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Annulment in the Conflict of Laws

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In this Article Professor Storke analyzes the concept of "annulment" and the rules which govern invalidation of the marital status in interstate proceedings. He suggests that legislation is needed to clarify existing rules of service of process, jurisdiction and res judicata, and that the choice of law rule that the place of celebration controls validity might better include express recognition of the interests of the forum.

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MRS. JONES consulted her lawyer about her teen-age daughter. "Sally has only been married a month," she said, "and now she wants a divorce."

"Wouldn't an annulment be better?" the lawyer inquired.

"What's the difference?"

"A divorce terminates a valid marriage," said the lawyer. "An annulment establishes that the parties were never legally married."

"But they were married," said Mrs. Jones. "Married in church, and everybody knows it. Besides, they have been sleeping together. Isn't an annulment something that people get when they have never slept together?"[1]

"Not necessarily. In this state a girl who marries before she is eighteen can have the marriage annulled any time before her nineteenth birthday, regardless of consummation."[2]

"For all I know," Mrs. Jones objected, "Sally may be pregnant. If she is, I don't want people going around saying she has never been married."

"Why not wait until we know?" the lawyer suggested. "If she is pregnant, we will get her a divorce. If not, we will go for an annulment."

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1. There is some basis for this notion. Courts are more reluctant to grant an annulment after the marriage has been consummated. See Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904); Lewine v. Lewine, 170 Misc. 120, 9 N.Y.S.2d 869 (Sup. Ct. 1938). See also Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912), distinguishing a New Jersey case cited on the ground that the marriage there had been consummated.

2. *E.g.*, COLO. REV. STAT. ANN. § 46-3-1 (Supp. 1957); *cf.* N.Y. DOM. REL. LAW § 7-1.

I. The Definition of Annulment

With woman's intuition, Mrs. Jones had put her finger on a flaw in the lawyer's statement. How can the courts say that a marriage never took place when it clearly had occurred? Part of the difficulty stems from an ambiguity in the definition of annulment. The word covers two distinct proceedings which are often confused, and which will be called "declaratory annulment" and "avoidance annulment."

The two types of annulment are related to the existence of two types of defective marriages. A "void marriage" exists when there is a defect so basic as to make it socially desirable to give no legal operation to the ceremony.[3] An example is where two persons are ceremonially married when one of them is already married to another spouse. Less serious defects make the marriage "voidable." Such a marriage can be set aside by legal proceedings, but if it is never judicially avoided, all the legal consequences of a valid marriage follow. For example, if one of the parties has practiced fraud or duress on the other, the latter may have the marriage annulled.

The distinction between a legal proceeding to have a marriage declared void and one to have a voidable marriage set aside has been pointed out[4] but has often been ignored or slighted in the cases. The function of the first type of proceeding is obviously declaratory, hence the term "declaratory annulment" used here to describe it. The same result can be obtained by the use of an ordinary declaratory judgment[5] although resort to this procedure is rare. The second type is "constitutive"[6] in the civil law phrase; that is, it produces important changes in existing legal relationships. The avoidance of the marriage is usually optional with one of the parties, although there are cases where either party can secure the annulment, as for example (in some states) where both spouses are under eighteen.[7]

No terms exist which are in general use to describe the two types. The New York statute[8] speaks of an action "to procure a judgment declaring the nullity of a void marriage or annulling a voidable marriage," and the Colorado statute[9] employs somewhat similar phrases.

3. 2 Schouler, Marriage, Divorce, Separation and Domestic Relations § 1081 (6th ed. 1921).

4. McMurray & Cunningham, *Jurisdiction To Pronounce Null a Marriage Celebrated in Another State or Foreign Country*, 18 Calif. L. Rev. 105 (1930); see N.Y. Civ. Prac. Act § 1132; Colo. Rev. Stat. Ann. § 46 (Supp. 1957).

5. Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819 (1929), at suit of lawful spouse.

6. See McMurray & Cunningham, *supra* note 4, at 112.

7. Colo. Rev. Stat. Ann. § 46–3–1 (Supp. 1957).

8. N.Y. Civ. Prac. Act § 1132.

9. Colo. Rev. Stat. Ann. § 46–3–4 (Supp. 1957).

The distinction can be more briefly expressed by the terms used in this article. The statutes restrict the word "annulment" to avoidance annulment, which would be unobjectionable if it were not for the fact that lawyers have been accustomed to use the term to designate declaratory annulment.

When a single word is used to describe two different things, its definition should reflect this by the use of an alternative. The correct definition of annulment is that it is a legal proceeding used to avoid a voidable marriage or to declare a void marriage invalid.

II. Effect of Annulment — Relation Back

If we recognize the distinction between declaratory and avoidance annulment, what are we to say about the operation of the decree in each case? It is quite obvious that a decree of declaratory annulment theoretically wipes the slate clean: it is as if the parties had never married. Children of the void marriage are illegitimate. The spouses have no property rights in each other's estates. If either spouse marries again, this later marriage is valid and the children of the new union legitimate. A decree of avoidance annulment might be supposed to operate differently, treating the marriage as good until annulled and having the same legal operation as a perfectly valid marriage terminated by divorce. The courts have held otherwise, ruling that the decree operates exactly like a decree of declaratory annulment reaching back and destroying all legal consequences which would have resulted from the voidable marriage if it had never been annulled.[10] The practice of the English ecclesiastical courts, which did not draw any distinction between void and voidable marriages,[11] and the analogy of an ordinary contract which is judicially avoided,[12] probably contributed to this result. However, the sweeping dogma that there is no difference between the operation of the two decrees has been undermind by recent cases which will be discussed later.

Does this rule of relation back apply to a marriage which by statute is declared "void from the time its nullity is declared by a court of competent jurisdiction"?[13] It is possible to look at the decree envisaged by such an enactment as the equivalent of a decree of divorce, treating the voidable marriage as a valid union until avoided. The lower courts in New York tended to take this view, but in *In re Moncrief's Will*[14] the law was settled other-

10. 2 Schouler, *op. cit. supra* note 3, § 1081; Note, 43 Harv. L. Rev. 109 (1929).
11. Note, 43 Harv. L. Rev. 109 (1929).
12. The contract analogy is stressed in *In re* Moncrief's Will, 235 N.Y. 390, 139 N.E. 550 (1923).
13. N.Y. Dom. Rel. Law § 7.
14. 235 N.Y. 390, 139 N.E. 550 (1923).

wise and the doctrine of relation back was applied. The result was to bastardize a girl who was born illegitimate and legitimitized by the subsequent marriage of her parents, a marriage later annulled for duress. The experience of Agnes Ga Nun in this case recalls that of England's Virgin Queen, conceived out of wedlock, legitimitized by one annulment and bastardized by another.[15]

Although the retrospective effect of annulment is hard on children, it has been very beneficial to another class of claimants: widows and divorcees who have forfeited their rights to continuing payments by a remarriage which is annulled later. These persons may plausibly assert that they have never "remarried" within the meaning of the law so that their right to the payments is reinstated by the annulment. Among the claims affected are alimony, separation payments, insurance and social security benefits, workmen's compensation and pensions. Sometimes, but not always, the courts hold that the rights are revived. Regardless of the social desirability of these holdings, they represent a trend which lawyers cannot afford to overlook. If a woman who has remarried is considering a divorce or an annulment, the latter may be advisable if it is legally possible whenever she is involved in any of these situations. The important cases involving some of these conflicts problems will be discussed later.

III. The Problem of Jurisdiction

It is generally agreed that presence of the defendant in the forum is not a sufficient basis for jurisdiction in matrimonial proceedings. These proceedings differ from ordinary transitory actions[16] in that there must be some additional contact point with the forum. Domicile of the husband or wife, residence of either, place of celebration of the marriage, or place where the violation of marital duty occurred have all been relied on in the divorce cases, and all of these except the last may plausibly be advanced as jurisdictional bases in annulment.

There is a lack of authority as to the sufficiency of residence short of domicile. If the current controversy about its sufficiency in the divorce cases[17] ends in approval of this basis by the Supreme

15. Henry's marriage to Ann Boleyn took place when he was supposedly married to Catherine of Aragon. The annulment of Catherine's marriage retroactively validated Ann's, so that Elizabeth was born legitimate while her sister Mary became illegitimate. The subsequent annulment of Ann's marriage bastardized Elizabeth. The succession of both princesses to the throne was made possible by an act of Parliament, but this act did not in terms legitimatize them. See *Elizabeth, Ann Boleyn* in Encyclopedia Brittanica (11th ed. 1911).

16. Restatement, Conflict of Laws §§ 78 (as to ordinary transitory actions), 110 (as to divorce), 115 (as to annulment) (1934); see Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

17. Denying jurisdiction, Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955)

Court, we may expect cases in which it is urged as a sufficient contact point in annulment. A recent case in England[18] sustains jurisdiction under these circumstances, although it should be remembered that residence plays a more important jurisdictional role in that country than in the United States.

The main controversy is between the state of domicile and the state of celebration. Should jurisdiction be exclusively in one state or concurrent in both? (Concurrent in three states if the spouses have separate domiciles.) This writer prefers concurrent jurisdiction, and this is the solution adopted in a recent Colorado statute.[19] Nearly all states recognize domiciliary jurisdiction[20] but authority for concurrent jurisdiction is more limited.

In the United States, the ease with which domicile may be changed may account for the paucity of cases in which the fact that the marriage took place in the forum is relied on as the sole contact point. It is different in England, where a wife cannot acquire a separate domicile and the courts are not so ready to find a change of domicile by the husband as they are here. The English cases are not at all consistent, but the most recent decision[21] supports this basis of jurisdiction. A commentator[22] believes that the English law is now settled and the earlier cases overruled.

A generation ago an acute controversy broke out on this matter, precipitated by the *Restatement's* proposal that jurisdiction should be limited solely to the state of celebration.[23] This view is surprising when we consider that it was opposed to nearly all of the cases.[24] The arguments for it are mainly doctrinal and derive from the now discredited vested rights theory, which holds that only the state which "creates" a status can dissolve it. Judge (then Professor) Goodrich[25] had previously taken this position, but there was a strong counterblast from McMurray and Cunningham.[26] The American Law Institute then voted in favor of domiciliary jurisdiction,[27]

(holding limited to Virgin Islands); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953). Upholding jurisdiction, Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

18. Ramsey-Fairfax v. Ramsey-Fairfax, [1955] 3 Weekly L.R. 188 (P.D.).

19. Colo. Sess. Laws 1957, ch. 129, § 4.

20. The cases are collected in Annot., 128 A.L.R. 61 (1940).

21. Addison v. Addison, [1955] No. Ire. L.R. 1 (Q.B.).

22. Webb, *The Twilight of the Doctrine of Inverclyde v. Inverclyde*, 4 INT'L & COMP. L.Q. 557 (1955), concluding that the English courts have jurisdiction on the basis of either domicile or place of celebration, and probably of residence.

23. RESTATEMENT, CONFLICT OF LAWS §§ 121, 122 (Tent. Draft No. 2, 1926).

24. See Annot., 128 A.L.R. 61 (1940).

25. Goodrich, *Jurisdiction To Annul a Marriage*, 32 HARV. L. REV. 806 (1919).

26. McMurray & Cunningham, *supra* note 4.

27. RESTATEMENT, CONFLICT OF LAWS § 115 (1934), which states that the jurisdiction for both declaratory annulment (§ 115(1)) and avoidance annulment (§ 115(2)) is the same as for divorce, covered in §§ 110–13.

and since that time the matter has seldom been debated. The new *Restatement* "takes no position as to whether the state of celebration should have concurrent jurisdiction."[28]

There is no good reason for denying jurisdiction to the state of celebration. It has a reasonable contact with the marriage and is sometimes a convenient forum. Its courts should have discretion to refuse jurisdiction if convenience does not exist. Since the question is an open one in many states, it would be wise to settle this matter one way or the other by statute, as Colorado has done.[29]

Holdings by American courts that they have jurisdiction, or that other state courts do not, are subject to review by the United States Supreme Court under the due process[30] and full faith and credit[31] clauses. To date no such ruling has ever been reviewed. In this situation we have to accept the state decisions, tentatively, as binding authority in particular jurisdictions. We get some insight into the solution of the constitutional problem from one case coming up from the lower federal courts.

The Supreme Court did not have occasion to pass on the jurisdictional problem until 1952 in *Sutton v. Leib*,[32] which will be considered in detail later. The Court upheld the jurisdiction of the state of the domicile to annul a marriage celebrated in another state and ruled that a federal court sitting in a third state must recognize the decree.[33]

Since this case, it is no longer possible to contend that the state of the domicile of both parties lacks judicial jurisdiction, and it seems plausible to assume that it will be sufficient if either spouse is domiciled in the forum. The case leaves untouched the jurisdiction of the state of celebration, and it may be a long time before this problem is finally settled.

IV. The Method of Service

When a sufficient basis of jurisdiction exists, there is a further requirement that proper notice of the proceeding must be given to the defendant.[34] In actions for divorce, it is widely held that this

28. Restatement (Second), Conflict of Laws § 115 caveat (Tent. Draft No. 1, 1953), citing in support of the jurisdiction Feigenbaum v. Feigenbaum, 210 Ark. 186, 194 S.W.2d 1012 (1946); Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1912); Sawyer v. Slade, 196 N.C. 697, 146 S.E. 864 (1929); McDade v. McDade, 16 S.W.2d 304 (Tex. Civ. App. 1929). *Contra*, Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923). See also Annot., 128 A.L.R. 76 (1940).

29. See note 19 *supra* and accompanying text.

30. U.S. Const. amend. XIV, § 1.

31. U.S. Const. art. IV, § 1.

32. 342 U.S. 402 (1952).

33. This part of the holding is based on Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

34. Restatement, Conflict of Laws §§ 75, 100, 109 (1934).

notice may be given by any of the usual forms of constructive service, including service by publication.[35] This is usually rationalized by the theory that an action affecting a status is in rem and that constructive service is always valid in this class of proceedings.[36] However, courts have had difficulty in seeing any "res" in the annulment cases, and there are holdings that this action is in personam and requires personal jurisdiction over the defendant, normally obtained by personal service within the forum.[37] In declaratory annulment at least, the very statement of the plaintiff's case negates the existence of any status.

The law of family relations is plagued by an excess of doctrinal thinking. This legal method consists of taking certain general statements as sweepingly true (usually without proof of their validity), and then using them as major premises of syllogisms for the solution of new cases by deductive reasoning. A better approach is found in the utilitarian (more exactly, social-utilitarian or sociological) method, which distrusts all generalizations except for tentative conclusions which are only valid if the practical results conform to our sense of justice and social desirability.

Doctrinal thinking frequently produces unsound results, but often the result is sound enough although based on unsatisfactory reasoning. It is suspected that the judge may have based the actual holding on practical considerations which he is reluctant to have appear in his written opinion. This leads to a doctrinal statement in which a good result is reconciled to an apparently conflicting general principle by means of a fiction. The vice of all this is that it obscures the real issues and sets a bad precedent for later decisions which may take the fiction too literally.

In the field under discussion there are two generalizations which cause trouble. One is that constructive service is proper for actions in rem but not for actions in personam. The other is that marriage is a status. Either statement may be correct enough if properly limited, but each contains seeds of difficulty.

We should start by realizing that the marital actions should not be classified as either in rem or in personam, but sui generis. The *Restatement of Judgments* correctly sets up a class of pro-

35. See 2 SCHOULER, *op. cit. supra* note 3, §§ 1521–23.

36. Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953). See discussion of the in rem or in personam aspect in the opinion of Mr. Justice Douglas in Williams v. North Carolina, 317 U.S. 287, 297–302 (1942) (opinion of the court), pointing out that there is no constitutional barrier to substituted service on a nonresident defendant in a divorce action.

37. See discussion in 35 AM. JUR. *Marriage* § 75 (1941). Cases refusing to allow constructive service are collected in Annot., 128 A.L.R. 61, 73 (1940). At least two states have permitted such service. Bing Gee v. Chan Lai Yung Gee, 89 Cal. App. 2d 877, 202 P.2d 360 (1949); Piper v. Piper, 46 Wash. 671, 91 Pac. 189 (1907).

ceedings with respect to status,[38] but unfortunately places them in a sub-class under proceedings in rem. Once we place them in a separate class, we are freed from the illusion that rules for the service of process must be analogous to those used in proceedings against property or for purely personal claims. The Supreme Court has indicated a growing reluctance to determine the validity of a given type of service on the basis of the orthodox in rem or in personam distinction in certain types of legal proceedings,[39] and it is not at all hard to regard annulment as one of these types.

From a utilitarian standpoint, service by publication in a divorce action can be justified in one situation and only one. This is where the defendant has disappeared and cannot be located after a reasonable search. Here the law must choose between two unsatisfactory alternatives. Service by publication is hard on the absent defendant, since it is unlikely that he will receive any real notice. On the other hand, refusal of jurisdiction will be very unfair to the plaintiff who is tied to a missing spouse. On balance, the plaintiff's case is stronger. The defendant's difficulty is usually of his own making and we need not treat a vanished husband with any more consideration than we do an absentee property owner.

Unfortunately, if we rationalize this result by calling divorce an action in rem, we appear to justify service by publication in the more common case of a nonresident spouse whose address is known. Here we should resort to the rule that a method of service which has a minimal tendency to reach the defendant should not be permitted when a better method is available,[40] and require service by registered mail or personal service outside of the state.

The analogous problem in annulment should not be attacked by the doctrinal classification of the action, but by asking whether the practical situation in the latter is so different as to call for a different rule. It is hard to see any important differences between the two, particularly between divorce and avoidance annulment. Each of these presupposes a "binding" marriage, that is, a party who remarries without a judicial decree dissolving the union is guilty of bigamy. One may theoretically do so if the marriage is "void" but only by risking a bigamy prosecution in case of a wrong conclusion about the validity of the marriage. It is not a good policy for the law to leave a spouse in this uncertain predicament.

Further, even if annulment is regarded as a proceeding in personam, this does not necessarily rule out all forms of constructive service. The notion that process cannot run across state lines in personal actions was given its death-blow in *McGee v. International*

38. RESTATEMENT, JUDGMENTS § 33 (1942).
39. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
40. *Ibid.*

Life Ins. Co.[41] The present approach is that if there are sufficient contacts with the forum, it may exercise jurisdiction in personam over nonresidents if reasonable notice of the proceeding is given to them.

The conclusion is that legislatures may and should provide for some form of constructive service in annulment actions, and allow service by publication upon court order, which should only be made when the judge is satisfied that the defendant cannot be located after a reasonable search.

Legislative dissatisfaction with the usual doctrinal approach is indicated by the developments in Colorado. In *Owen v. Owen*[42] the court ruled that domicile of the husband was a sufficient basis of jurisdiction, although the wife was domiciled in Texas and the marriage celebrated there. However, following the majority rule and approving the in personam theory, the court held that personal service in Texas was insufficient to give personal jurisdiction over the defendant.

Four years later the legislature passed a new statute which attempted a complete revision of the law of annulment. The doctrinal difficulty was circumvented by the creation of a "determinable marriage status."[43] On this basis the statute allows service of process in accordance with the rules of civil procedure for other actions in rem affecting a specific status.[44]

While the new law reaches the desired result, there are certain objections to its method of approach. It perpetuates the notion that divorce and annulment should be classified as in rem or in personam. It justifies the in rem classification of annulment by a fiction which may not even work. The courts might say that where no status exists, the legislature cannot create one. Finally, it is too liberal in allowing service by publication when a nonresident defendant can be located.[45]

V. The Decree as Res Judicata

When two or more states have concurrent jurisdiction with respect to a certain matter, the question of which one will ultimately decide the controversy naturally arises. Each state claims the right to determine the marital status of its domiciliaries,[46] but we

41. 355 U.S. 220 (1957).
42. 127 Colo. 359, 257 P.2d 581 (1953).
43. Colo. Sess. Laws 1957, ch. 129, § 4.
44. Colo. Sess. Laws 1957, ch. 129, § 5.
45. The statute must be read in connection with Colo. R. Civ. P. 4(g), (h). The rule requires a showing that personal service cannot be had within the state, but does not require efforts to locate nonresident defendants.
46. Williams v. North Carolina, 317 U.S. 287 (1942).

cannot permit conflicting determinations where the husband is domiciled in one state and the wife in another. The answer, of course, is that the first judgment will prevail under the principle of res judicata and must be given full faith and credit in every other American state. This may produce a race of diligence. If one spouse affirms and the other denies the validity of the marriage, a race might ensue to get an annulment decree on record before a declaratory judgment is entered in another state establishing the validity of the marriage.

For an illustration suppose *H*, a New York resident, secures a Nevada divorce from *W-1* and marries *W-2*, also a New York resident, in Nevada. Returning to New York he is faced simultaneously with a support action by *W-1* and an annulment suit by *W-2*.[47] Acting fast, he changes his domicile to Connecticut[48] and brings a declaratory judgment action against both wives in that state and is lucky enough to secure personal service on them in the forum. It is quite possible that the Connecticut court, applying Nevada law, will affirm the validity of the Nevada divorce and marriage. If this judgment is entered before the New York actions have proceeded to judgment,[49] the latter state must give full faith and credit to the judgment. It is now too late for *W-1* to contend that she is *H*'s wife or for *W-2* to contend that she is not. The judgment, however, does not necessarily destroy *W-1*'s right to support.[50] The practical result is that New York has lost its power to determine the marital status of the two wives who reside there.

Assuming that the central issue of the existence of the marriage is conclusively determined by the annulment decree or declaratory judgment, how about the other matters which may fall within the broad scope of res judicata? Does it decide *all* of the legal relations of the alleged spouses? Does it operate as collateral estoppel with respect to the issues involved? How far does it affect the legal relations of third parties to the spouses?

If we continued to regard the marriage status as a single and

47. The facts so far are taken from Sutton v. Leib, 342 U.S. 402 (1952). The rest are hypothetical.

48. Did he need to do so? There is no requirement in the Uniform Declaratory Judgment Act nor in the Connecticut statute that one of the spouses must be domiciled in the forum when a determination of status is sought. The courts, however, might say that this is one of the marital actions and requires the same additional contact points as divorce and annulment.

49. It is immaterial which action was begun first. It is the judgment that counts. Paine v. Schenectady Ins. Co., 11 R.I. 411 (1876–1877).

50. Suppose *H* asked for an adjudication that the Nevada divorce had extinguished his duty to support *W-1*? It would be erroneous for Connecticut to grant this prayer, assuming that *W-1* was not personally subject to the jurisdiction of the Nevada court. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). However, if the Connecticut court made such a declaration it would have the effect of res judicata if no appellate proceedings were taken.

indivisible thing, we would conclude that an annulment cut off any possibility that any of the incidents of the status survived the decree. We have been compelled, however, to recognize the divisibility of the marriage status and the divisibility of divorce. A court which lacks personal jurisdiction over the defendant spouse may have the power to sever the marital bond, but it cannot impose a personal duty to pay alimony,[51] nor cut off the right of support,[52] nor determine the custody of children.[53]

Is there a similar problem in annulment? Not in the majority of courts, since they will not entertain annulment suits unless personal jurisdiction over the defendant is obtained.[54] In the growing minority that put jurisdiction for annulment on the same basis as jurisdiction for divorce,[55] the same problem may come up and should receive the same solution.

Between the original parties, a decree of annulment operates by way of collateral estoppel as well as bar. Neither spouse can re-litigate any of the issues of law or fact in any other proceeding in which they may become involved with the other spouse.[56]

The effect of annulment on the rights and duties of third persons is not so easy to state. The *Restatement,* treating judgments in status proceedings as a division of actions in rem, lays down an almost identical rule for the two. Just as the judgment as to the ownership of property in a true[57] action in rem is binding on "the whole world," so the determination of the existence or nonexistence of a status binds everyone. And just as the findings on issues of law or fact in the action in rem are conclusive only on the parties who have actually litigated these matters, so such findings in status proceedings do not operate as collateral estoppel on third persons generally.[58]

Even those courts which consider annulment an action in personam requiring personal service seem to have no difficulty in accepting the rule that a determination of the existence of status binds everyone. Once a decree is entered annulling a marriage, no one can successfully contend in any legal proceeding that the marriage still exists. Does it follow that no third person can ever base a claim or defense on the fact that two parties may have gone through a marriage ceremony which turns out to be nugatory? We

51. 2 SCHOULER, *op. cit supra* note 3, § 1762.
52. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).
53. May v. Anderson, 345 U.S. 528 (1953).
54. See note 37 *supra.*
55. See note 37 *supra*; *cf.* RESTATEMENT, CONFLICT OF LAWS § 115 (1934).
56. RESTATEMENT, JUDGEMENTS § 74 (1942).
57. *Ibid.*
58. *Ibid. But see* Headen v. Pope & Talbot, Inc., 252 F.2d 739 (3d Cir. 1958) (effect of declaratory judgment establishing the validity of a marriage).

should bear in mind the divisible nature of status and the possibility that some of the incidents of a valid marriage may arise from an abortive one and may even survive a decree of annulment. The extent to which this is true will appear from a detailed analysis of the cases that follow.

Let us now return to *Sutton v. Leib.*[59] The thrice-married Mrs. Sutton sued her ex-husband, the defendant Leib, in a federal court in Illinois, for alimony alleged to have accrued between the dates of her second and third marriages. Under her Illinois divorce decree, Mrs. Sutton was entitled to alimony until she remarried. She claimed that the second marriage to Walter Henzel did not count, since it had been declared void by a New York court, so that Mr. Leib's duty to pay alimony continued until her third and admittedly valid marriage.

Mrs. Leib married Mr. Henzel in Nevada just after he had received a divorce there from his first wife, Dorothy. He had been a resident of New York but claimed that he had acquired a Nevada domicile. The couple returned to New York where Dorothy sued Mr. Henzel for separate maintenance. The court held that the Nevada divorce was void for lack of a genuine domicile.[60] Mrs. Leib then sued for a declaratory annulment, which was granted, and later married Mr. Sutton and brought the present action for alimony.

The federal court had to decide whether Mrs. Leib had "remarried" when she went through the Nevada ceremony. The lower courts ruled that the Nevada marriage was valid in spite of the New York decree of annulment.[61] The Supreme Court, however, took the position that the New York decree was entitled to full faith and credit and the marriage should be treated as void. The questions of the jurisdiction of the Nevada divorce court[62] and the validity of the Nevada marriage had become res judicata. The judgment for Mr. Leib was therefore reversed.

The matter did not rest there. "Marriage status" is not an indivisible concept. It is a short term for a collection of rights, duties, powers and privileges, some of which are central and vitally connected with the very existence of the marriage, some secondary and relatively unimportant, often involving the legal relationship of third persons to one of the spouses. We can give the New York decree the effect of res judicata without holding it to be determi-

59. 342 U.S. 402. (1952).

60. That a divorce decree may be attacked on this ground was established by the second *Williams* case. Williams v. North Carolina, 325 U.S. 226 (1945).

61. Sutton v. Leib, 188 F.2d 766 (7th Cir. 1951).

62. As to the three-state jurisdictional problem, the result follows from Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

native of these collateral matters. The duty of Mr. Leib to pay his ex-wife alimony had never been adjudicated by the New York courts and is not so vitally connected with the Henzel marriage as to stand or fall with the existence of that status. If Illinois chooses to say that Mrs. Leib lost her right to alimony when she went through a marriage ceremony with Mr. Henzel, Illinois is free to do so in spite of the New York decree.

Reasoning along these lines, the Supreme Court remanded the case with instructions to the court of appeals to find out what effect the Illinois law would give to the void ceremony. If his duty was discharged by this state law, Mr. Leib would again win. Mr. Justice Frankfurter thought the court should have required petitioner to bring a declaratory judgment action in the Illinois courts to decide this question, in view of the uncertainty of the holding in the Illinois case most nearly in point.

On remand, the court of appeals[63] decided that Mr. Leib was liable for the back alimony under Illinois law. *Lehmann v. Lehmann*[64] was distinguished on the ground that the marriage there was merely voidable and imposed a duty of support until annulled, while the Henzel marriage was void and imposed no such duty. The writer seriously doubts that the Supreme Court of Illinois would have taken this position if the matter had been submitted to them.

If the court of appeals is correct about Illinois law, an ex-wife who secures a decree of declaratory annulment of a later marriage is entitled to the alimony, but one who gets a decree of avoidance annulment is not. This shows that there may be important differences between the two kinds of annulments, and points up the need for distinguishing carefully between the two types.

In *Lehmann v. Lehmann*[65] the wife's right to alimony was permanently lost by her second and voidable marriage. It did not revive when an Illinois court annulled the second marriage, which had been contracted in New Jersey before the end of the year during which Mrs. Lehmann was forbidden to marry by the Illinois decree.

In New York the ex-wife may lose part but not all of her alimony by a voidable marriage. In *Sleicher v. Sleicher*,[66] the second marriage was annulled for fraud. It was held that Mrs. Sleicher was entitled to alimony from the date of the annulment decree, but not for the intervening period. In this case the forum, New York, was also the state of celebration of both marriages and the annulment forum, but the claim for alimony was based on a Nevada divorce.

63. Sutton v. Leib, 199 F.2d 163 (7th Cir. 1952).
64. 225 Ill. App. 513 (1922).
65. *Ibid.*
66. 251 N.Y. 366, 167 N.E. 501 (1929).

The New York decree was one of avoidance annulment, not declaratory annulment, since the second marriage was not void but voidable. However, a complication arose because of the New York doctrine that avoidance annulment produces the same legal consequences as declaratory annulment. It wipes the slate clean, reaching back and destroying the voidable marriage from the beginning. This would give Mrs. Sleicher a good argument for the recovery of all of the back alimony. Mr. Justice Cardozo, admitting that the rule was an established one, managed to evade it. The whole doctrine, he said, was a fiction designed to promote justice, and in this case it would be unjust to require Mr. Sleicher to pay alimony for the period when his wife was being supported by another man.

The rule of the *Sleicher* case was modified in *Gaines v. Jacobsen*,[67] in which the ex-wife was denied any further payments under a separation agreement when her subsequent marriage was annulled as void from its inception. The court thought that the passage of Civil Practice Act 1140-a, giving power to award alimony in annulment proceedings, made it unnecessary to give retroactive effect to the decree of annulment so as to reinstate the wife's claim for support against the first husband.[68]

How does *Sutton v. Leib* affect the very similar situation in *Dodds v. Pittsburgh, M. & B. Rys.*?[69] Here Mrs. Dodds lost, not alimony, but workmen's compensation payments as a result of her Mexican marriage later annulled by a court of the domicile, California. By Pennsylvania law, the ceremony was sufficient to cut off her widow's rights, and *Sutton v. Leib* confirms the view that this law controlled. The actual decision for the railway was therefore correct, but much of the court's reasoning and analysis is wrong and should not be followed.

The superior court, like the trial court in *Sutton v. Leib*, considered itself free to ignore the California decree of annulment. The discussion hopelessly confuses jurisdiction and choice-of-law. After stating the orthodox rule that the validity of the marriage is governed by the laws of state of celebration, the court concluded that California lacked judicial jurisdiction to annul a marriage on grounds proper by the law of the forum, when the marriage was valid by the law of Mexico. Under *Sutton v. Leib*, it is clear that California, as the state of the domicile (here both premarital and postmarital) and with both parties personally before it, had judicial jurisdiction. The fact that the court may have followed a wrong

67. 308 N.Y. 218, 124 N.E.2d 290 (1954).

68. See also Nott v. Folsom, 161 F. Supp. 905 (S.D.N.Y. 1958); Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950) (not a conflicts case).

69. 107 Pa. Super. 20, 162 Atl. 486 (1932).

choice-of-law rule did not oust that jurisdiction or relieve Pennsylvania from its obligation to give full faith and credit to the decree.

Curiously, the court quoted the rule that, as between states, the application of the law of the forum when the law of some other state should have been applied may be a violation of the full faith and credit clause.[70] This implies that the California court was acting unconstitutionally in annulling the Mexican marriage. The court failed to notice three reasons why this implication would be incorrect. The full faith and credit clause does not apply as between an American state and a foreign country. The quoted rule is of limited application and does not apply when the forum is the state of the dominant interest.[71] Finally, even if the forum followed an unconstitutional choice-of-law rule, its judgment would be binding unless reversed by appellate proceedings in the United States Supreme Court.[72]

The interaction of state and federal law in this field is well brought out in the social security cases. In *Pearsall v. Folsom*,[73] a widow who was entitled to mother's benefits lost them by remarriage but regained them when the second marriage was annulled for fraud by a California court. The decree recited that the marriage was "declared wholly null and void from the beginning," a phrase appropriate to declaratory annulment, although fraud is usually a ground for avoidance only and California law treats such marriages as voidable. The federal court, applying California law, held that the decree reached back and erased the marriage. It is true that in California an ex-wife does not regain her right to alimony when her second marriage is annulled,[74] but California applies Cardozo's idea that relation back is a fiction and will be applied only when justice will be thereby promoted. An ex-husband will normally change his position in reliance on the remarriage of his divorced wife, but no such change of position takes place in the social security cases.

It should be noted that the federal court's application of state law in this case is not required by the *Erie* doctrine,[75] since the

70. See Royal Arcanum v. Green, 237 U.S. 531 (1915). See also Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due Process Clause*, 22 ORE. L. REV. 109 (1943); Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1931).

71. The situations in which the rule is applied are discussed at length in Carroll v. Lanza, 349 U.S. 408 (1955).

72. Angel v. Bullington, 330 U.S. 183 (1947).

73. 138 F. Supp. 939 (N.D. Cal. 1956), *aff'd*, Folsom v. Pearsall, 245 F.2d 562 (9th Cir. 1957); *accord*, Sparks v. United States, 153 F. Supp. 909 (D. Vt. 1957); Mays v. Folsom, 143 F. Supp. 784 (D. Idaho 1956). Nott v. Folsom, 161 F. Supp. 905 (S.D.N.Y. 1958), reached an opposite result applying New York law.

74. Sefton v. Sefton, 45 Cal. 2d 895, 291 P.2d 439 (1955).

75. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). According to the Social Security Act, 49 Stat. 627 (1935), as amended, 42 U.S.C. § 416(h) (1952), determination

widow's claim is based on a federal statute. The act itself calls for the application of state law to determine whether an applicant is the widow of an insured individual. It does not require much straining to extend this to the effect of a remarriage and later annulment.

Another interesting case is *Magner v. Folsom*,[76] in which there was no actual annulment but a collateral attack on a void marriage in the social security proceeding. The Administrator, applying New York conflicts rules, held that the marriage of two New York domiciliaries, celebrated in Connecticut after each had secured a Mexican mail-order divorce from a former spouse, was void and the issue of the marriage, the claimant, was illegitimate. Under the New York statute[77] the child of an annulled marriage is legitimate if either parent was competent to marry and was ignorant of the other's incompetency. This was not the case here, but the judge is given discretion to declare the child legitimate in other cases. The Administrator thought he could not exercise the discretion when the marriage was collaterally attacked. The district court set him right, ruling that he had the same powers which the New York judge would have had in a direct annulment proceeding.

It should be remembered that the reference to local law in the social legislation cases may require the application of the conflicts rule of some state, usually that in which the federal court is sitting. The rule is applied in *Tatum v. Tatum*,[78] involving a widow's claim to insurance under the Federal Employees' Group Insurance Act. Decedent was covered by a policy and since he had designated no beneficiary, the proceeds would go to his widow if he left one, otherwise to his children. He had married the plaintiff in Arizona five years before he was divorced from his first wife, mother of the adverse claimants. This marriage was void, no matter what law we apply, so plaintiff relied on a common-law marriage, also void by the internal law of California. The court applied the California conflicts rule which referred to the law of Texas, where the common-law marriage was allegedly contracted. Although Texas recog-

of family status, requires a reference to state law to determine whether applicant is the widow of an insured individual, but the act does not mention the effect of remarriage. The court does not cite this clause in the *Pearsall* case but refers to § 402(g)(1)(F) as to the termination of the benefits on remarriage. In Nott v. Folsom, 161 F. Supp. 905 (S.D.N.Y. 1958), and Magner v. Folsom, 153 F. Supp. 610 (S.D.N.Y. 1957), the courts correctly relied on § 416(h). In Sparks v. United States, 153 F. Supp. 909 (D. Vt. 1957), the court ruled that the question was controlled by federal law.

76. 153 F. Supp. 610 (S.D.N.Y. 1957). See comment on this case in RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 127 & n. (Supp. OASDI 1958), citing other Social Security cases.

77. N.Y. CIV. PRAC. ACT § 1135(6).

78. 241 F.2d 401 (9th Cir. 1957).

nizes such marriages, it has special rules applicable to nonresidents and the marriage failed to meet the standards set by these rules.

An extreme application of res judicata is found in *Headen v. Pope & Talbot, Inc.*,[79] where the doctrine infused vitality into an imaginary decree of annulment. Plaintiff brought an action in a federal court in Pennsylvania for the death of decedent, whom she had married in Maryland when she was domiciled in Pennsylvania and had a former husband living and undivorced. She relied on an annulment of the earlier marriage by a South Carolina court in an action brought by the former husband, but no such decree was on record. Later on, this husband married again and brought a declaratory judgment action (apparently against his second wife) in which the court found that the annulment and remarriage were valid. It was this judgment which was held to bar the present defendant from attacking the alleged annulment.

Was this a sound application of the doctrine? Ordinarily, a declaratory judgment binds only the immediate parties. This is good policy, since otherwise there is extreme danger of collusion. The South Carolina statute,[80] differing from the Uniform Act,[81] makes the judgment conclusive "upon all persons concerned." The court did not rely on the statute only but held that the action was in rem and therefore conclusive on the whole world as to the existence of the marital status. It may be pointed out that the distinction made in *Sutton v. Leib* might properly have been applied. Even though the declaratory judgment forever establishes the validity of the remarriage of Mrs. Headen's first husband, it did not necessarily control the validity of her second marriage or the duties of third persons arising out of the latter.

This case is also of interest in its adherence to the theory of the state of paramount interest. Pennsylvania law, not Maryland law, governs the validity of the marriage celebrated in the latter state when it has no other contact points. The court therefore applied the Pennsylvania presumption of the validity of plaintiff's second marriage, a presumption which greatly strengthened her otherwise shaky case.

We can now regard it as established law that a decree of annulment must be given full faith and credit in other states, and conclusively establishes the invalidity of the marriage as against all persons who may assert its validity. The extent of the effect of res judicata, especially as it operates as collateral estoppel and as it bears on the rights and duties of third persons remains to be worked out in the future. *Sutton v. Leib* gives us a good lead by holding

79. 252 F.2d 739 (3d Cir. 1958).
80. S.C. Code § 20-42 (1952).
81. Uniform Declaratory Judgements Act § 11.

that the forum may apply its own law to determine whether the annulled marriage has produced certain legal consequences affecting rights and duties of third persons. The extent to which this may be done is not yet clear. The broad effect given to a declaratory judgment establishing the validity of a marriage cannot be approved. However, the court in the *Headen* case correctly applied Pennsylvania state law to determine whether the remarriage was valid insofar as it affected defendant's duties.

VI. Choice of Law

In contrast to the uncertainty and conflict about jurisdiction, there is at least surface agreement about the choice of law in annulment proceedings. The courts uniformly apply, or purport to apply, the law of the state where the marriage is celebrated, subject to certain well-known exceptions.[82] This is merely a particular application of the broad principle that a marriage good where it is contracted is good everywhere, and the converse principle that a marriage which is not good where contracted is not good anywhere.[83] Since annulment is only allowed when the marriage is void or voidable, its validity is the central issue in every such proceeding.

The validity of a marriage may be attacked directly by the plaintiff in an annulment action or by the defendant in a declaratory judgment action. It may also be collaterally attacked in a wide variety of other proceedings in which the rights of the parties turn on the existence of the marriage. Cases of the latter type are therefore in point as to the choice-of-law rule in annulment and deserve some consideration in this article. However, no attempt will be made to cover this field in detail. Our attention will be chiefly focussed on the rule applied in actual annulment cases.

Why is there a difference between the choice-of-law rule in annulment and in divorce? In the latter the courts apply the law of the forum.[84] Perhaps it would sound better to say that they are applying the law of the plaintiff's domicile, since this would normally coincide. When both parties are domiciled in the forum, the interest of that state in the continuance of the marital relation far out-weighs the interest of the state where they were married and jusifies the application of the internal law of the former. Without too much discussion, the courts have assumed that this is equally true when only one of the spouses is domiciled in the forum.

82. Restatement, Conflict of Laws § 121 (1934); Goodrich, Conflict of Laws § 116 (3d ed. 1949); Stumberg, Conflict of Laws 281 (2d ed. 1951).

83. Goodrich, *op. cit. supra* note 82, § 116.

84. Torlonia v. Torlonia, 108 Conn. 292, 142 Atl. 843 (1928); Restatement, Conflict of Laws § 135 (1934).

In annulment we are *not* asking whether a valid marriage should be terminated but whether there *ever was a valid marriage.* It is quite natural that the courts should look to the law of the state of celebration for the answer to this question. It is highly probable that the rule was originally based on the idea that marriage is a contract, so that its validity, like that of all other contracts, should depend on the *lex loci contractus.* This phrase is still used in the English cases where American law is more apt to speak of the *lex celebrationis* or its translation. The rule that contracts are governed by the law of the place of making is not consistently followed as to contracts made in one state and to be performed in another. Here the English courts apply the "proper law" and it has been suggested that they should do the same as to marriages contracted in one state with an intent to establish the marital domicile elsewhere.[85]

The standard exceptions to the orthodox rule relate to bigamous, polygamous and incestuous marriages and those which violate the public policy of the forum.[86] Of course, we could lump all of these under a single exception, public policy, which is an implied exception to all choice-of-law rules. The first three exceptions, however, are considered important enough to justify separate statement. Recent cases tend to emphasize the policy aspect and the trend now is to recognize some of the *incidents* of such marriages while denying recognition to the status itself.[87]

Cases of annulment of bigamous or polygamous marriages valid by the law of the state of celebration are not easy to find. The situation most likely to arise was that occurring in *Henzel v. Henzel,*[88] where plaintiff sought annulment of a marriage which she had contracted in the mistaken belief that her husband had been legally divorced from his former wife. On the surface, the court is applying the orthodox exception by refusing recognition to a marriage bigamous by its law but valid by the law of the state of celebration. However, the forum could not have done this if the Nevada divorce court had had jurisdiction. Not only the divorce decree, but the single status of Mr. Henzel resulting from this decree, must be recognized by all states under the full faith and credit clause.[89]

In one case of collateral attack, *Toler v. Oakwood Smokeless Coal Corp.,*[90] the forum refused recognition to a bigamous marriage

85. Sykes, *The Essential Validity of Marriage,* 4 INT'L & COMP. L.Q. 159 (1955).
86. *In re* Miller's Estate, 239 Mich. 455, 214 N.W. 428 (1927).
87. Estate of Bir, 83 Cal. App. 2d 256, 188 P.2d 499 (1948); see RESTATEMENT (SECOND), CONFLICT OF LAWS § 134 (Tent. Draft No. 4, 1957).
88. A New York annulment proceeding which was not appealed. It is referred to in Sutton v. Leib, 342 U.S. 402, 405-06 (1952).
89. Williams v. North Carolina, 317 U.S. 287 (1942).
90. 173 Va. 425, 4 S.E.2d 364 (1939).

which was "valid until annulled" (in other words voidable) by the law of the state of celebration, denying workmen's compensation to a widow who had remarried in the mistaken belief that her first husband was dead. It was argued by plaintiff that she was the lawful widow of decedent by West Virginia law and it was now too late for annulment proceedings, but the court countered with the orthodox exception reinforced by the public policy doctrine. In this case the marriage was bigamous by the law of both states, and the result could be justified on the theory that the classification of such a marriage as void or voidable is a matter of primary characterization to be governed by the law of the forum.

The leading case involving the annulment of an incestuous marriage valid by the law of the state of celebration is *Garcia v. Garcia.*[91] The court refused to annul the marriage of first cousins who had married in California, their domicile at the time. This case can be supported on the usual theory that the incest exception is limited to relationships "deemed incestuous by the common consent of Christendom" and this means *only* brother-sister marriages and marriages in the direct line of ascent and descent.[92] Thus circumscribed the exception becomes meaningless, since in all probability these marriages are not lawful anywhere in the world.[93] There are conflicts cases of collateral attack on marriages not falling within the narrow category: uncle and niece, cousins and persons closely related by affinity. The results are conflicting, depending on the strength of the local policy against these unions.[94]

Apart from the exceptions just discussed, refusal to apply the law of the state of celebration is usually based on policy grounds. *Cunningham v. Cunningham* is typical.[95] A young girl was willing to marry a middle-aged roomer living in her parents' home. New York law forbade this[96] so the couple crossed to New Jersey and persuaded a minister to marry them. The marriage was never consummated and the girl returned to her home after the ceremony. Annulment was granted, the court stressing the right of every state to determine the marital status of its residents and emphasizing the strength of the legislative policy. Actually, the marriage

91. 25 S.D. 645, 127 N.W. 586 (1910).

92. *In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953).

93. Brother-sister marriages were contracted in the royal families of Burma and Siam as late as the nineteenth century. A conflicts problem arose in Egypt after the Roman occupation when certain Roman colonists married their sisters in accordance with Egyptian law. This was eventually forbidden by imperial edict.

94. Uncle-niece marriages were upheld in Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358 (1916), and *In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953). *Contra,* United States *ex rel.* Devine v. Rodgers, 109 Fed. 886 (E.D. Pa. 1901).

95. 206 N.Y. 341, 99 N.E. 845 (1912).

96. N.Y. DOM. REL. LAW § 7.

may have been invalid under a New Jersey statute[97] which forbade persons authorized to perform the ceremony to do so when the parties were under age. The statute did not in terms declare the marriage void and a New Jersey court[98] had refused to annul such a marriage after consummation. The New York court thought the marriage was probably invalid and subject to annulment before consummation, but insisted on the application of New York law in any event. In contrast to this case, there are holdings that the forum will apply the law of the state of celebration even in the case of its own domiciliaries.[99]

The public policy exception has been resorted to in the miscegenation cases.[100] These holdings will probably soon run afoul of the federal constitution, and the statutes themselves may meet the same end.[101] In *Naim v. Naim*,[102] the Supreme Court of Appeals of Virginia upheld an annulment of a marriage contracted in North Carolina between a white woman, domiciled in Virginia, and a Chinese man, when a Virginia statute prohibited such marriages. In a brief memorandum opinion, the United States Supreme Court ordered the judgment vacated but refused to pass on the constitutionality of the statute because of the state of the record.[103]

Study of the public policy cases raises some doubt as to the accuracy of the orthodox rule. Are the courts really applying the law of the state of celebration or the law of the domicile, which often coincides with the former? Cases in which the courts refuse to apply the law of the state of celebration usually involve strong domiciliary contacts with the forum, and departure from the orthodox rule is justified by the state's interest in the matrimonial status of its citizens. At least three suggestions have been made as to the rule which the courts ought to apply: the law of the state having the paramount interest,[104] the proper law,[105] and the law of the state of intended matrimonial domicile.[106] The first two

97. N.J. STAT. ANN. § 2A:34–1 (1952).

98. Wyckoff v. Boggs, 7 N.J.L. 138 (Super. Ct. 1822).

99. Payne v. Payne, 121 Colo. 212, 214 P.2d 495 (1950); *In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953); *In re* Miller's Estate, 239 Mich. 455, 214 N.W. 428 (1927).

100. *In re* Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); State v. Bell, 7 Baxt. 9 (Tenn. 1872).

101. Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948).

102. 197 Va. 80, 87 S.E.2d 749 (1955), *adhered to after remand to complete record*, 197 Va. 734, 90 S.E.2d 849 (1956).

103. Naim v. Naim, 350 U.S. 891 (1955). In Naim v. Naim, 350 U.S. 985 (1956) (memorandum decision), the Court refused to interfere after the Supreme Court of Virginia reaffirmed its decision.

104. This phrase is explained in RESTATEMENT (SECOND), CONFLICT OF LAWS Topic 1, Introductory Note (Tent. Draft No. 4, 1957). See also *id.* § 132.

105. Sykes, *supra* note 85.

106. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942);

are so nearly synonymous as to be considered differing phrases for the same basic idea. The third suggestion, which is supported by distinguished authors, is open to practical objections because of difficulties of proving intent and the limited interest of any state in parties who have not yet made their home there.[107]

A reasonable compromise is to retain the rule applying the law of the state of celebration except in cases where this state has no other contact, and where the domiciliary contacts with one other state are strong enough to give the latter the paramount interest. The rule should be flexible, leaving the court free to disregard technical or short-lived domiciliary contacts and striking a reasonable balance when the pre-marital and post-marital domiciles differ. Such a rule explains cases like *Cunningham v. Cunningham*[108] and *Headen v. Pope & Talbot, Inc.*[109] where the interest of the state of domicile is clearly paramount. We can not, however, eliminate the public policy limitation altogether. *Cunningham v. Cunningham* can only be reconciled with *In re May's Estate*[110] on the basis of a differing policy with respect to the two types of forbidden marriages.

Which rule should be applied by a forum which has no other interest in the case when the state of celebration is not the state of paramount interest? Departure from the orthodox rule is hardly justified on the basis of public policy, but the rule suggested here dictates the application of the law of the state of paramount interest. This should include the conflicts rule of that state, which means the introduction of renvoi.

This might very well explain the result in *Meisenhelder v. Chicago & N.W. Ry.*,[111] a fascinating case complicated by a federal statute. Meisenhelder and Louise D'Albani, first cousins residing in Illinois, married in Kentucky and returned to their home state, where the Uniform Marriage Evasion Act made the union void.[112] After the death of her husband on the job, Louise sued his employer in Minnesota under the Federal Employers' Liability Act.[113] (A suit in Illinois would have been hopeless.) The statute governed as far as it went, but gaps would have to be filled by refer-

CHESHIRE, PRIVATE INTERNATIONAL LAW 311 (4th ed. 1952); Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U.L. REV. 353 (1939).

107. Sykes, *supra* note 85.

108. 206 N.Y. 341, 99 N.E. 845 (1912).

109. 252 F.2d 739 (3d Cir. 1958).

110. 305 N.Y. 486, 114 N.E.2d 4 (1953). The domiciliary contacts in the *May* case are not so strong as in *Cunningham*, but strong enough to make New York's interest paramount.

111. 170 Minn. 317, 213 N.W. 32 (1927). See 26 MICH. L. REV. 327 (1928).

112. ILL. ANN. STAT. ch. 89, § 19 (Smith-Hurd 1956).

113. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

ence to state law. The court assumed this to be the conflicts rule of the state of the tort, Illinois. The weight given to the Uniform Act, which states a conflicts rule, makes it clear that the reference is not directly to the internal law of that state. If there were no statute, the conflicts rule might have referred to the internal law of the state of celebration, Kentucky, validating the marriage. This would have been an instance of transmission renvoi.

If the court had followed Morse's "guiding principle" that courts favor widows *de facto*,[114] a holding for Louise would have been in order and could easily be justified by a little juggling of the basic analysis. Should not the reference from the federal statute be to the conflicts rule of the forum?[115] Then if Minnesota followed the orthodox rule it might refer directly to the internal law of Kentucky, short-circuiting Illinois and reaching a just result. This, however, would ignore the paramount interest of Illinois which the court seems to sense, although it does not rationalize its holding in this way.

VII. What Price Annulment?

Is annulment really necessary? Years ago Judge Goodrich suggested dropping the idea of nullity altogether and substituting divorce as a means of putting an end to imperfect marriages.[116] This would do away with the rule of relation back and all its undesirable consequences. The suggestion is worthy of serious consideration, but so far the law does not seem to be taking this direction. It is true that statutes of many states permit divorces for grounds existing at the time of the marriage,[117] thus blurring the distinction between divorce and annulment. On the other hand, the idea of a sweeping abolition of annulment has not won any substantial support.[118]

Certain practical difficulties may be noticed. Should the idea extend to void as well as voidable marriages? If we retain the distinction between them and abolish annulment, we are taking a step backward by making it impossible for a spouse to secure clarification of an uncertain marital status. If we abolish the distinction between void and voidable marriages and treat both as good

114. Morse, *Characterization: Substance or Shadow*, 49 Colum. L. Rev. 1027 (1949).

115. In Tatum v. Tatum, 241 F.2d 401 (9th Cir. 1957), a federal court applied the conflicts rule of the state in which it was sitting to fill a similar gap in another federal statute.

116. Goodrich, *Jurisdiction To Annul a Marriage*, 32 Harv. L. Rev. 806 (1919).

117. 2 Schouler, Marriage, Divorce, Separation and Domestic Relations §§ 1547–53 (6th ed. 1921).

118. A contrary position is taken in McMurray & Cunningham, *Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country*, 18 Calif. L. Rev. 105 (1930).

until one of the parties secures a divorce, are we not giving too much recognition to bigamous marriages, at least in the light of popular moral condemnation of such unions? Moreover, the suggested change would run counter to the feelings of large groups who oppose divorce on religious grounds. These feelings should have weight with the legislatures, who would probably be disinclined to change a system which is working fairly well, and will work much better if it is revised instead of being abolished.

If we are going to live with annulment for some time to come, what can be done to improve this institution? There is too much conflict, too much uncertainty, too much unjust operation in the law as it stands. The only practicable way to change all this is by legislation, and statutes are badly needed in nearly all states. These statutes should not be drafted until a thorough study has been made in the law of each state with a view to discovering its defects, combined with an attempt to state the ideals that should control the proposed legislation, and an appraisal of the possibility of securing something approaching national uniformity in the law in this field. Such a study should analyze the 1957 Colorado statute carefully, starting with this as a working model and exploring the possibilities of improvement and adaptation to the policy of other states. There should be no great difficulty in drafting new statutes which will give us a greatly improved law of annulment.

Conclusion

The foregoing discussion suggests the following conclusions.

1. The definition of annulment needs clarification. The difference between the two kinds of annulments should be constantly borne in mind, and short descriptive phrases should be introduced to accentuate this difference. "Declaratory annulment" and "avoidance annulment" are useful terms for this purpose.

2. Jurisdiction for annulment should be asserted and recognized in the courts of the state of celebration and those of the state of domicile of either husband or wife.

3. Constructive service should be allowed by order of court when the defendant cannot be personally served within the forum. If the whereabouts of the defendant is known or can be ascertained with reasonable diligence, the court should direct service by registered mail or personal service outside the state. Service by publication should be permitted only after the court is convinced that the defendant cannot be located.

4. A decree of annulment entered by a court of competent jurisdiction has the effect of res judicata. Between American states this is compelled by the full faith and credit clause. Under prin-

ciples of conflict of laws, decrees of foreign courts should be given equal effect.

5. The extent of res judicata should be worked out along the lines indicated in *Sutton v. Leib*. Since "marriage status" is not an indivisible concept, a decree terminating the status or declaring it nonexistent does not necessarily reinstate the exact situation that would have existed if the parties had never gone through the form of a marriage. Courts should have power to qualify decrees of declaratory annulment so as to legitimize children, protect the interests of third persons, and limit the effect of the decree on such matters as custody and support.

6. The validity of the marriage should normally be governed by the law of the state of celebration, except where the forum has a strongly opposed public policy. The public policy exception should be narrowly limited. When the state of celebration has no other contact, the forum may properly apply the law of the state having the paramount interest.

7. Unsettled questions in this field should be worked out on the basis of practical utilitarian considerations and not by deductive reasoning from *a priori* generalizations. Fictions should be discarded. Annulment proceedings should be classified as sui generis, and the method of service should not be controlled by analogies drawn from contract or tort actions in personam or property actions in rem.

8. In nearly all states there is need for legislation to modernize and clarify the law of annulment. The Colorado statute is a convenient model but can be improved and adapted to the needs of other states.