par. 1), a foreign marriage that is valid at the place of celebration is recognized, although, however, invalidation by an ecclesiastical court must be respected. 50

Switzerland. Swiss law is applicable in cases of evasion, where the parties marry in a foreign place with evident intention to evade the grounds of nullity of Swiss law. 51 The three premises for this rule are that only an artificial contact with the foreign place of celebration existed, that mandatory requirements have been evaded, and that both parties knew the facts and manifestly intended to evade the Swiss prohibitions. All these three conditions are seldom proved in a single

49 The case of a married person causing the death of his or her own spouse, must obviously be included.
50 No analogous consequence of the state’s connection with the Catholic church exists in Italy or Spain.
51 NAG. art. 7 f par. 1.
A tacit fourth condition for the application of this rule seems to be Swiss nationality or at least Swiss domicil of both parties; if the parties have in fact, and not merely fictitiously transferred their domicil from Switzerland to a foreign place, the provision is inoperative, just as the American evasion rules.

Apart from the rule just mentioned on evasion, which may or may not be included in the idea of international public policy, Swiss courts reserve to themselves the discretionary power to consider a marriage void on grounds of public policy. The Federal Tribunal, emphasizing the necessity of such stringent national policy, has recently denied recognition to a foreign remarriage of a Swiss citizen who was still married under Swiss law. However, not all grounds for invalidity, opposed to the marriage of foreigners in Switzerland, are applicable to the foreign marriage of a Swiss subject. Particularly, the provisions preventing marriage between uncle and niece and aunt and nephew do not have the effect of invalidating a marriage celebrated abroad, although in such cases Swiss certificates that the candidates are capable of intermarrying are not issued.

3. Exceptions: Permissive Public Policy

The United States. In the United States, it is a fairly well settled policy that foreign penal restrictions upon freedom are not recognized. This principle applies to penal legislative

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52 In the practice of the Federal Tribunal there is just one decision, BG. (Jan. 19, 1934) 60 BGE. II 1, Clunet 1938, 984, where a lunatic and his bride traveled to Brighton, England, to marry there, and NAG. art. 7 f was invoked ad abundantiam.

53 Cf. Schnitzer 322, and Beck, NAG. 241 no. 88, having different opinions. Beck, NAG. 241 no. 85, and others suggest that the husband must be a Swiss citizen; I have disregarded this arbitrary opinion.

54 BG. (May 13, 1938) 64 BGE. II 74.

55 Beck, NAG. 232 no. 56 and ibid. 262 no. 154.

56 Beck, NAG. 232 no. 57.
prohibitions on remarriage; extraterritorial effect is denied to such prohibitions everywhere, even when they are established by the domiciliary state.\textsuperscript{57} Disregard of racial prohibitions\textsuperscript{58} falls in the same category.

Switzerland. Swiss law has established the following important general limitations on recognition of foreign marriage prohibitions:

A marriage contracted abroad, which is invalid according to the law of the place of its celebration, may be declared invalid in Switzerland only if it also is invalid under Swiss law.\textsuperscript{59}

The idea is that the domestic legal order is not interested in annulling a marriage that satisfies Swiss requirements. It is doubtful, however, to what group of persons this provision is intended to apply.\textsuperscript{60}

III. Personal Law

1. The Primary Principle

Law of the domicil. The law of the domicil of either party governs marriage requirements in Great Britain, according to prevailing opinion, and in the British Empire, Norway, and, as has been mentioned, to some extent in Denmark.\textsuperscript{61} The Scandinavian Convention on Family Law also has established this as a primary rule.

The position of British law, it is true, is not quite clear. English courts are accustomed to think in terms of jurisdiction rather than to distinguish competency of tribunal and applicable law. They are supposed to recognize, however, foreign judgments affecting the status of Englishmen domi-

\textsuperscript{57} Commonwealth v. Lane (1873) 113 Mass. 458; Van Voorhis v. Brintnell (1881) 86 N. Y. 13; State v. Shattuck (1897) 69 Vt. 403, 38 Atl. 81.

\textsuperscript{58} State v. Tutty (C. C. S. D. Ga., 1890) 41 Fed. 753.

\textsuperscript{59} NAG. art. 7 \textsuperscript{f} par. 2.

\textsuperscript{60} See discussion by Beck, NAG. 258 no. 143, and Schnitzer 322.

\textsuperscript{61} Cf. supra p. 270; for Denmark, supra p. 277, n. 45.
ciled within the jurisdiction of the foreign court. Nevertheless, in *Wilton v. Montefiore (1900)*, a marriage between a Jewish maternal uncle and his niece domiciled in England was declared void, although it was alleged to be valid by both Jewish custom and the law of the place of celebration. In *Sottomayor v. De Barros (1877)*, it was held that a marriage of first cousins domiciled in Portugal, prohibited from marrying there, is to be deemed invalid also in the eyes of an English court; a contrary result was reached in the second case of *Sottomayor v. De Barros* in 1879, solely because it had then been established that the bridegroom had his domicil in England when the parties married in England.

On the basis of this latter case, many writers have believed that English courts would always apply domestic law, if the marriage is celebrated in England and one party, or at least the bridegroom, is domiciled there, irrespective of any incapacity by which the other party may have been affected under his own domiciliary law. Thus, whereas a domiciled Englishman marrying abroad would remain subject to the English rules on capacity, the foreign grounds of incapacity of a person domiciled abroad would be disregarded. This alleged rule has acquired world-wide notoriety; it has been labelled a badge of "insular pride and complacency." In fact, apart from the unclear grounds of the court in the second *Sottomayor* decision and the entirely discredited case of *Ogden v. Ogden*, there is no reasonable support for such a unilateral

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62 [1900] 2 Ch. D. 481.
63 [1877] 3 P. D. 1.
64 [1879] 5 P. D. 94.
65 Westlake §§ 21, 25; Dicey, Rule 169 Exc. 1; 6 Halsbury 376; less decidedly, Foote 125.
English doctrine. That the place of celebration has no importance was expressly stated in the second *Sottomayor* case.

Cheshire criticizes the rule from another point of view, suggesting that only the "matrimonial domicil" should be decisive. We shall discuss the merits of this doctrine shortly. At any rate, Cheshire himself believes that only the second *Sottomayor* case is in his favor; he admits that Sir James Hannen did not base his decision upon the fact that England was the matrimonial home and, further, that the grounds of decision are unsatisfactory. In any event, recent English decisions, overlooking Cheshire's opinion, adopt with better foundation the prevailing doctrine that the domicil of either party determines the capacity to marry.

**National law.** In the rest of the world, the national law of either party governs intrinsic marriage requirements. The

68 In Chetti v. Chetti [1909] P. 67 the prohibition against intermarriage between a Hindu Brahman and a foreigner was disregarded, but this disability was one that the person affected could discard at will (Cheshire 299). Moreover, it was considered inappropiate to assert such a prohibition against an English marriage to an English partner, obviously because repugnant to public policy to do so.

69 However, Beckett, "The Question of Classification ('qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46 advocates the American principle.

70 Cheshire 316; contra, see Graveson, 20 Journ. Comp. Leg. (1938) 55, cited supra n. 66.


72 Austria: Decree of Oct. 15, 1941, § 6. OGH. (1907) 44 GIU.NF. no. 3811; Walker 597, 598.

Belgium: C. C. art. 170 ter, as established by Law of July 12, 1931, art. 14.


Finland: Law of Dec. 5, 1929 on Family Relations of International Nature, sec. 1 (Finns abroad); sec. 2 par. 1 (foreigners in Finland).
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Hague Convention on Marriage of 1902, article 1, and the Código Bustamante, article 36 (for states following the nationality principle), adopted this rule, while the Scandinavian Convention on Family Law acknowledges it as a subsidiary rule.

If, within a state, religious law determines the personal law, the substantive requirements of marriage are usually included. 

Renvoi. In the conflict of domicil and nationality principles or of either of them with the law of the place of celebration, renvoi is accepted in most European countries.

France: C. C. arts. 3 and 170.
Germany: EG. art. 13 par. 1.
Greece: C. C. (1856) art. 4 par. 3; C. C. (1940) art. 13.
Haiti: C. C. art. 155 (Haitians abroad).
Hungary: Law no. IV/1952 art. 6 par. 1; Decree-Law no. 23/1952 § 16.
Italy: C. C. (1865) art. 100 par. 1; C. C. (1942) art. 115 (Italians abroad); art. 116 (foreigners in Italy).
Luxemburg: C. C. art. 3 par. 3 and art. 170.
Monaco: C. C. art. 3 par. 3 and art. 138.
The Netherlands: BW. art. 138; H. R. (Jan. 6, 1911) W. 9125.
Nicaragua: C. C. arts. 102 and 103.
Poland: Law of 1926 on international private law, art. 12 par. 1.
Portugal: Code of Civil Register of Dec. 22, 1932, arts. 315, 316; Regul. Consular, D. no. 6462 of March 7, 1920, arts. 143, 144; see CUNHA GONÇALVES, 1 Direito Civil 678.
Spain: C. C. art. 9; Trib. Supr. (July 10, 1916) 137 Sent. 105 (Spaniards abroad). Spanish Morocco, Dahîr de la condici6n civil de los españoles y extranjeros, art. 10.
Sweden: Law of July 8, 1904 with amendments, c. 1 §§ 1, 2, c. 7 § 4a.
Switzerland: NAG. art. 7c (for marriage within the state).
Turkey: 7 Rêpert. 264 no. 209.
China: Law of 1918, art. 9.
Siam: Law of March 10, 1939, § 19.

73 The rule that religious law governs the requirements for marriage is in accordance not only with Catholic canon and Greek Orthodox law but also "with Ottoman and Oriental tradition" in Palestine, as GOADBY, 152, declares; he cites, id., n. 8, Re Alison's Trusts (1874) 31 L. T. 638 (marriage in Persia of an Armenian Christian woman held invalid under Armenian canon law) and Moharem Benachi c. Salomon Sasson, infra p. 293, n. 118.

74 France: Cour Paris (March 23, 1888) Clunet 1889, 638; cf. WEISS, 3 Traité 478 n. 2.
Germany: EG. art. 27; RG. (Feb. 15, 1912) 78 RGZ. 234, for further
Illustrations: (i) Two Swiss parties domiciled in Switzerland married in Brighton, England. Swiss law (NAG. art. 7f) refers the validity of the marriage to the English conflicts law, which, in turn, refers the question to the Swiss domestic law. Hence, Swiss law was applied by the Swiss Federal Tribunal.\(^{75}\)

(ii) An American citizen domiciled in Germany married a German woman, apparently in Germany. The German court applied German law to the requirements for both parties, on the erroneous basis that the American law referred the man's capacity to marry to the law of his domicil; but the court could have reached the same result through the application of the American principle of *lex loci celebrationis*.\(^{76}\)

Contrary to its general attitude, the Hague Convention of 1902, article 1, in deference to the aforementioned Swiss rule, allowed an "express" reference of the national law to another law, thus affirming the Swiss rule while condemning renvoi in general.

2. Problems Arising when Parties are Subject to Different Personal Laws

*Each law applied separately.* The general doctrine is that each party must be free from prohibitions to marry the other party, this to be decided, in a country following the domiciliary principle, separately according to the law of the domicil of each party and, in a country following the nationality principle, separately according to the national law of each party. It must be noted, however, that this doctrine has had and still has opponents.

*Minority opinions.* Savigny,\(^{77}\) at the time when the domi-
ciliary principle was unchallenged, pleaded for the law of the first matrimonial domicil, which he identified with the domicil of the future husband, unless the parties had in fact established their domicil at another place or intended to do so. Savigny was followed by many writers of the early and later nineteenth century, but his view has finally been abandoned, since long ago objections were made that it is unfair and antiquated to disregard the personal law of the bride. It is also frequently urged that the validity of the marriage cannot be tested by the law of the place where the parties establish their domicil after their marriage. Nevertheless, Cheshire explicitly invokes Savigny's theory for his resurrection of the same opinion.

The Marriage Act of Hungary provided that in any case where a Hungarian man marries a foreign woman, either at home or abroad, her personal law is to be considered only with respect to her age and capacity to consent, while in all other respects the validity of the marriage is to be tested exclusively by Hungarian law. The Civil Code of Honduras even makes Honduran law obligatory on the capacity of both parties to marry abroad, when one party is a citizen. By such laws, the influence of domestic public policy, described below, is certainly exaggerated.

Another opinion, now discredited, urged the application of the more severe of the two laws involved. At present,
the only doctrine of importance is the general doctrine first stated.

**Doctrine of unilateral prohibitions.** To apply to either party his or her personal law has proved delicate. Following the canon law and Savigny, a distinction has been drawn between unilateral and bilateral prohibitions, although no settled definition of these terms exists nor even seems necessary. Roughly speaking, some provisions of matrimonial law concern only one person, while others apply to both parties or generally to the conclusion of the marriage. In the first case, one of the parties lacks capacity, and this party alone is prohibited from marrying (unilateral); in the second case, the prohibition resulting from the disqualification of one of the parties includes both.

In consonance with the personal law, each requirement must be observed just as it would have to be observed in the homeland. Illustration is provided by the following four important unilateral prohibitions (a–d). A fifth example (e) leads to the related question of the party who may bring suit for annulment, the determination of which also depends on the personal law.

(a) *Age required for marriage.* In all countries following the system of nationality, an Italian girl may marry on attaining fourteen years of age, a German at sixteen, a Serbian at seventeen, and a Greek, Spanish, or Northern Irish girl at twelve. It is immaterial what the law of the other party prescribes.

(b) *Consent in form but not in fact; defective intention.* Defects affecting consent to marriage, such as consent in-

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JW. 1937, 2039 and Pugh v. Pugh [1951] P. 482, 493 (supra n. 71); see contra RAAPE, IPR. 230, 233 n. 7.


85 For other cases in French practice, see J. Donnedieu De Vabres 439 ff.

duced by error, fraud, or duress, are exclusively determined by the law of the spouse whose intention is alleged to be vitiated. The law of the partner is immaterial.\textsuperscript{87}

\textit{Illustration}: A Belgian man married a German woman. He was mistaken as to her virginity. The man is not allowed to avail himself of the German provision that a marriage may be attacked upon the ground of error concerning the personal characteristics of the other spouse, but is limited to the Belgian provision which regards only an error in physical identity of the other spouse as relevant.\textsuperscript{88}

\textbf{(c) Consent of parents or guardians.} The consent of parents or guardians required for a marriage of parties who have not reached a certain age, such as twenty-one,\textsuperscript{89} and, according to some laws, the duty of the child to notify his parents of his intended marriage ("acts of respect"),\textsuperscript{90} all come under the general rule regarding the capacity of the child or ward to marry. This is one of the requirements


Germany: RG. (May 3, 1917) Warn. Jahrbuch 1917, no. 210; RG. (Oct. 6, 1927) Revue 1930, 129; RG. (June 23, 1930) IPRspr. 1930, n. 65; RG. (Feb. 16, 1931) JW. 1931, 1340, and many decisions of lower courts collected by 3\textsuperscript{rd} FRANKENSTEIN n. 86. In the case RG. (Feb. 6, 1930) JW. 1930, 1003, IPRspr. 1930, no. 64, the error of a Swiss husband was decided under the Swiss Civil Code instead of the Swiss conflicts rule (NAG. art. 7 f), calling for the application of the German Civil Code; cf. 3 FRANKENSTEIN 59 n. 13.

Italy: Cass. Torino (July 31, 1883) Giur. Ital. 1883, I 617, Sirey 1886.4.1

Switzerland: OG. Bern (Oct. 27, 1927) 64 ZBJV. (1927) 185.


\textsuperscript{88} German Marriage Law of 1946, § 32 (even broader than BGB. § 1333); Belgian C. C. art. 180; cf. Cass. Belg. (July 17, 1925) Pasicrisie. 1925.1.370, emphasizing that not even "dol," fraudulent misrepresentation, justifies an action for avoiding the marriage, the same as in France, see Chambres R\'eunies (April 24, 1862) D.1862.1.153.

\textsuperscript{89} E.g., France: C. C. arts. 148, 158, 159; Germany: BGB. §§ 1303-1308, Marriage Law of 1946, §§ 3 ff.; Quebec: C. C. art. 119.

\textsuperscript{90} France: C. C. art. 151. Belgium and Luxemburg: C. C. art. 151.

Spain: C. C. art. 47.

The Netherlands: BW. art. 99.
called, according to the French doctrine, "formes habilitantes," understood in France to have nothing to do with formalities. These requirements are governed by the same law that is competent to declare a party incapable of marrying by his own will alone. Continental opinion has it that these requirements are ruled by the national law and not by the law of the place of celebration. For example, the opposition of an American father to the marriage of his daughter, likewise an American national, has been rejected because of her national law.

This conception also seemed accepted for a time in England. English courts applied in accordance with their meaning foreign statutes requiring the consent of parents or similar acts, that is, the statutes were construed as in the countries of their enactment, either as postponing the marriage or as threatening its validity. At present, however, such permission is ordinarily regarded in England as a formal requirement and governed, for this reason, by the law of the place where the marriage is celebrated. It is again primarily


Greece: Law of May 28–29, 1887, see 2 Streit–Vallindas 291 n. 27.

Quebec: Agnew v. Gober (1907) 32 Que. S. C. 266, (1919) 38 Que. S. C. 313 (judgment revised); cf. 1 Johnson 283, 287.


93 Postponing impediments: Simonin v. Mallac (1860) 2 Sw. & Tr. 67; Gretna Green cases: see Brook v. Brook (1861) 9 H.L. 193; prohibitory impediment: Sussex Peerge Case (1844) 11 Cl. & F. 85.

94 Dicey, Rule 760, 765; Westlake §§ 18, 25; Foote 101; also Foster, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84, 90 (although sharply disapproving of this view); 3 Frankenstei 85, and many other Continental writers. More hopeful of
the decision of Ogden v. Ogden which led to this change, a "very much discredited" authority indeed.95 A better rule would perhaps have been found, were it not for the misleading habit of English courts and writers, even such critics of current opinion as Cheshire and Beckett, customarily contrasting mandatory requirements with formal instead of with directory requirements. Instead of saying that in English family law the want of parental consent does not invalidate a marriage, every writer asserts that consent is a formal requirement in English matrimonial law;96 therefore, discussion continues whether it is such also in English conflicts law.

Hence, it is not certain that (1) a marriage official in England is empowered to officiate at an attempted marriage of foreigners that he knows is prohibited at their domicil because of lack of permission and that (2) a marriage celebrated in England would be held valid in the absence of parental permission, if this is an essential requisite under the domiciliary law for the validity of the marriage. These assumptions would be necessary, if it were true that the power given parents in Continental codes to interfere with their future better advised decisions: Beckett, 15 Brit. Year Book Int. Law (1936) 46, 77-80, supra n. 69.

Recently, the problem has been, if possible, still more confused by the question whether the matter pertains to "primary" or "secondary" characterization, see Cheshire 55-59; Robertson, Characterization 239-245, Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 So. Cal. L. Rev. 221 at 235; an unfortunate controversy, see also Falconbridge, "Renvoi and the Law of the Domicile," 19 Can. Bar Rev. (1941) 311, 338, now Essays 74 ff.


96 Cheshire (ed. 4) 57, 306, but correctly ed. 5, p. 56 ff.; Foster, 16 Brit. Year Book Int. Law (1935) at 90, supra n. 94. This formulation is also to be found in the critical report of Falconbridge, 3 Giur. Comp. DIP. no. 89, Essays 76, on the basis of a particular theory of classification against which Cansacchi, ibid., protests.
children's marriages "cannot be tolerated in England or the United States," as Wharton once asserted. But at present nobody seems to envisage such a public policy. Dean Falconbridge hopes that English and Ontario courts will recognize the nullity of French and Quebec marriages in the absence of the requisite parental consent.

Less radical, an unusual provision of the Civil Code of Venezuela, article 134, had declared, apparently on grounds of public policy (and not because of wrong classification), that lack of permission or lack of an "act of respect" does not invalidate a marriage, unless such permission or "act of respect" is required in the interests of ascendants or guardians.

The formality of notification, of course, is adjusted everywhere to the modes available locally.

Although form and substance need not be distinguished in the United States, since the law of the place of celebration governs both, on grounds of public policy the domiciliary law is occasionally taken into consideration with respect to parental consent. No such attention would be given to a mere formality.

(d) Prohibition against remarriage. A prohibition to contract a new marriage, not because of another existing marriage but as an effect of a former dissolved marriage, is considered a unilateral incapacity.

Illustrations: (i) An Italian married a widow, a citizen of Fiume, where Hungarian law was in force, before the expiration of the ten months' period prescribed by Hungarian law,

97 I WHARTON § 253 at 573.
98 Annotation [1932] 4 D.L.R. 1 at 35.
98a In the C. C. of 1942, art. 106, this provision has been changed into the usual rule requiring parental consent in the case of minor foreigners according to their national law.
99 CUNHA GONÇALVES, 1 Direito Civil 679.
100 Cf. the survey of cases given in Sturgis v. Sturgis (1908) 51 Ore. 10, 93 Pac. 696 and Goodrich 364.
the widow having obtained, however, a dispensation under Hungarian law granted to her upon a finding that she was not pregnant. The Italian Tribunal of Alba recognized the marriage,\textsuperscript{101} although Italian law did not admit such dispensation from its corresponding impediment.

(ii) A Belgian divorcée domiciled in Paris was held bound by the three hundred days' delay of the Belgian Civil Code (arts. 228, 296) and ineligible for dispensation under the analogous French provision.\textsuperscript{102} On the other hand, when the French provision is more severe than that of the national law, French courts are likely to insist upon the former.\textsuperscript{103}

(e) \textit{Impotence}. Because of a personal characteristic of one party, a statute may give to the other an exclusive right to have marriage annulled. This is often assumed to be the case when a spouse is found to be impotent,\textsuperscript{104} although this is not the only nor the most modern view. In consequence, it has been contended\textsuperscript{105} that if, e.g., a Brazilian, married to a woman of French nationality, was affected by this condition, the wife could not avail herself of Brazilian law, and French law would afford her no relief on this ground.

\textit{Doctrine of bilateral prohibitions.} Many obstacles involve both parties, even if founded on the qualities of one party. In this event, each party may avail himself of the remedy offered, irrespective of whether it is established by his own personal law. In other words, the personal law of either spouse decides whether a prohibition concerns one party or both; if both, the ensuing conflicts rule gives full international weight to the decision of the personal law.

(a) \textit{Social policy}. Of such a bilateral nature are the enact-

\textsuperscript{101} Trib. civ. Alba (Feb. 27, 1922) Giur. Ital. 1922, I, 2, 155.
\textsuperscript{103} See \textit{infra} n. 152.
\textsuperscript{104} This was the justified construction of Italian C. C. (1865) art. 107, but has been changed by C. C. (1938) art. 121, C. C. (1942) art. 123.
\textsuperscript{105} KAHN, 2 Abhandl. 63.
ments that forbid bigamy,\textsuperscript{106} marriage between near relatives,\textsuperscript{107} miscegenetic marriages,\textsuperscript{108} marriages of lunatics, syphilitics, epileptics, drunkards, persons afflicted with contagious diseases, and the like.\textsuperscript{109} Insanity falls into this category only when treated from the viewpoint of eugenics, not when considered a defect of consent.\textsuperscript{110}

(b) \textit{Adultery}. Doubts have been expressed concerning the scope of statutes under which, in the case of an adultery stated in a divorce decree, adulterer and paramour are forbidden to marry each other.\textsuperscript{111}

The German prohibition was considered bilateral under the Civil Code,\textsuperscript{112} and the official comment on the recent Marriage Act has confirmed this interpretation.\textsuperscript{113} This means that both guilty persons are involved in the prohibition, and therefore the marriage is forbidden if the unmarried accomplice is a German, even though the adulterous spouse may be non-German.

\textit{Illustration:} A German was divorced on the ground of adultery, then became a Polish national and wished to marry his paramour. The Prussian Ministry of Justice held that the unmarried woman, who was still a German citizen, needed a dispensation.\textsuperscript{114}

\textsuperscript{106}See RG. (April 22, 1932) 136 RGZ. 142, 144-145 and RG. (June 8, 1936) 151 RGZ. 313, 317.
\textsuperscript{107}E.g., under Swiss C. C. art. 100 no. 1, uncle and niece are prohibited from marrying if either one is a Swiss.
Swedish Marriage Law of 1920, c. 2 §§ 7, 8.
Great Britain: Mette v. Mette (1859) 1 Sw. & Tr. 416.
\textsuperscript{108}Twenty-eight states of the United States, formerly Germany, Italy, etc.
\textsuperscript{109}Many states of the United States; Sweden, Denmark, Germany, and an ever-increasing number of other countries.
\textsuperscript{110}See RAAPE, IPR. 233 n. 7, in opposition to KG. (Dec. 21, 1936) JW. 1937, 2039.
\textsuperscript{111}E.g., Belgium: C. C. art. 298, as amended by Law of April 16, 1935 (limiting the period of prohibition to three years).
The Netherlands: BW. art. 89.
\textsuperscript{112}RAAPE, 2 D.IPR. (ed. 1) 144.
\textsuperscript{113}Ordinance of July 27, 1938, RGBl. I 923 § 5 (5); RAAPE, IPR. 232.
\textsuperscript{114}StAZ. 1934, 292.
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After the substitution, in East German law, of specific grounds for divorce by one general clause,¹¹⁴a West German practice has settled that the mere mentioning of adultery in the reasons of an East German divorce decision does not create the impediment.¹¹⁴b

In the Netherlands, this question is unsettled, but the courts treat the impediment as an obligatory policy of good morals, precluding marriage within the state by any guilty party mentioned in a divorce decree,¹¹⁵ no matter whether the judgment be domestic or foreign and whether or not the personal law so provides.¹¹⁶ In both Germany and the Netherlands, however, a marriage concluded in spite of the prohibition is not annulable.

(c) Impediments connected with religion. The famous Austrian religious impediments were intended to be bilateral¹¹⁷ and were so applied in the countries where they were in force. The same is true for the impediment of difference of faith as it still exists in Egypt¹¹⁸ and elsewhere.¹¹⁹

¹¹⁴a Decree of Nov. 24, 1955, § 8.
¹¹⁴b LG. Bielefeld (Sept. 28, 1956) NJW. 1957, 64; Ministry of the Interior of Hesse, Order of Jan. 31, 1957, StAZ. 1957, 68.
¹¹⁵ H.R. (April 16, 1908) W. 8718, Kosters-Bellemans 135, Clunet 1912, 293 and H.R. (June 2, 1936) W. 1936, no. 1013, criticized by Scholten, N. J. 1936, 1013 and Asser-Scholten, Familierecht 64. This criticism probably affects also the decision of Rb. Haag (Feb. 1, 1935) W. 12974, whereby the prohibition does not concern a foreign woman who has received a dispensation from an analogous impediment under her own law.
¹¹⁶ Rb. Amsterdam (Nov. 12, 1936) W. 1937, no. 270.
¹¹⁷ See the explicit exposition by Walker 602 ff.; it may be remembered that these impediments were not applied if the parties married abroad and did not intend to go to Austria. Similarly, Spain: Trib. Supr. (July 10, 1916) 137 Sent. 105.

Czarist Russia and Lithuania: Büchler in StAZ. 1929, 192 to the effect that Christians as well as Jews are prohibited by their respective religious laws recognized by the state.
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The Spanish provision, now again in force, whereby no one is allowed to marry a divorced person, also is a bilateral prohibition directed against both parties to the intended marriage. Thus, under Spanish law, a French divorced woman cannot marry a Spanish bachelor. In France, however, not less than three different opinions have been expressed: that the prohibition is unilateral but as such makes the marriage invalid; that it is bilateral but the capacity of the woman depends on French law alone; and that Spanish law is primarily applicable but eliminated by French public policy.

(d) Sham marriages. An obvious but notable example of a twofold defect is presented by the case of parties who go through a ceremony of marriage for some purpose other than that of creating a true marriage. Legislation that regards marriage essentially as a contract, is inclined to deny validity to simulated consent to marry; thus canon law, as well as French, Scotch, English, and probably American opinion, consider the marriage in such case void. Modern codifications presume that a public formal declaration of

119a Trib. Supr. (May 12, 1944) Revista Critica de Derecho Immobiliario 1944, 754, also in GOLDSCHMIDT, 2 Sistema (ed. 1) 554.
120 Special literature: CHAMPCOMMUNAL, in “Conflit de lois nouveau,” Revue 1921, 41, 47 ff; SERIN, Les conflits des lois dans les rapports Franco-Espagnols en matière de mariage, de divorce et de séparation de corps (Toulouse, 1929).
123 Trib. civ. Seine (May 5, 1919) S.1921.2.9, Revue 1919, 543. Recently prevailing opinion has favored this interpretation. Cf. AUDINET, II Recueil 1926 I 175, 182; J. DONNEFIEU DE VABRES 443.
124 Codex Juris Canonici c. 1086 § 2.
126 Cf. BISHOP, 1 New Commentaries on Marriage §§ 328 ff.
marriage should not be disavowed by revealing an intention to misuse the marriage institution. But recently in Germany, marriage for the sole purpose of procuring a name for the woman\textsuperscript{127} or merely to give her the nationality of the husband,\textsuperscript{128} has been excepted and considered void. In Switzerland similar rules were advocated\textsuperscript{129} that have been adopted in a changed practice of the Federal Court and the Swiss Government and have recently been enacted.\textsuperscript{130} The United States has reacted against sham marriages designed to facilitate immigration; the Federal Act of May 14, 1937, simply orders deportation.\textsuperscript{130a} In all these cases it is sufficient that one personal law establish the invalidity.

\textit{Illustration:} During World War I, a French girl married an American in Turkey with the understanding that she should escape internment in a camp and that the marriage should serve no other purpose. The Tribunal of Grenoble declared this marriage void according to French law, regardless of the law of the domicil of the American husband.\textsuperscript{181}

\textit{Time element.} It is well settled that the applicable personal law is the personal law as of the time of the celebration of the marriage\textsuperscript{132}—not that to which a party is subject at a time prior to or subsequent to the marriage.

\textsuperscript{127} BGB. § 1325a (Law of Nov. 23, 1933), Marriage Law of 1946, § 19.
\textsuperscript{128} Marriage Law of 1938, § 23 par. 1; and RG. (April 7, 1938) 92 Seuff. Arch. 311 no. 129. The provision was abrogated by the Marriage Law of 1946.
\textsuperscript{130} BG. (November 9, 1939) 65 BGE. II 225 and (Oct. 18, 1940) 66 BGE. II 225. In both cases a Swiss citizen had married a German woman threatened by expulsion because of her behavior; the courts stated in both cases that the woman had not intended permanent marital community. The rule is now embodied in C. C. art. 120 no. 4 (added by law of Sept. 29, 1952). The Federal Council, by order of Dec. 20, 1940, article 2, par. 2 has even authorized the Just. Dep. to annul nationality acquired by such marriages; see 38 SJZ. (1941) 175.
\textsuperscript{130a} U. S. Code (1953) 8 § 1251 (c).
\textsuperscript{181} Trib. civ. Grenoble (July 11, 1923) cited by J. DONNEDIEU DE VABRES 440 n. 1. Cf. 2 STREIT-VALLINDAS 291 n. 28; RG. (Dec. 15, 1930) JW. 1931, 1340.
\textsuperscript{132} Germany: RG. (Dec. 17, 1908) JW. 1909, 78; RG. (Feb. 15, 1926) 113
Consequently, a defect inhering in a marriage at its inception is not cured by the acquisition of a new domicil or a new nationality; a void marriage remains void.

Exceptions have been made, however, in favor of validity. Thus, the German Reichsgericht in a recent case had to deal with a marriage void under Austrian law on the ground of disparity of cult (Christians and non-Christians), the parties having changed their Austrian nationality for that of Italy. The court saw no reason why it should invalidate a marriage considered valid in the new homeland because of public policy contrary to the impediment. Likewise the Kamergericht in Berlin stated recently that, if both husband and wife voluntarily acquired a new citizenship, their marriage could not be declared void on a ground not recognized as an impediment under their new law.

Conversely, a valid marriage is not affected by a change of personal law; for instance, where a former French Catholic priest married and afterwards became a citizen of Spain, the marriage would not be invalidated under French law and probably not under Spanish law.

RGZ. 38; RG. (June 23, 1930) IPRspr. 1930, no. 65; RG. (Dec. 15, 1930) JW. 1931, 1340; 46 Z.int.R. (1932) 14; RG. (June 22, 1931) 133 RGZ. 161, and others.


In this case the Reichsgericht went so far as to reverse the principle, holding that the decisive time should be that when the action for annulment is brought. But this can hardly be taken literally in view of the general rule illustrated in the preceding note.

KG. (Aug. 5, 1937) JW. 1938, 855 (marriage celebrated in 1916 before the German consulate in Adana, Chile, between a German woman and a Russian who afterwards became a Chilean subject; error as to the personal qualities of the husband entitled her to sue for nullity under German BGB. § 1333 but not under Chilean Law of Jan. 10, 1884, art. 33; she was held to be deprived of the right under German law if she had become a Chilean national on her own application; if only the husband had applied, her citizenship would depend on the validity of the marriage. In a note Massfellner, without protesting, expresses doubts).

BARTIN 2 Principes 122 suggests that a defect that can be cured according to prior law should be eliminated by a new law not retaining the impediment but that an “absolute” voidness cannot be cured.
A far-reaching deviation from this principle is implied by the Código Bustamante, article 40, whereby any country is entitled to deny recognition to a marriage, if the marriage is contrary to certain expressly enumerated prohibitions of the forum. This provision, taken literally, would entitle Brazil to declare void a marriage celebrated validly in Chile between an uncle and his niece,\(^{136}\) if the parties became citizens of Brazil and perhaps even if they did not. Such an application of public policy would be unreasonable, unless the court believed the continuance of the marriage within the forum to be as shocking as did the Ohio Supreme Court in the famous case of State v. Brown.\(^{137}\)

3. Prohibitive Public Policy of the Country of Celebration

*The Hague Convention.* The Hague Convention on Marriage reduces the prohibitory effect of domestic marriage impediments to a few fundamental points. This was the main achievement of the Hague treaty. It includes five prohibitions, entitling the participant states to prevent the celebration of marriages on grounds, not of the personal law of the parties, but of its own local law:

(a) Absolute prohibition on account of relationship or affinity;

(b) Absolute prohibition between parties to adultery, provided the marriage of one of them has been dissolved on the ground of this adultery;

(c) Absolute prohibition between persons who have been convicted of a joint attempt upon the life of the spouse of one of them;

(d) Prohibitions concerning a former marriage;

(e) Religious prohibitions.

The grounds for the first three prohibitions listed above are

\(^{136}\) Argued by M. Wolff in *4 Rechtsvergl. Handwörterb.* 403.

\(^{137}\) (1890) *47 Ohio St.* 102, *23 N. E.* 747.
contained in article 2, paragraph 1; the last two are implied in article 2, paragraph 4.

An absolute prohibition is a prohibition which is not dispensable. In case of adultery, for instance, dispensation may be granted in Germany; Swiss parties, their national law including no prohibition at all to marriage on account of adultery, may therefore marry in Germany. The Dutch courts, however, consider adultery an absolute obstacle both for nationals and foreigners.\textsuperscript{138}

In the countries that have been or still are members of the Convention, every prohibition of local law has been examined in this way to meet the test of article 2. The Convention goes still further in limiting the local prohibitory rules. If a marriage has been celebrated in violation of one of the prohibitions listed above but is valid according to the personal law of the parties, it is valid everywhere with the exception that it may be considered invalid in the state of celebration (not in a third state) in the cases mentioned in (d) and (e), not (a)–(c) above.\textsuperscript{139}

Hungary, for instance, may forbid an ordained Catholic priest of Belgian nationality to marry within Hungarian territory; if he succeeds in doing so, however, Hungary may consider the marriage void, but it is valid in Belgium and therefore in all other participant states.

No prohibition other than those mentioned above is proper ground for preventing a marriage of nationals of another member state. Hence, an Italian girl fourteen years old or a Rumanian girl of fifteen may marry in Switzerland or Sweden, where the age limits are seventeen and eighteen respectively.

\textsuperscript{138} Settled doctrine, see H. R. (June 2, 1936) W. 1936, no. 1013, and cf. 11 Z. ausl. PR. (1937) 205.

\textsuperscript{139} The Polish Law on international private law of 1926, art. 12 par. 2, was drafted less clearly; see Pol. Supr. Ct. (Jan. 7, 1931) 6 Giur. Comp. DIP. (1940) no. 104, with a critical note by Rencki.
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Código Bustamante. The Código Bustamante, article 38, permits the local law to avail itself of (all) its prohibitions which are not dispensable. Article 40 adds a rule for marriages already celebrated, whereby "the contracting states," i.e., as it seems each of them, may refuse recognition to a marriage conflicting:

With their provisions relative to the necessity of dissolution of a former marriage, to the degree of consanguinity or affinity, in respect to which there exists an absolute impediment, to the prohibition of marriage established in respect to those guilty of adultery by reason of which the marriage of one of them has been dissolved, to the same prohibition in respect to one guilty of an attempt against the life of one of the spouses for the purpose of marrying the survivor, and to any other excusable grounds of annulment.

Trend. International literature, long critical of unlimited local policy, has encouraged the trend towards restricting its influence. This tendency is exhibited in the Polish Statute of 1926 (art. 12 par. 2) which confines the cases of overriding local policy to four enumerated impediments. That the Italian Civil Code of 1865 (art. 102 par. 2) reserved to the local law every prohibition contained therein (arts. 55-69), was considered an "excessive and irrational" rule, needing a restrictive interpretation, although hardly seeming to permit it. The new Code no longer tries to override the nationality principle to such an extent and enumerates the prohibitions that are intended to apply to foreigners. It is true that foreign Catholics desiring a canon law marriage

140 Udina, 6 Répert. 513, no. 139; Udina, Elementi 177, no. 127.
141 Cf. Kuhn, Comp. Com. 128.
142 Anzilotti (1919) 236; Udina, Elementi 178, no. 127, n. 2.
144 C. C. (1938) art. 114 par. 2, C. C. (1942) art. 116 par. 2. The Minister of Justice declined to include Italian provisions on nonage in the list of inderogable impediments, where the personal law does not infringe public policy. See Relazione 1938 no. 78.
with civil effect must comply not only with civil requirements but with all those established by the canon law and their national laws.\textsuperscript{145} In Spain, a similar position seems to be taken, all the Spanish requirements for Catholic marriage being added to those of the national laws.\textsuperscript{146}

Another example of increased understanding is that of a recent Greek decision confining to Greek subjects the old prohibition of marriage between Christians and non-Christians.\textsuperscript{147}

The Scandinavian Convention on Family Relations\textsuperscript{148} incorporates chiefly nondispensable prohibitions arising out of relationship and affinity, and the Finnish law of 1929\textsuperscript{149} enumerates only relationship, affinity, and existing marriage as obstacles under local policy.

But exaggerated mandatory local requirements are still frequent. The period of delay instituted for women after the dissolution of a former marriage figures in the list of compulsory prescriptions of local policy in Switzerland,\textsuperscript{150} the Netherlands,\textsuperscript{151} and France.\textsuperscript{152} The most recent civil code,
that of Venezuela, has retained its long and exacting list.\textsuperscript{153} Thus, the result is the same as when the law of the place of celebration is taken as decisive, and therefore all requirements of the local law as well as of the personal law impede the marriage of foreigners.\textsuperscript{154}

\textbf{Effect of treaties and conventions.} Has the adherence of a state to a treaty, such as the Hague or the Montevideo treaties, or a state's participation in the Scandinavian Convention, any effect beyond the scope of the treaty, generally limiting the realm of unyielding public policy? Some Italian decisions\textsuperscript{155} and a few writers\textsuperscript{156} have answered this question affirmatively with respect to the Hague Convention. They argue that states, having once subscribed in a treaty, for example, to the principle that the domestic age limit is alterable for foreigners, can no longer allege the contrary with respect to nationals of non-member states. Such a construction of an international treaty is not only untenable but would indeed endanger the conclusion of future treaties. Treaties are binding upon states only within their limits.

4. Permissive Public Policy of the Country of Celebration

\textit{The Hague Convention.} According to article 3 of the Hague Convention, the law of the place of celebration may permit the marriage of foreigners contrary to their national laws, if these prohibitions are based exclusively on grounds

\textsuperscript{153}Venezuela: C. C. (1916) art. 132, C. C. (1942) art. 104 referring to all mandatory requirements valid for nationals.

\textsuperscript{154}See \textit{supra} n. 47.

\textsuperscript{155}See \textit{infra} n. 157.

\textsuperscript{156}WEISS, 3 Traité 478 n. 2; POUJET 410; AUDINET, 11 Recueil 1926 I 174, 186; 3 FRANKENSTEIN 113 n. 202; \textit{ibid.} 195.

of a religious nature. The other states are entitled to deny to a marriage contracted under such circumstances recognition as a valid marriage.

Which impediments are of religious nature? The question has been extensively discussed in the countries whose liberal doctrine denies recognition to foreign discriminations on account of religion. In agreement with the dominant opinion of these countries, the commentators on the Convention ascribe religious character to prohibitions based on:

(a) Difference of religion (disparitas cultus),\(^{157}\) such as the canon law prohibition of marriages between Christians and non-Christians in Spain and Greece, formerly also in Austria, Poland, and Bulgaria; the prohibition of marriages between Christians and pagans in Sweden; between Moslems and non-Moslems according to the laws of Islam; and between Jews and non-Jews under Jewish law.

(b) The relation between godfather and godchild (cognati spiritualis) under canon law\(^{158}\) and in Rumania.

(c) The vows of priests or monks, endowed with civil

\(^{157}\) Not recognized: by enacted law in Venezuela, C. C. (1942) art. 105; by the courts in:

- France: Cour Paris (Nov. 17, 1922) S.1924.2.65, Clunet 1923, 85, Revue 1923, 437 (Serbian).
- Switzerland: Kreisschreiben (June 30, 1928) n. 13, 25 SJZ. 183.
- Germany: A much cited decision of the OLG. Hamburg (Oct. 6, 1908) 18 Z.int.R. (1908) 541 is to the same effect, but the prohibition was recognized by the OLG. Karlsruhe (March 28, 1917) 35 ROLG. 358 (marriage celebrated in London); and finally by the RG. (May 16, 1931) 132 RGZ. 416, 418 and RG. (Oct. 10, 1935) 148 RGZ. 383. Cf. RAAPE 239.

\(^{158}\) Cf. the controversy between SATTER, 32 Z.int.R. (1924) 69 n. 88, and 3 FRANKENSTEIN 114 n. 204.
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effect in Spain and formerly in Austria, parts of Yugoslavia, Poland, and Hungary. 159

It is doubtful, however, whether article 3 applies to a former marriage still considered existent for religious reasons despite a divorce (Italy 160 and for Catholics, Spain, formerly also Austria and the Warsaw district).

No other prohibition established by the national law of a party may be neglected, not even the politically inspired impediments which the Western tradition is accustomed to disregard. 161 Thus, military deserters and conscientious objectors from Austria and Germany, prevented from producing a certificate of ability to marry, had to be refused the right to marry in other member states. 162 To France this result seemed so intolerable with respect to the emigrants from Alsace and Lorraine, that France left the Hague Convention on May 31, 1914, followed by Belgium on May 31, 1919. The Hague Conferences of 1925 and 1928 tried in vain to win these countries back by permitting a member state to ignore prohibitions arising from military obligation or from the status of a prince who needs the consent of the head of his house.

The Swiss authorities apply these prohibitions as well as the provisions of an Italian law of 1938 requiring governmental authorization for the marriage of an Italian to a per-

159 Not recognized in France (contra: Audinet, ii Recueil 1926 I 174, 184).
Great Britain, cf. Dicey, Rule 169 Exc. 2.
Italy: Cass. Roma (July 31, 1924) Monitore 1924, 727.
160 Viewed as a religious impediment by Walker §87, §88; Satter, Note opposing App. Liège (Feb. 2, 1937) 5 Giur. Comp. DIP. 13 n. 11. Many writers think that art. 3, compared with art. 2 par. 3, and art. 6 par. 1, excludes the impediment of former marriage from the conception of religious impediments.
161 See supra pp. 114, 279.
162 Cf. Swiss Fed. Dep. of Justice, BBl. 1917, III 575, no. 14: canton governments may grant license to marry (under NAG. art. 7e par. 2 to foreign objectors and deserters only if they are subjects of states having not adhered or having left the Hague Convention).
son of other nationality. On the same ground, German writers claimed that the German legislation on difference of race must be recognized by all other participants in the Convention.

It is, of course, left to the law of the place of the intended celebration whether or not it will respect a religious prohibition of the homeland. Switzerland, e.g., respects such prohibitions in the case of non-resident foreigners, while it ignores them in the case of domiciliaries. Third states are equally free to determine their position.

In general. Outside of the Hague Convention and apart from the religious prohibitions which have already been dealt with, all political and penal prohibitions of a foreign country are generally ignored. This liberal doctrine underlies the Civil Code of Venezuela, which expressly rejects prohibitions of marriage founded on differences of race, class, or religion.

In view of the American discussions of the effect of remarriage prohibitions, it may be noted that the situation in other

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165 Beck, NAG. 293 no. 12.
167 Hindu caste: Chetti v. Chetti [1909] P. 67. Racial prohibitions: Trib. civ. Pontoise (Aug. 6, 1884) Clunet 1885, 296. The Danish Minister of Justice, by Circular of Oct. 12, 1937, informed interested officials that the German racial laws were applicable if no party was domiciled in Denmark. This seemed to indicate that a contrary policy was expected in the case where at least one party was a domiciliary; cf. RAAPE, 2 IPR. (ed. 1) 160 n. 2, who also notes the reaction of other countries to the German "law for the protection of German blood" of Sept. 15, 1935.

An interesting combination of considerations may be illustrated by a South-African decision. In the Roman-Dutch law, the old rule of lex loci contractus still obtains. In addition, the facts that the bride was domiciled and the marriage was celebrated in the forum, Natal, formed grounds to disregard the inability of the man, under the common law of his domicile in Transvaal, to marry his late wife's sister. Friedman v. Friedman's Executors (1922) 43 Natal Law Rep. 259, at 264, 266.
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countries depends on analogous considerations. The first
problem is to determine whether the law forbidding remarriage is intended to be applied abroad and, if so, to what marriages.\footnote{168}{For instance, German courts have discussed at length whether by the enigmatic provision of the Argentine Civil Marriage Law (1888) art. 82, parties who have married in Argentina and have been divorced abroad are prohibited from remarrying only in Argentina or everywhere. See infra p. 464, n. 178.} A prohibition meant to be applied extraterritorially may not be applied by another country because it is regarded as penal.\footnote{169}{England: Scott v. Att. Gen. (1886) 11 P.D. 128 declared inoperative the South African restriction on remarrying by the guilty party. France: Trib. civ. Marseiiles (Nov. 25, 1925) Clunet 1926, 388 refused recognition to a Serbian episcopal decree of divorce, because it contained a clause making remarriage dependent on the bishop's consent, which the court deemed inseparable, but the court should have recognized the divorce without the remarriage clause, see Note in Gaz. Pal. 1926. 1. 442; in accord Trib. civ. Seine (May 14, 1956) Clunet 1957, 146. Germany: KG. (May 30, 1938) JW. 1938, 2750 refused to apply the delay for remarriage imposed by a Swiss court in accordance with arts. 104 and 150 of the Swiss C. C. because of its penal (“somewhat disgracing”) character. Switzerland: Prohibition of remarriage declared in a divorce decree by a Yugoslav bishop is not recognized, Just. Dep., BBl. 1928, II 309.} Otherwise, it applies as part of the personal law.\footnote{170}{England: Warter v. Warter (1890) 15 P.D. 152 per Sir James Hannen, Pres., recognizes a six months' delay after decree under the Indian Divorce Act, No. 4 of 1869. But in Miller v. Teale (1954) 29 A.L.J. 91, decided by the High Court of Australia, the three months' delay is regarded as an incidence of the foreign divorce decree, the law of the spouse's domicil at the time of the second marriage ceremony being expressly discarded. See also supra p. 290.}

Relation to the forum. The subject under discussion furnishes significant applications of the general doctrine of public policy. To enforce a domestic policy upon a case subject to foreign law, a strong tie between the case and the forum should be present. Thus, Swiss law quite appropriately entitles a foreigner domiciled in Switzerland to invoke the Swiss Federal Constitution, as opposed to his national law, in protection of his right to marry. Political or racial prohibitions, even if not specifically eliminated by the Constitution, will be disregarded on behalf of a resident foreigner. A non-
domiciled alien has no such right; on the contrary, the cantonal authorities are required to prevent him from entering into a marriage not recognized by his homeland.\textsuperscript{171}

Some codes, it may be remembered,\textsuperscript{172} following the example of section 4 of the Austrian Civil Code, are restricted in their external effect to transactions intended to have effect within the territory of the personal law. The Austrian Supreme Court declared valid, despite Austrian impediments, a marriage celebrated abroad by an Austrian citizen, in the absence of intention to return to Austria immediately. This rule was applied even to former Catholic priests and to marriages between Christians and Jews.\textsuperscript{173} Thus, a foreign court had no need to resort to its own public policy to allow such a marriage.

\textit{Consequences of a state's acts.} A permissive policy of the country of celebration may be based upon reasons different from those thus far mentioned. Shall the forum permit a party locally divorced, which divorce is not recognized by his personal law, to remarry? This problem arose in Germany out of two apparently conflicting rules, viz., one determining according to the personal law whether a person is married or unmarried (EG. art. 13 par. 1) and the other ascribing full credit to a domestic divorce decree.\textsuperscript{174} The second rule ought to be enforced, if the authority of the state is to be main-

\textsuperscript{171} Hu\textsc{ber-Mutzner} 430, gives a clear picture; Beck, NAG. 205 no. 49.

\textsuperscript{172} \textit{Supra} p. 126, n. 55.

\textsuperscript{173} OG\textsc{h}. (May 24, 1907) Spruch-Repertorium no. 198, 10 GIU.NF. no. 3787 and OG\textsc{h}. (July 17, 1906) 9 GIU.NF. no. 3485 (Austrian Catholic marrying an Austrian Jewess in New York). Singular distinctions were developed. For instance, the Austrian prohibitions upon marriage were maintained where an Austrian abroad had a job, the loss of which would force him to return to Austria, OG\textsc{h}. (Oct. 28, 1936) 55 Zentralblatt (1937) 120 no. 50; See also OG\textsc{h}. (July 23, 1937) 56 Zentralblatt (1937) 889.

\textsuperscript{174} Two opinions correspond to these two rules. The first opinion, stressing the conflicts rule of EG. art. 13, was advocated by Lewald 118; Raape 404; OLG. Hamburg (Jan. 3, 1923) 78 Seuff. Arch. 57. The second opinion: KG. (March 13, 1911) 24 ROLG. 15; Reichel, 124 Arch. Civ. Prax. 200; Massfeller, St.AZ. 1938, 112, 115; Dt. Justiz 1939, 1236ff.
tained consistently. A state is not supposed to dissolve a marriage and yet deny the parties the advantage of the dissolution. In Switzerland, however, the majority opinion has taken this very position; hence, a marriage between an Italian and a Swiss woman may be dissolved in Switzerland, but the right of remarriage is enjoyed only by the woman.

5. Sanctions for the Fulfillment of Intrinsic Requirements

Certificate of ability to marry. Officials issuing marriage licenses or presiding at marriage ceremonies are in an unfavorable position to ascertain the impediments of a foreign candidate. A large number of countries, therefore, require foreign nationals or domiciliaries to exhibit a certificate issued by a competent officer in the country from which they come, to the effect that to his best knowledge no impediment is known to the prospective marriage. Accordingly, in a great number of states, measures have been taken, and offices have been designated for the issuing of appropriate certificates to be used abroad. The Hague Convention on Marriage, article 4, paragraph 1, prescribed this precaution to the extent that the Convention adopted the rule of national law. Some important countries are unwilling to issue such cer-

175 BBl. 1922, II 582 no. 14 (Spaniard); Beck, NAG. 464 no. 223; contra Regierungstrat Zurich, SJZ 1952, 376.
176 See for fuller discussion infra pp. 557-559.
Finland: Gen. Ord. of Dec. 28, 1929, 1 Bergmann (Finland p. 11).
Italy: C. C. (1865) art. 103, C. C. (1938) art. 114 par. 1, C. C. (1942) art. 116 par. 1, not abolished as had been proposed.
Switzerland: NAG. art. 76, Beck, NAG. 185, 200.
178 Boschan in 5 Zausl.PR. (1931) 332 n. 2 gives a list of offices declared competent in numerous states.
179 In some countries banns are issued before giving the certificates, as in Luxemburg, and Switzerland.
tificates;\textsuperscript{180} therefore, either dispensation in the country of celebration is frequently obtained,\textsuperscript{181} or “certificates of custom” are produced.\textsuperscript{182}

The underlying idea of this institution is clearly demonstrated in Switzerland; foreign citizens intending to marry within the country must apply to the government of the canton for permission and, with the constitutional exception of domiciled foreigners,\textsuperscript{183} are not permitted to marry unless it is shown that the marriage would be recognized in the homeland.\textsuperscript{184}

\textit{Dispensation.} Dispensation, likewise, is governed by the personal law. Not the law of the place of celebration but the personal law determines what officials are competent to grant dispensation from any prohibition to marry.\textsuperscript{185}

\textsuperscript{180} This is true particularly for Great Britain (excepting treaties concluded on the basis of the Marriage with Foreigners Act, 1906) though in practice consular certificates even without statutory authority are issued (CHESHER 327) and almost all the states of the United States, except perhaps Wyoming, where a provision corresponding to § 3 of the Uniform Marriage Evasion Act is in force. (L. 1935, ch. 3 § 1, Compiled Statutes, 1945, sec. 50–106, 107). On the difficulties caused by this attitude see HACKWORTH, 2 Digest of International Law (1941) 356 § 161.

In France a “certificat de non-opposition” may be issued, but it is not recognized as equivalent to a certificate of “no impediment.”\textsuperscript{181} E.g., Switzerland in all cases of Americans, Federal Council, BBl. 1887, III 700; Just. Dep., BBl. 1922, II 581 no. 13, in view of the recognition, in the United States, of Swiss marriages celebrated according to Swiss law.


\textsuperscript{182} Mostly through the diplomatic service of the country of celebration; see Swiss Just. Dep., BBl. 1938, II 498 no. 7.

\textsuperscript{183} Swiss Federal Constitution art. 54 par. 3; NAG. art. 7e. Where the bridegroom is of Swiss nationality, authorization is unnecessary, Just. Dep., BBl. 1925, II 143 no. 12.

\textsuperscript{184} HUBER–MUTZNER 433.

In Germany, besides the certificate of ability, other documents are required, such as a certificate that the husband’s nationality will not be lost by marriage under foreign law; another showing that the husband transfers his nationality to the bride is probably obsolete. Moreover, it is remarkable that where religious marriage is compulsory in the homeland of a party, Germany and Switzerland require a priest to declare himself ready to marry the parties. Cf. supra p. 231, n. 55.

\textsuperscript{185} KOSTERS 366 states this principle and exceptions thereto granted by Royal favor in the Netherlands.
Effect of violation of personal law. Because of the broad scope of the personal law, it is necessary to determine what law governs the effects of a violation of its prescriptions. As we have seen in connection with formal prescriptions, the dominant opinion is that the same internal law that establishes a requirement determines the effect of failure to comply with the requirement. Covered by this rule are the problems whether a prohibited marriage is valid in spite of the prohibition or whether, if not, it is absolutely null (non-existent), conditionally valid until annulment, or voidable at the instance of certain persons; whether or not an annulment has retroactive effect; by what persons action may be brought; whether an annulment may be pronounced by persons other than judges; by what events the right to annul is extinguished, etc.

Where the parties have different personal laws, each of the two laws must be consulted with respect to the consequences of a violation. The law of the husband may give him an exclusive right to avoid the marriage or may perhaps entitle the wife alone to do so; sometimes both laws concur in the same or in more or less similar effects. In addition to the illustrations implied in the cases discussed above, the following may be of interest:

(i) Case decided by the Reichsgericht on January 20, 1928 (120 RGZ. 35): in 1910 two Swiss citizens, A (male) and B (female) married in Salt Lake City, Utah. Without having obtained a divorce from A, the wife B married C, a German citizen, in Indianapolis, Indiana, in 1916. Not until 1918 was the marriage between A and B dissolved by di-

Switzerland: Just. Dep., BBl. 1922, II 581 no. 11 points out: a Swiss cannot marry his late wife's sister who is of Italian nationality, unless she receives dispensation under Italian C. C. (1865) arts. 59, 68, and hence produces an Italian certificate of nihil obstat.

186 See citations supra p. 247, n. 121.
186a In the result Trib. civil Bruxelles (June 18, 1949) Pasicrisie 1950 III 7 (Simulation of marriage).
orce. In 1921 C, who had meanwhile returned to Germany, received knowledge of B's previous marriage to A, and thereupon B and C separated. Upon inquiry, C was told by an American Military Commission in Germany that his marriage with B was null and void. Thereupon, in 1924 C went through a German ceremony of marriage with D. When the validity of this last marriage came up for determination by a German court, this court, according to the German choice of law rule, had to test the validity of the marriage between B and C by the national laws of these parties, i.e., simultaneously by German and Swiss law. By article 7f of the Swiss Law on Conflicts, the court would have been referred to the law of Indiana. Under Indiana law, the marriage was absolutely nonexistent, while German law merely regarded it as destructible ex tunc by decree of court. Following the general Continental approach of applying to such cases the law establishing the more severe sanction, the court should have found the second marriage void without any legal process and the third marriage valid. By inadvertence, the Reichsgericht overlooked the renvoi of the Swiss statute on conflicts and, instead of Indiana law, applied as B's personal law the law of Switzerland, which it held to be identical with that of Germany. Hence, the court held that C's marriage to B was valid when he married D, that the marriage with D, objectively considered, was adultery and that B would be entitled to a divorce.

(ii) Let us assume that in 1916 B had married in Iowa instead of in Indiana; then the infirmity of the marriage would have been cured by the divorce of 1918. The same would have resulted if they had married in Sweden.

(iii) The following situation is quite different. A German girl, fifteen years old and domiciled in Switzerland, marries somewhere, her age being concealed. Germany claims her as

187 This finding was not entirely correct either. Under German law an annulment of a bigamous marriage destroys the marriage ex tunc; it is effective only ex nunc in Swiss law. The sanction of the German law is the more severe and should have been applied.

188 Iowa Code (1939) § 10445 subsec. 4, § 10486 subsec. 3.


190 Swedish Marriage Law of June 11, 1920, c. 10 § 1 par. 2.
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a national, Switzerland as a domiciliary. The marriage would be considered void (annullable) in Germany and voidable in Switzerland.

Evasion of directive requirements. Since the effect of a violation of a requirement depends on the law establishing the requirement, it follows that the effect is the same whether the marriage takes place abroad or at home. Thus, the Dutch requirement of parental consent, being merely a directive prescription, does not invalidate a foreign marriage, although the wording of the Dutch conflicts rule could be understood to entail invalidity. In other words, evasion of directive requirements by a foreign marriage is of no consequence. This result is certain. It is obscured only by the usual idea that, in a well-ordered system of civil status, even non-mandatory rules of domestic marriage laws are securely protected against violation.

IV. Conclusions

The law of the place of celebration, which governs without qualification the substantive requisites of marriage in the United States and Argentina, contrasts with the personal law observed as a matter of course everywhere else. The contrast is striking enough to offer a legislative problem, a problem aggravated by the limited knowledge we have of the exact reasons at present for the American system. The historic background is obvious. Those of the statutists who advocated the law of the place where the marriage is celebrated, did no more than apply the rule they taught for contracts in general, and their main impulse in establishing the rule sprang from self-sufficient territorialism. We may


Likewise, for instance, to avoid nullity Belgian citizens are bound to observe only mandatory requirements abroad, i.e., the requirements of age, consent, relationship and affinity. See PAGE, i Droit civil belge (1933) no. 692.
presume the same conception to have prevailed in America, while it remained a country dependent on immigration and pioneering. Requirements of the old countries were not to impede the marriages necessary to new settlers. It was fair to replace them by the demands of an honest Christian commonwealth. All this is understandable without much research.

However, for a considerable period, neither immigrants nor pioneers have typified the shifting population of this country. Nevertheless, while in each of the forty-eight jurisdictions the legislature occupies itself with enactments elaborately shaping the requirements for marriage, marriages out of the state are fairly numerous, and the conflicts rule permits citizens to choose at pleasure any one of all these statutes, to which to submit both the celebration and validity of their marriages. This equation of intrinsic with formal requirements is no longer appropriate. While the various forms of secular ceremonies solemnizing marriage are interchangeable, the very different kinds of marriage impediments in the statutes are not thought of as equivalent in any way in the mind of the legislators. Yet, under the conflicts rule, they are all treated in the same way.

The harm done by indiscriminate application of local law, however, involves more than trespassing on the domain of foreign state legislation. First, social progress achieved in one jurisdiction in the field of eugenics—as respects insanity, medical certificates, etc.—is freely frustrated in others. Granted that some reformers of marriage welcome the unbounded multitude of marriage statutes as an immense laboratory for social experimentation—an attitude rather ques-

192 The marriage of a fourteen-year-old girl from Wisconsin marrying in Minnesota was declared in Iowa voidable only according to the Minnesota statute of the time (cf. at present Minn. Stats. 1953, sec. 517.02, 518.02) despite the prohibition and the evasion statute of Wisconsin. See, in contrast, supra p. 275, n. 37.
tionable—here freedom is converted into anarchy. Second, if the state of the domicil reacts against foreign violation of its policy, the great advantage of the principle that a marriage is good if valid at the place of celebration, disappears. Nevertheless, the implications of the legislative power and of specific marriage policies are being more distinctly realized, and the cases where a marriage is held void at the domicil of a party grow more frequent.

Under these circumstances, the failure of the Uniform Marriage Evasion Act to rally the states to the principle that marriages concluded contrary to the domiciliary law should be avoided is most regrettable. Could it be that its reforms were not sufficiently clear and adequate to be considered worthwhile? Probably, they were regarded as inefficient in the absence of more effort than the Act dared to require. No machinery for enforcement was provided to prevent false allegations by the parties and to effectuate interstate exchange of legal requirements and personal records. Nor has the one state that adopted the section in the Uniform Act requiring the license issuer to ascertain whether the proposed marriage contravenes the home statutes of the parties, been interested to prescribe investigation of the alleged facts. It may have been premature to expect more. Today in many jurisdictions, as a hundred years ago, marriage licenses are granted with the greatest facility and promptness. While a growing number of statutes stress the necessity of proofs of age, parental consent, and freedom from dangerous diseases, as well as banns or notice of intention to marry, others have repealed the requirement, formerly obtained by social students, of a few days' interval between the advance notice and the celebration.198 A new species of state supervision may be needed to insure to marriage legislation due respect by the state's own officers as well as by other states. The develop-

198 See Vernier, Suppl. 10 § 16.
ment in foreign countries seems to suggest, however, that a better interstate understanding would not require restrictions on the legislatures, whether they prefer ultraradical or ultra-conservative policies.

The chief rule of the civil law countries certainly is in extreme opposition to the American. While codes and treaties are pathetically engaged in trying to conciliate clashing policies of two or more jurisdictions, the American method of simply ignoring the problem by exclusively depending on the law of the place of celebration is so far from the European view that Diena called it “absurd.” But, if simplicity indicates a sound law, the American rule is sound, and the European system hopelessly “absurd.” Still worse than the complications themselves is the variety of the attempts to harmonize contradictory principles of the national and local laws. The system of applying the personal laws of two parties and the law of the celebration at the same time, if carried through as initiated by the school of Mancini and embodied in innumerable codes, is impractical. A thoroughly informed representative of the Prussian Ministry of Justice told the legal committee of the Diet in 1929 that the difficulties of ascertaining the capacity of foreigners to marry had increased to a disturbing extent after the first world war, strange results were occasioned by exotic religious laws, and that the principle of nationality was far from furnishing the certainty it was supposed to guarantee.¹⁰⁴

A remarkable remedy, however, may be noted. By international conventions, the scope of the requirements that should be observed abroad has been narrowed. Further aid in the same direction is supplied by modern enactments, such as the new Italian Code, which spontaneously reduces the causes of nullity of marriage when celebrated abroad. Indeed, if a statute insists on prohibiting marriage between

first cousins, which is allowed in most jurisdictions, why should another country yield to this problematic proposition? The state enacting such a statute would do better to limit the prohibition to domestic ceremonies. The Hague Convention, the Treaty of Montevideo, and the Código Bustamante agree in the division of domestic marriage impediments into two categories, one of international and the other of merely national applicability. Only the gravest objections, shared by all participant states or raised by one state and understood by the others, are considered sufficient to prevent or nullify a marriage contracted outside of the home state. The lists of internationally relevant impediments so far established coincide in some obvious inclusions—as for instance consanguinity between ascendent and descendent or between brother and sister, or an existing marriage of a party—and in other respects vary in a characteristic manner. The religious impediments that had so great significance for the Hague Convention on Marriage are excluded from consideration in the two Latin American treaties. Under that of Habana (art. 40), any minimum age, including that of eighteen years for male and sixteen years for female parties prescribed in Brazil (C.C. art. 183, XII), must be observed in the other states. The Montevideo Treaty (art. 11) does not oblige a state to respect a lower limit than fourteen years for men and twelve for women. Although this is unsatisfactorily low, the idea of fixing an international age limit is excellent.

Finally, the existing contrasts suggest a compromise on another basis. Suppose Italians visiting the United States. If they are well informed, they may walk right from the pier into a court house and be married at once. The permissibility of their union will be judged exclusively under the law of the state where they happen to stay during a couple of hours. An American may be domiciled for forty years in Italy, but
his capacity to marry at all, or to marry a certain person, will be determined by all Italian authorities concerned, by searching the law of some forgotten home of his or of his father or grandfather. One system is as abusive as the other. A state should not want to join foreigners in marriage utterly disregarding their home laws. Nor should a state, using the dubious test of nationality, exaggerate and perpetuate its significance for the determination of civil status.

When is it reasonable to acknowledge the effect of a change of circumstances upon the substantive requisites of marriage? That the mere presence of parties ought not to suffice to change the applicable law, is recognized, at least in theory. But also the mere, though actual, change of domicile should not be regarded as enough. Evasion will not in practice be eliminated if people who contemplate matrimony may choose their marriage law by simple transfer of their domicile. This is the danger also in making the first matrimonial domicile govern the substantive requisites.

All this leads to the proposition that the personal law of the parties should continue to govern for a certain period after the parties change their domicile. Marrying after this time, they would be subject to the law of the place of celebration alone, with effect also in their home countries. In such a simple system, no additional precaution is needed. If it must be complicated by concessions to the actual conflicts law, the method of shortened lists of international impediments is unavoidable.