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MISCEGENATION IN THE CONFLICT OF LAWS*

Law and Reason Versus The Restatement Second

Albert A. Ehrenzweig†

Walter Wheeler Cook and Ernest Lorenzen, perhaps the greatest American scholars in this field, felt obliged to spend much of their life-work in the destruction of that grand and dangerous experiment of the American Law Institute, the so-called Restatement of the Law of Conflict of Laws. Many of our own generation, led by judges like Roger Traynor and writers like Currie, Rhemstein, Stumberg and Yntema, have contributed their share to the task. They have done their job well. So well that for many years well meaning teachers and writers have discouraged their students and colleagues from continuing the work of destruction because the Restatement was "dead."

But it seems that the fight will have to be fought again. The Restatement is not dead by any means. The highest court of at least one state has continued to declare that "it will generally follow the Restatement. . . ."¹ Other states similarly suffering from dearth of precedents, have been inclined to follow suit. Abroad, the Restatement has remained the primary, if not the sole, source of American conflicts law.² And—most important and most disturbing—the Institute, defying the virtually unanimous judgment of leading courts and writers, has decided to renew, nay to double, the threat of its first venture in a Restatement of the Law Second. It has renewed the threat because it has virtually ignored the work of Cook and Lorenzen and retained the theoretical fundament and framework of the original. It has doubled the threat because, after removal of the most glaring inaccuracies of the original under the guidance of an able reporter, the deceptively simple formulas which apparently are to be retained will tempt courts and lawyers unlearned in the field even more effectively than the earlier cruder experiment.

In the law of marriage, where conflicts law comes, perhaps, closer to human problems than elsewhere, this temptation may become particularly

* The author is greatly indebted to his colleague, Professor Barbara N. Armstrong, for valuable criticism and suggestions.

This is the second in a series of two articles prepared for the Cornell Law Quarterly by Professor Ehrenzweig. The first study, "Alienation of Affections In the Conflict of Laws," appeared at 45 Cornell L.Q. 514 (1960).

† See Contributors' Section, Masthead, p. 722, for biographical data.

¹ *Irwin v. Murphy*, 81 Ariz. 148, 152, 302 P.2d 534, 537 (1956). For additional authority and analysis, see Ehrenzweig, "The Restatement as a Source of Conflicts Law in Arizona—A Dangerous Error," 2 Ariz. L. Rev. — (1960).

² See Ehrenzweig, "American Private International Law and the 'Restatement,'" 28 Nordisk Tidsskrift for International Ret 229 (1958); "Zum Handwerkszeug des amerikanischen internationalen Privatrechts," 7 Österreichische Zeitschrift für Öffentliches Recht 521 (1956); "El Restatement Americano del Conflicto de Derechos," [1954] Cuadernos Derecho Anglo-Americano 37.

serious. Here, the American Law Institute's new fanciful creation of a "state of paramount interest"³ threatens to add a submyth to Professor Beale's highly objectionable myth of "legislative jurisdiction."⁴ This state is defined as the "state where at least one of the parties was domiciled at the time of the marriage and where both intend to make their home thereafter";⁵ and the law of that state is given overriding effect for the purpose of both validating and invalidating foreign marriages.⁶ It is with the alleged invalidating effect of the law of the "state of paramount interest" that this article is primarily concerned.

The Institute assures us that cases establishing this effect are "comparatively rare because the state of paramount interest will normally make the validity of a marriage depend upon its compliance with the requirements of the state where it took place."⁷ This may or may not be true concerning marriages attacked because of non-age,⁸ "incest,"⁹ or

³ Restatement (Second), Conflict of Laws § 120, at 94 (Tent. Draft No. 4, 1957) [hereinafter referred to as Rest. Second, Tent. Draft or the Draft].

⁴ Cf. Ehrenzweig, Conflict of Laws 8-9 (1959).

⁵ Rest. Second, Tent. Draft § 120, at 94. See also id. § 132. Cook, The Logical and Legal Bases of the Conflict of Laws 448 (1942), would have given similar prominence to the state of the "intended family domicile." Beale, et al., "Marriage and the Domicil," 44 Harv. L. Rev. 501, 523 (1931) "summarily dismissed" both concept and theory.

⁶ Rest. Second §§ 122, 132.

⁷ Id. § 120, at 94.

⁸ The courts seem split concerning the weight to be given to their own laws as to marriages invalid under the age or consent requirements of the forum but valid in the state of celebration. For validity: See, e.g., *State v. Graves*, 228 Ark. 378, 307 S.W.2d 545 (1957); *McDonald v. McDonald*, 6 Cal. 2d 457, 58 P.2d 163 (1936); *Spencer v. People*, 133 Colo. 196, 292 P.2d 971 (1956); *Payne v. Payne*, 121 Colo. 212, 214 P.2d 495 (1950); *Noble v. Noble*, 299 Mich. 565, 300 N.W. 885 (1941); *Keith v. Pack*, 182 Tenn. 420, 187 S.W.2d 618 (1945). Against validity: See, e.g., *Wilkins v. Zelichowski*, 26 N.J. 370, 140 A.2d 65 (1958); *Cunningham v. Cunningham*, 206 N.Y. 341, 99 N.E. 845 (1912). In the *Wilkins* case the court expressly excepted cases involving foreign domiciliaries, 26 N.J. 370, 377, 140 A.2d 65, 69. See also *Anton & Francescakis*, "Modern Scots 'Runaway Marriages,'" [1958] *Jurid. Rev.* 253; *Note*, 49 *Colum. L. Rev.* 693 (1949); *Annot.*, 104 *A.L.R.* 1294 (1936). For a somewhat intemperate attack against a Belgian decision holding invalid the New York marriage of a Belgian minor with a New York girl which would have been valid in New York, see Beale, "The Law of Capacity in International Marriages," 15 *Harv. L. Rev.* 382, 394 (1902), ascribing this and similar decisions based on the parties' personal law to the fact that "in European countries . . . [in contrast to the common law which "regards man as a natural creature"], natural facts and powers of human life are nothing to the law until the law makes them so." *Id.* at 382. Concerning marriages invalid at the place of celebration but valid under the law of the (usually domiciliary) forum see *infra* note 87.

⁹ *In re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1953), upheld a Rhode Island marriage between uncle and niece under Rhode Island law although the spouses were New York domiciliaries at all relevant times. See also, e.g., *People v. Siens*, 198 Ill. App. 342 (1916); *Mazzolini v. Mazzolini*, 168 Ohio St. 357, 155 N.E.2d 206 (1958) (first cousins, upheld as merely voidable under the forum law of first matrimonial domicile); *In re Miller's Estate*, 239 Mich. 455, 214 N.W. 428 (1927); *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577 (1938); *Annot.*, 117 *A.L.R.* 186 (1938); 127 *A.L.R.* 437 (1940).

Among the more recent cases, *Bucca v. State*, 43 N.J. Super. 315, 321, 128 A.2d 506, 510 (1957), invalidating under New Jersey law a marriage between uncle and niece concluded validly under Italian law, relies on the assumption that "these parties at the time of ceremony in Italy (intended) to establish their family domicile in New Jersey." But plaintiff had returned to New Jersey and desired to bring his wife to the state so that the forum was also the state of the present domicile. See also *In re Mortenson's Estate*, 83 *Ariz* 87, 316 P.2d 1106 (1957) (first cousins). See generally *Kingsley*, "The Law of Infants' Marriages," 9 *Vand. L. Rev.* 593, 603 (1956).

non-compliance with form requirements.¹⁰ But the Institute's assurance is certainly misleading with regard to those very cases in which the problem will arise most dramatically, namely with regard to the cases involving so-called "interracial" marriages.¹¹ Here, a "state of paramount interest" that invalidates such marriages will generally refuse to defer to the law of the place of celebration.¹²

¹⁰ Most important are common law marriages and marriages by proxy. Concerning the latter, compare, e.g., *United States v. Snyder*, 177 F.2d 44 (D.D.C. 1949), with *Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951). See also, e.g., *In re Valente's Will*, 18 Misc. 2d 701, 188 N.Y.S.2d 732 (Surr. Ct. King's County 1959); *Ponticelli v. Ponticelli*, [1958] 2 Weekly L.R. 439; Note, [1958] *Camb. L.J.* 146; Lorenzen, "Marriage by Proxy and the Conflict of Laws," 32 *Harv. L. Rev.* 473 (1919); De Nova, "La Legge Regolatrice del Matrimonio Celebrato per Procura," 11 *Guir. Comp. DIP* 3 (1954); Stern, "Marriages by Proxy in Mexico," 19 *So. Cal. L. Rev.* 109 (1945); Note, 33 *Cornell L.Q.* 129 (1947). In the great majority of cases common law marriages concluded in a state recognizing such marriages have been recognized in non-common law states even as to forum domiciliaries. *Travers v. Reinhardt*, 205 U.S. 423 (1907); *Madewell v. United States*, 84 F. Supp. 329 (E.D. Tenn. 1949); *Gradias v. Gradias*, 51 *Ariz.* 35, 74 P.2d 53 (1937); *In re McKanna's Estate*, 106 Cal. App. 2d 126, 234 P.2d 673 (1951) (domicile not required under Texas law); *In re Tersip's Estate*, 86 Cal. App. 2d 43, 194 P.2d 66 (1948); *In re Foster*, 77 *Idaho* 26, 287 P.2d 282 (1955) (also valid in forum); *Boltz v. Boltz*, 325 *Mass.* 726, 92 N.E.2d 365 (1950); *Craddock's Case*, 310 *Mass.* 232, 37 N.E.2d 508 (1941); *Bourelle v. Soo-Crete, Inc.*, 156 *Neb.* 731, 87 N.W.2d 371 (1958); *Shea v. Shea*, 268 *App. Div.* 677, 52 N.Y.S.2d 756 (2d Dep't 1945), *rev'd* on other grounds, 294 N.Y. 909, 63 N.E.2d 113 (1945); *Welsh v. Surface Transportation Co.*, 7 *Misc. 2d* 167, 161 N.Y.S.2d 190 (Sup. Ct. N.Y. County 1957); *Skinner v. Skinner*, 150 N.Y.S.2d 739 (Sup. Ct. N.Y. County 1956); *In re Schneider's Will*, 206 *Misc.* 18, 131 N.Y.S.2d 215 (Surr. Ct. King's County 1954); *Red Eagle v. Cannon*, 201 *Okla.* 511, 208 P.2d 557 (1949); *Troxel v. Jones*, 322 *S.W.2d* 251 (Tenn. App. 1958); *In re Gallagher's Estate*, 35 *Wash.* 2d 512, 213 P.2d 621 (1950). *Peirce v. Peirce*, 379 *Ill.* 185, 39 N.E.2d 990 (1942) would recognize such marriages only as to non-domiciliaries. Decisions denying the existence of common-law marriages allegedly entered into in sister states are usually based on a finding of non-compliance with the law of that state rather than on a finding of continued forum domicile. See, e.g., *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957); *Rittgers v. United States*, 154 F.2d 768 (8th Cir. 1946); *Ponzi v. Ponzi*, 157 *Cal. App. 2d* 772, 321 P.2d 847 (1958); *Abramson v. Abramson*, 161 *Neb.* 782, 74 N.W.2d 919 (1956); *In re Binger's Estate*, 158 *Neb.* 444, 63 N.W.2d 784 (1954); *Winn v. Wiggins*, 47 *N.J. Super.* 215, 135 A.2d 673 (1957); *State v. Superior Court*, 23 *Wash.* 2d 357, 161 P.2d 188 (1945). See also *Harleysville Mut. Cas. Ins. Co. v. Carroll*, 50 *Del. Super.* 67, 123 A.2d 128 (1956); *Janbrone v. David*, 16 *Ill.* 2d 32, 156 N.E.2d 569 (1959); *Kennedy v. Damron*, 268 *S.W.2d* 22 (Ky. 1954); *Ropken v. Ropken*, 169 *Neb.* 352, 99 N.W.2d 480 (1959). Cf. *In re Vetas' Estate*, 110 *Utah* 187, 170 P.2d 183 (1946).

¹¹ The provisions concerning the treatment of foreign remarriage prohibitions are omitted in this analysis. See *Rest. Second, Tent. Draft* §§ 130, 131; notes 32, 88 *infra*.

¹² For decisions to this effect, see generally *Annot.*, 3 *A.L.R.2d* 240 (1949). Cf. *Beale, et al.*, "Marriage and the Domicil," 44 *Harv. L. Rev.* 501, 512 (1931); *Taintor*, "Marriage in the Conflict of Laws," 9 *Vand. L. Rev.* 607, 613 (1956); *Storke*, "Annulment in the Conflict of Laws," 43 *Minn. L. Rev.* 849, 866 (1959); *Notes*, 16 *Minn. L. Rev.* 172, 175 (1931), 20 *So. Cal. L. Rev.* 80, 85 (1946). See also *In re Takahashi's Estate*, 113 *Mont.* 490, 129 P.2d 217 (1942) (Montana statute since repealed); *Ehrenzweig, Ikehara & Jensen*, *American-Japanese Private International Law* (forthcoming); Note, 17 *Tenn. L. Rev.* 378, 383 (1942). Even minority states have been prepared to recognize interracial marriages concluded under a validating law without intent to return to the forum. See *State v. Ross*, 76 *N.C.* 242 (1877); *Miller v. Lucks*, 203 *Miss.* 824, 36 *So. 2d* 140 (1948); *Caballero v. Executor*, 24 *La. Ann.* 573 (1872). Massachusetts treated her own prohibition (since repealed) as one not invalidating a marriage celebrated in a majority state. *Medway v. Nedham*, 16 *Mass.* 157 (1819). California upheld a Utah interracial marriage against the laws of both the forum and the former domicile. *Pearson v. Pearson*, 51 *Cal.* 120, 125 (1875). See also *Whittington v. McCaskill*, 65 *Fla.* 162, 61 *So.* 236 (1913); *State v. Hand*, 87 *Neb.* 189, 126 N.W. 1002 (1910) (facts supplemented in *Taintor*, "Effect of Extra-State Marriage Ceremonies," 10 *Miss. L.J.* 105, 120 (1938)). For a later case, see *People v. Godines*, 17 *Cal. App. 2d* 721, 62 P.2d 787 (1936) (*dictum*). See generally *Rodgers*, "Validity of Marriages where the Contract is Entered into in a Jurisdiction other than

A minority of states continue to enforce their "miscegenation statutes" which prohibit, either civilly or criminally, or both, marriages between "white persons" and persons of other "races," primarily "Negroes."¹³ It is likely that the Supreme Court of the United States will ultimately declare such statutes unconstitutional and thus eliminate conflicts problems in this field. But the Court may postpone this decision.¹⁴ In the meantime, a significant, though necessarily limited, alleviation of the problem could conceivably be achieved by courts of majority states which would be prepared to adjudicate, by declaratory judgment, the validity of local inter-racial marriages. Such judgments would be entitled to full faith and credit throughout the nation.¹⁵ In any event, many and serious conflicts problems will continue to arise. Majority states will be asked to recognize "interracial" marriages purportedly invalid at the place of celebration or premarital domicile, and minority states will be faced with such marriages alleged to be valid at either place.

The (First) Restatement expressly includes such marriages among those subject to invalidation by the "law of the state of domicile of either party."¹⁶ The published Draft of the Second Restatement would continue expressly to subject such marriages to the law of the domiciliary state (now redefined as the state of "paramount interest"), but would have relegated this controversial "rule" to the comment.¹⁷ And now we understand that the Institute, in response to the criticism of its members, has deleted even this discreet reference.¹⁸ But this deletion will not

that of the Domicile of the Parties," 31 Am. L. Rev. 524 (1897). For the status of the domicile myth in the law of divorce, see Ehrenzweig, *Conflict of Laws* 234 (1959).

¹³ For a criticism of this terminology, see, e.g., *Perez v. Lippold*, 32 Cal. 2d 711, 724, 198 P.2d 17, 21 (1948).

Forty states, beginning with Maryland in 1661, have at one time had statutes against "interracial" marriages. Note, 10 Wyo. L.J. 131 (1956). Riley, "Miscegenation Statutes—A Re-evaluation of their Constitutionality in Light of Changing Social and Political Conditions," 32 So. Cal. L. Rev. 28 (1958), lists 24 states which, as of 1958, had preserved their miscegenation statutes. Of these, two have since repealed theirs. *Idaho Laws 1959*, ch. 44, at 89; *Nevada Statutes 1959*, ch. 193, § 1, at 216. See generally Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes," 42 Cornell L.Q. 208 (1957), brought up to date, 6 *Revue de Droit International pour le Moyen-Orient* 79 (1957); *Comments*, 32 Calif. L. Rev. 269 (1944), *Selected Readings on Family Law* 277 (1950); 36 *Yale L.J.* 858 (1927). See also Notes, 11 Fla. L. Rev. 235 (1958); 19 *La. L. Rev.* 700 (1959); 30 *Miss. L.J.* 326 (1959); 11 *Okla. L. Rev.* 305 (1958); 11 *W. Res. L. Rev.* 93 (1959); 3 *Wyo. L.J.* 159 (1948); 10 *Wyo. L.J.* 131 (1956).

¹⁴ The court avoided the issue in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, vacated & remanded, 350 U.S. 891 (1955), decision adhered to, 197 Va. 734 90 S.E.2d 849, app. denied, 350 U.S. 985 (1956). See also *Jackson v. State*, 37 Ala. App. 519, 72 So. 2d 114, cert. denied, 348 U.S. 888 (1954).

¹⁵ See generally Ehrenzweig, *Conflict of Laws* 165 (1959). Declaratory judgments on issues not truly controverted, would probably require statutory authorization. Borchard, *Declaratory Judgments* 36, 138, 480 (2d ed. 1941). An alternative solution could, in proper cases, be found in the requirements of full faith and credit to administrative acts, extended to constitutive licensing acts of sister states. See Ehrenzweig, *op. cit. supra* at 174.

¹⁶ Restatement, *Conflict of Laws* § 132(d) (1934).

¹⁷ Rest. Second, Tent. Draft § 132, comment b (3).

¹⁸ For this information I am indebted to Professor Willis L. M. Reese, the Reporter of

do. So long as "interracial marriages" are not expressly exempted from the ominous regime of the "state of paramount interest," courts may, and in view of the previous utterances of the two "Restatements" probably will, continue to find the "rule" implied in the broad language of the text.

The problem faced by these courts is the principal subject of this article which will deal with other facets of the conflicts law of marriage only where this is required by the broader implications of this problem. Within a scope thus limited, emphasis will be upon interstate cases dealing with the marital status, and upon those cases in which the state of "paramount interest" is a state other than that of the forum. For it is these cases which alone are solvable on principles of choice of law, and it is as to those cases that the "rules" of the Draft are wholly inaccurate, with regard to both marriages valid and those invalid under the law of celebration.

MARRIAGES VALID WHERE CELEBRATED

A "white" woman domiciled in Illinois and a "Negro" domiciled in Mississippi desire to marry. Since Mississippi treats "interracial" marriages as invalid, they enter into a marriage ceremony in California which has no such "miscegenation" law, but intend to make their home in Mississippi. Immediately after the ceremony, having realized the risks inherent in this plan, they decide to stay in California. Can it seriously be contended that a court of that state will hold a marriage, validly concluded under its own law, invalid merely because it has been "proved" that, at the moment of the ceremony, the spouses had intended to return to the husband's home state?¹⁹ The American Law Institute would apparently so hold, and would even extend invalidity beyond domicile and place of celebration into any "fourth State,"²⁰ because, says Professor Beale, "every state should acknowledge the privilege of the domicil to deny the status, however out of sympathy it may be with the particular manifestation thereof."²¹ This apparently would be in recognition of the "logical development of the power of the domicil over the marital status,

the Second Restatement. The original wording of the Draft was attacked in the general discussion. See ALI Proceedings 443 (1957).

¹⁹ Section 132 of the (First) Restatement would extend this invalidating effect in certain cases to "the law of the state of domicil of either party," whether or not the spouses had intended to make their home there. For criticism, see Cook, *op. cit. supra* note 5; Stumberg, *Conflict of Laws* 290 (2d ed. 1951). Professor Beale's own views seem to require the two domiciliary laws to coincide. 1 Beale, *Conflict of Laws* 693 (1935).

²⁰ Restatement, *Conflict of Laws* § 132, comment d, illustr. 3 (1934). To Beale, et al., "Marriage and the Domicil," 44 *Harv. L. Rev.* 501, 526 n.84 (1931) there is "clearly no reason for a distinction" between cases arising at the original domicil and in other states, which are said to include the state of celebration (at n.83).

²¹ Beale, et al., *supra* note 5, at 528.

a power which is emphatically granted by the current of common-law opinion."²² Neither such a power nor the "paramount interest" of the Second Restatement has ever been "current" in the history of the common law.

Until the Reformation, the conflicts law of the Church, which since the 10th century had acquired the primary jurisdiction in marriage matters,²³ was limited to the "interpersonal" treatment of pagan and heretic marriages. Even when other problems arose, such as priest marriages prohibited in some and tolerated in other parts of Christendom, the all-embracing character of the Church precluded territorial solutions.²⁴ And when, after the Reformation, English courts first faced territorial conflicts, they reached a result directly opposed to Professor Beale's "emphatical" message of the common law. Thus, in what is probably the leading early English case adjudicating the validity of a foreign marriage, the court announced that "the laws of the country where the marriage is celebrated are to be the rule by which the validity of it is to be tried," and this even in cases where the inhabitants of the forum state in order to evade their own law forbidding such marriages "go to a country where they are allowed, and marry there in transitu."²⁵ In accordance with this principle, English courts, at least until the middle of the nineteenth century, quite generally upheld marriages valid at the place of celebration as to both form and capacity and without regard to the law prevailing at either party's domicile even where this domicile was England.²⁶ This practice has, in substance, continued with regard to form requirements.²⁷ But even as to capacity there was no recognition of a "power" of the parties' domicile even when the House of Lords, in

²² 2 Beale, *Conflict of Laws* 697 (1935). See, however, *id.* at 666, where the "general rule" is stated differently. Beale could also have escaped his untenable result as to miscegenation without abandoning his general approach, by classifying miscegenation as a legal incapacity which he would subject to the law of celebration because "capacity, of itself, is merely one of the facts of a transaction and not a status." Beale, *et al.*, *supra* note 5, at 518.

²³ Salvioh, *La giurisdizione patrimoniale e la giurisdizione della Chiesa in Italia prima del mille* 141 (Modena 1884). See also, e.g., 1 Feine, *Kirchliche Rechtsgeschichte* 357 ff. (1950).

²⁴ See generally 1 Esmein, *Le Mariage en Droit Canonique* 247 ff., 328, 334 (1929); Feine, *op. cit. supra* note 23, at 617; 2 Eichmann-Mörsdorf, *Lehrbuch des Kirchenrechts* 261 ff. (6th ed. 1959).

²⁵ *Scrimshire v. Scrimshire*, 2 Hag. Con. 395, 414, 161 Eng. Rep. 782, 789 (1752). The case involved a marriage invalid at the place of celebration, note 62 *infra*. See also *Kent v. Burgess*, 11 Sim. 361, 59 Eng. Rep. 913 (1840) (English domiciliaries' marriage in Belgium complying with English requirements held invalid under Belgian law); *Berthiaume v. Dastous*, [1930] A.C. 79 (1929) (similar facts and holding).

²⁶ See Dicey's *Conflict of Laws* 231, 250 (7th ed. 1958).

²⁷ See, e.g., *Swift v. Kelly*, 3 Knapp 257, 12 Eng. Rep. 648 (1835) (Spanish Catholic marriage); *Compton v. Bearcroft*, Bull. N.P. 113 (Court of Delegates 1768) (Scottish clandestine marriage). For more recent cases, see Dicey's *Conflict of Laws* 230 ff. (7th ed. 1958). As to the "wrong" judgment by a divided House of Lords in *Reg. v. Millis*, 10 Cl. & Fin. 534, 8 Eng. Rep. 844 (1844), see Falconbridge, *Conflict of Laws* 717 (2d ed. 1954).

1861, held invalid as incestuous under English law a marriage valid under the Danish law of celebration.²⁸ To be sure there was stress on the spouses' English domicile. But England was also the country of the forum, and not a single English case can be found that recognized the alleged common law power of the law of the domicile as such by holding invalid under that law a marriage which would have been valid in England as well as at the place of celebration.²⁹ Indeed, as to miscegenous marriages in particular, it has been suggested in a leading English text that a marriage valid in the country of its celebration would probably be held valid in England today though it would have been invalid under a miscegenation law in force at the "domicile of both or either of the parties."³⁰

Nor does the "power" of the domiciliary law fare better in this country. Professor Beale cites two cases for his proposition that, if any state "refuses to attach a status to the valid contract of marriage . . . , all courts should, in dealing with the marriage of domiciliaries of that state, decide the question as the courts of the domicil would decide it."³¹ Neither case is in point.³² Other pertinent cases would have supported

²⁸ *Brook v. Brook*, 9 H.L. Cas. 193, 11 Eng. Rep. 703 (1861). See also *Mette v. Mette*, 1 Sw. & Tr. 416, 164 Eng. Rep. 792 (1859) (German valid marriage of British domiciliary invalid as incestuous under English law); *Re Paine*, [1940] Ch. 46 (1939) (same); *Re De Wilton*, [1900] 2 Ch 481 (same); *Pugh v. Pugh*, [1951] Prob. Div. 482 (non-age).

²⁹ In *Sottomayor v. DeBarros* (No. 1), [1877] 3 Prob. Div. 1, the Court of Appeals had reversed a judgment upholding an English marriage of Portuguese citizens under English law, on the assumption that the marriage would be invalid under Portuguese law if both spouses were domiciled in Portugal. But, upon remand, the Probate Division again upheld the marriage finding the husband to have been domiciled in England at the time of the marriage. *Sottomayor v. DeBarros* (No. 2), [1879] 5 Prob. Div. 94. Cf. *Dicey's Conflict of Laws* 264 f. (7th ed. 1958). See also *Papadopoulos v. Papadopoulos*, [1930] Prob. Div. 55 (1929), upholding an English marriage between a domiciled Cypriot and a Frenchwoman although Greek-orthodox rules had not been observed.

³⁰ *Dicey's Conflict of Laws* 266 (7th ed. 1958). In *Chetti v. Chetti*, [1909] Prob. Div. 67 (1908), the English marriage between a Hindu domiciled in India and an English woman was upheld against the husband's contention that under the law of his domicile he could not marry a woman outside his own caste and not a Hindu by religion.

³¹ 2 Beale, *Conflict of Laws* 697 (1935). But see also *Id.* at 696: "a third state, regardless of the actual pronouncements of the domicil, might decide the validity of the marriage according to the principles revealed by the current trend of common-law authority."

³² In *People v. Steere*, 184 Mich. 556, 151 N.W. 617 (1915), defendant's conviction for the abandonment of his wife was set aside because the Michigan marriage had been concluded in violation of the remarriage prohibition of Illinois, the state of the matrimonial domicile. While using ambiguous language the court, in effect, merely denied the wife's status as that of an "abandoned wife" under the criminal statute of the forum. The second case, *Hall v. Industrial Commission*, 165 Wis. 364, 162 N.W. 312 (1917), concerned an Indiana marriage entered into by plaintiff in evasion of a remarriage prohibition of Illinois, the state of her prior divorce and domicile at that time. This marriage was held invalid in Wisconsin. The decision was based not on the law of either party's premarital domicile but on the limited effect of the Illinois divorce into which the Illinois remarriage statute had been "imported," and on the fact that this statute was "substantially the same" as that of the forum. But see *Goodrich*, "Foreign Marriages and the Conflict of Laws," 21 Mich. L. Rev. 743, 758 n.49 (1923), who declares the latter fact "immaterial"—a rather peculiar conclusion in the light of the court's express reasoning. *Annot.*, 51 A.L.R. 1412 (1927), fails to add better authority. This case thus leaves intact the rule announced by the same court in *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787, 788 (1908), according to which the only exceptions to the general validity of a validly celebrated marriage are violation of "a law of nature as generally recognized by Christian civilized states" or of

the opposite view.³³ It might also have been worth mention that this opposite view was shared by *all* American treatises which had previously dealt with this question. In 1830, Chancellor Kent, in his *Commentaries*, had declared the principle to be "settled law . . . that, in respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence."³⁴ In 1834, Story discussed the question "how far a marriage regularly celebrated in a foreign country, between persons belonging to another country, who have gone thither from their own country for that purpose, is to be deemed valid if it is not celebrated according to the law of their own country."³⁵ Rejecting civilian authority to the contrary, he found it "settled, after some struggle, both in England and America, that such a marriage is good,"³⁶ and stated the same rule with regard to the capacity to marry.³⁷ Bishop, in 1864, found "the question . . . settled, in the way indicated, both in England and America."³⁸ Similarly, Field, in his International Code of 1872, had rejected all exemptions from the *lex celebrationis* (except for certain polygamous or incestuous marriages), without regard to the law of either party's domicile;³⁹ Rorer's Inter-State Law of 1879 had reached the same conclusion.⁴⁰ Minor, equally ignored by Professor Beale, had stated as late as 1901 that, "if the parties are domiciled in one State by whose law they are prohibited to marry, but the marriage occurs in another State where such marriages are permitted, and the validity of the marriage is impugned in the *latter* or any *third* State, the general rule is that the *lex celebrationis*, not the *lex domicilii*, will govern." (Emphasis added.)⁴¹ If Chief Justice Gray's 1880 summary of Massachusetts law had been noted in its entirety, it would have revealed the same view. Beale, and

a forum law expressly invalidating such marriages "on grounds of public policy." Moreover, it seems doubtful whether the Institute itself would, in the fact situation of the Hall case, *supra*, hold invalid a valid marriage violating the remarriage prohibition of the premarital domicile. See Rest. Second § 131 (the spouses had established their first domicile in the forum state); Ehrenzweig, *Conflict of Laws* 260 (1959).

³³ In *Dodds v. Pittsburgh, M. & B. Rys.*, 107 Pa. Super. 20, 162 Atl. 486 (1932), a Mexican marriage of California residents was upheld under Mexican law against an attack for fraud, without regard to a subsequent California annulment presumably based on the domiciliary law of California. In *In re Ommang's Estate*, 183 Minn. 92, 235 N.W. 529 (1931), an evasory Minnesota marriage of Wisconsin domiciliaries was upheld as against a domiciliary prohibition. See Note, 16 Minn. L. Rev. 172, 184 (1931). In *Boehm v. Rohlfis*, 224 Iowa 226, 276 N.W. 105 (1937), the Iowa court upheld an evasory Minnesota marriage of Wisconsin domiciliaries as against a Wisconsin prohibition.

³⁴ 2 Kent, *Commentaries on American Law* 79 (1830).

³⁵ Story, *Conflict of Laws* 115 (1834).

³⁶ *Id.* at 116.

³⁷ *Id.* at 87.

³⁸ 1 Bishop, *Marriage and Divorce* 311 (4th ed. 1864).

³⁹ Field, *Outlines of an International Code* 383-89 (2d ed. 1876).

⁴⁰ Rorer, *American Inter-State Law* 177 (1879).

⁴¹ Minor, *Conflict of Laws* 150 (1901).

his colleagues, in a now classic article on the subject, quote from this summary the statement of "the general principle, that the status or condition of a person, the relation in which he stands to another person . . . is fixed by the law of the domicil."⁴² They omit the limitation of this statement to relations by which a person "is qualified or made capable to take certain rights in that other's property,"⁴³ and fail to mention that Chief Justice Gray, in the same opinion, concludes that the validity of a contract of marriage "is governed, even as regards the competency of the contracting parties, by the law of the place of the contract; that this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicil; and therefore that any such marriage, valid by the law of the place where it is contracted, is, even if contracted between persons domiciled in this Commonwealth and incompetent to marry here under our laws . . . valid here to all intents and effects . . ."⁴⁴ This treatment of judicial and other authority by Professor Beale and his colleagues casts a strange light on the concluding sentence in the same article. Here, those are derided who draw different conclusions from the "psychoanalysis" of judges instead of reading "the decisions themselves—the Minerva-like progeny of their emotional disturbances, [which] if you will—show one underlying principle: control over the marital status rests with the domicil."⁴⁵ Psychoanalysis would perhaps trace this outburst to the absence of those very "decisions" on which the "principle" is alleged to rely.

Nor has Professor Beale's principle been confirmed by a single case decided since its formulation. Instead, the highest court of one state has found it possible to uphold an evasory marriage in a sister state under the law of that state contrary to the rule prevailing at the spouses' domicile in a third state.⁴⁶ And Professor Stumberg has urged that "in a search for the proper law to determine the validity of a marriage, emphasis upon domiciliary power, or, for that matter, power of any state, is apt to obscure the real reason for prohibiting certain types of marriages."⁴⁷

This warning has remained unheeded. The American Law Institute proposes, in substance at least, to retain Professor Beale's clearly inac-

⁴² Beale, et al., *supra* note 5, at 503 n.5, quoting from *Ross v. Ross*, 129 Mass. 243, 246 (1880). The incorrect quotation has been carried into recent case law. See, e.g., *Smith v. Smith*, 99 N.H. 362, 111 A.2d 531, 533 (1955).

⁴³ *Ross v. Ross*, *supra* note 42.

⁴⁴ *Id.* at 247-48.

⁴⁵ Beale, et al., *supra* note 5, at 529.

⁴⁶ *Boehm v. Rohlfis*, 224 Iowa 226, 276 N.W. 105 (1937); note 33 *supra*.

⁴⁷ Stumberg, *Conflict of Laws* 290 (2d ed. 1951). See also Cook, *op. cit. supra* note 5, at 443.

curate conception of the "current of common law opinion." Even as to marriages valid at the place of celebration the Reporter of the Second Restatement suggests that third states would follow "if the State of paramount interest chose to knock out a marriage on the ground of formalities. . . ."⁴⁸ To be sure, some miscegenation cases would now be decided more reasonably than under the rule of the (First) Restatement. If our California spouses from Illinois and Mississippi had first intended to settle in Texas, and then had stayed in California, they could then have remained validly married. For, though they had run afoul of the laws of both the husband's former and their intended domicile, these domiciles did not coincide as required in the Second Restatement.⁴⁹ Moreover, perhaps less confident than Professor Beale in its conceptualist approach, the Institute would now delete, both in the text of, and in the comments to, its new Restatement any specific reference to miscegenous marriages.⁵⁰ But the Institute proposes to retain its first Reporter's fundamental idea of the ubiquitous "power" of the state of domicile and would now, for this purpose, expressly endow this state with the dignity of the state of "paramount interest."⁵¹ The California spouses from Illinois and Mississippi, who made the mistake of "intending" to settle in Mississippi, the husband's home state, would be held invalidly married in California, though they have never actually gone back to Mississippi and have made California their first and last home.⁵² We are told that the regime of the state of "paramount interest" which produces such absurd results "has been adopted by the courts."⁵³ But we must be satisfied with a "see e.g." reference to the case of *Hall v. Industrial Commission* which, adduced for the same purpose by Professor Beale, has been found wanting.⁵⁴ Judge Goodrich, the Director of the American Law Institute, maintains in his text, that "in the Anglo-American view of the matter, it is the sovereign at the domicile, the place where the person has his permanent abode, who is most concerned in affairs like his domestic relations,"⁵⁵ and that, therefore, "one state cannot decide that the domiciliary of another state has contracted a valid marriage."⁵⁶

⁴⁸ ALI Proceedings 419 (1957).

⁴⁹ This result was attacked on the floor of the Institute. ALI Proceedings, at 439.

⁵⁰ Note 13 *supra* and accompanying text.

⁵¹ Note 3 *supra* and accompanying text.

⁵² Cf. ALI Proceedings, *supra* note 48, at 443.

⁵³ Rest. Second, Tent. Draft 102.

⁵⁴ *Supra* note 32.

⁵⁵ Goodrich, *Conflict of Laws* 350 (3d ed. 1949). See also Goodrich, "Foreign Marriages and the Conflict of Laws," 21 Mich. L. Rev. 743 (1923); Stimson, "Law Applicable to Marriage," 16 U. Cinc. L. Rev. 81 (1942). Cf. Ehrenzweige, *Conflict of Laws* 182 (1959).

⁵⁶ Goodrich, *Conflict of Laws* 367 (3d ed. 1949).

Neither statement is supported by any authority, "Anglo-American" or other.

If the Restatement dogma is wrong on the law, it is even more clearly so on reason. Any rule which would forever and everywhere tie a marriage "status" to the law, however inequitable, prevailing at either or both parties' premarital or first intended, or continued and intended domicile, is socially unbearable. Every state of the Union is free, and the majority of states are likely to uphold under their own laws a marriage valid under the law of celebration without reference to where the spouses were domiciled or intended to make their home at the time of marriage.⁵⁷ Any other conclusion can be understood only under a theory which assumes a status immutably "vesting" at the time, and only at the time, of the ceremony, or in other words a system of "legislative jurisdictions"⁵⁸ established by a superlaw outside of the Constitution. Such a system has never existed.⁵⁹

MARRIAGES INVALID WHERE CELEBRATED

In 1821 Lord Stowell, in *Ruding v. Smith*,⁶⁰ remarked that while "a foreign marriage, valid according to the law of the place where celebrated, is good every where else," the courts have "not è converso established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally . . . to be regarded as invalid in England."⁶¹ But in 1834, Justice Story, partly relying on this case and partly on other cases not here pertinent,⁶² stated the general proposition that a marriage invalid where celebrated "is equally invalid every where."⁶³ Story also relied on Kent and Lord Kames. But the former had limited himself to the validity rule⁶⁴ which was discussed in the first part of this study, and Lord Kames had urged the very opposite of Story's proposition, namely that "Justice . . .

⁵⁷ On the concept of status, see Ehrenzweig, *Conflict of Laws* 174 (1959).

⁵⁸ Beale, et al., *supra* note 5, at 503. See note 4 *supra*.

⁵⁹ Ehrenzweig, *Conflict of Laws* 8 (1959).

⁶⁰ 2 Hag. Con. 371, 390, 161 Eng. Rep. 774, 781 (1821). The rule of this case which validated a marriage celebrated between British subjects at the Cape by a chaplain of the British forces in contravention of local Dutch law, is apparently limited to cases "where the use of the local form is impossible" and where "one of the parties is a member" of occupying forces. Dacey's *Conflict of Laws* 230 (7th ed. 1958).

⁶¹ *Ruding v. Smith*, *supra* note 60, at 390, 161 Eng. Rep. at 781.

⁶² Among these, *Scrimshire v. Scrimshire*, 2 Hag. Con. 390, 161 Eng. Rep. 782 (1752), is the one most cited. Here a French marriage between British subjects conducted "by a Popish priest after the English ritual" (at 786) was held void under French law though it would have been merely "irregular" (at 783) under English law. As interpreted by later cases, this decision was one based on a prior French annulment. *Harford v. Morris*, 2 Hag. Con. 423, 432, 161 Eng. Rep. 792, 795 (1776), upholding a marriage between British subjects in Austrian Flanders and Denmark in violation of local law, and distinguishing the *Scrimshire* case on that ground.

⁶³ Story, *Conflict of Laws* 104 (1834).

⁶⁴ Kent, *Commentaries* 91 (2d ed. 1832).

requires that a marriage be held good here, though not formal according to the law of the country where it was made, provided the will and purpose of the parties to unite in marriage clearly appear."⁶⁵ It seems very probable that Story, like some of his successors, was carried away by that crave for symmetry which was to reach its fateful climax in Beale's teaching. That his theory did not state existing law is made likely by such decisions as that of the Supreme Court of Pennsylvania in 1840, where that court reaffirmed the observation of the *Ruding* court for the law of the United States in the very words of Lord Stowell.⁶⁶ To be sure, by the end of the nineteenth century most writers seem to have accepted Story's counterpart of the validity rule.⁶⁷ But the equation is anything but compelling.

In the first place, differentiation between the validating and invalidating effects of the law of celebration seems indicated in the light of the history of American law. Most other countries refer the validity of marriages to the personal laws of the parties. The deviation of the American rule from this pattern has in part been ascribed to the desire of a country of "immigration and pioneering" not to permit "requirements of the old countries. . . . to impede marriages necessary to new settlers."⁶⁸ While this desire is not inconsistent with the recognition of foreign marriages under the law of celebration, it would be defeated by the non-recognition under that law of foreign marriages which satisfy American conceptions.

Nor is the equation between marriages valid at the place of celebration with those invalid there "logical" in any sense. As I have tried to show in a series of articles on the conflicts law of contracts,⁶⁹ courts in this field have usually applied what I have called the "law of validation" under which a contract (other than one of adhesion)⁷⁰ will in accordance

⁶⁵ 2 Kames, Principles of Equity 324 (1778). Since Lord Kames does not treat of capacity to marry, and since form and capacity in his time were treated alike (see text accompanying note 26 supra), his statement seems applicable to capacity as well. On Lord Kames' earlier authority in this country, see Nadelmann, "Joseph Story and George Joseph Bell," 1959 Jurid. Rev. 31.

⁶⁶ Phillips v. Gregg, 10 Watts 158, 168 (Pa. 1840).

⁶⁷ See, e.g., Field, Outlines of an International Code § 548 (2d ed 1876); 1 Bishop, Marriage and Divorce 329 (1864). Rorer, American Inter-State Law 178 (1879), relies on Greenwood v. Curtis, 6 Mass. 358 (1810) (foreign contract valid where made), and Cheever v. Wilson, 9 Wall. (76 U.S.) 108 (1869) (wife's domicile for divorce), both irrelevant.

⁶⁸ 1 Rabel, Conflict of Laws 312 (2d ed. 1958).

⁶⁹ See the following articles by Ehrenzweig: "The Real Estate Broker and the Conflict of Laws," 59 Colum. L. Rev. 303 (1959); "Contractual Capacity of Married Women and Infants in the Conflict of Laws," 43 Minn. L. Rev. 899 (1959); "The Statute of Frauds in the Conflict of Laws," 59 Colum. L. Rev. 874 (1959); "Contracts in the Conflict of Laws," 59 Colum. L. Rev. 973, 1171 (1959); Book Review, 12 Leg. Ed. J. 137 (1959); "Releases of Concurrent Tort-feasors in the Conflict of Laws," 46 Va. L. Rev. 712 (1960).

⁷⁰ Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 Colum. L. Rev. 1072 (1953).

with the intention of the parties at the time of contracting, be upheld under any one of the court's "proper laws", except in certain well-defined situations characterized by strong governmental interests to the contrary.⁷¹ The same conclusion applies a fortiori to the law governing the contract of marriage.⁷² Courts have, therefore, as has been shown,⁷³ narrowly limited exceptions to the general recognition of marriages valid at the place of celebration while, on the other hand, always refusing to limit themselves to that law in order to uphold a marriage. As late as 1883, American courts seem to have been unwilling to accept a general regime of invalidity under the law of celebration.⁷⁴ And it is hardly a coincidence that this hesitation has been shared by all states which have ever approached the subject by statute. They have, directly or indirectly, borrowed from the first rule of Field's International Code,⁷⁵ which acknowledges the ubiquitous validity of marriages valid at the place of celebration. But they have rejected his second rule which declares invalid marriages invalid at the place of celebration.⁷⁶ The fact that Field had admitted to a lack of authority for this second rule⁷⁷ may have had some bearing on this legislative decision.

Notwithstanding all these considerations and the total absence of authority, Professor Beale "restated" the law to be that any marriage failing to comply with mandatory requirements of the place of celebra-

⁷¹ In this sense a governmental interest is understood, in its narrowest sense, as an interest of the (forum or foreign) government itself, in contrast to Professor Currie's terminology. See, e.g., Currie, "On the Displacement of the Law of the Forum," 58 Colum. L. Rev. 964 (1958).

⁷² The Institute itself has recognized this. Thus, it would admit validity under the law of continued and intended domicile generally, while limiting invalidity under that law, even of evasive marriages (Rest. Second, Tent. Draft § 129), to cases affecting "an overriding public policy" of that law. Rest. Second, Tent. Draft 118. See also, generally, *id.* at 100, 102. This limitation may yet be included in the black letter text. ALI Proceedings, *supra* note 48, at 440.

⁷³ See p. 663 *supra*. For cases more than liberally construing foreign laws as holding the marriage valid, see, e.g., *Loring v. Thorndike*, 87 Mass. 257 (1862); *In re Lando's Estate*, 112 Minn. 257, 127 N.W. 1125 (1910).

⁷⁴ See *Hynes v. McDermott*, 91 N.Y. 451 (1883), leaving the question undecided as one requiring "careful consideration." See also *Canale v. People*, 177 Ill. 219, 52 N.E. 310 (1898), involving an Italian marriage between Italians held invalid under Italian law "in favor of the innocence of the accused."

⁷⁵ *Supra* note 39, at 382.

⁷⁶ Cal. Civ. Code § 63 (Deering 1949) (first enacted 1872); Idaho Code Ann. § 32-209 (1947) (first enacted 1872); Colo. Rev. Stat. Ann. § 90-1-5 (1953); Kan. Gen. Stat. Ann. § 23-115 (1949) (first enacted 1867); Ky. Rev. Stat. § 402.040 (1959) (limited to forum residents); Mont. Rev. Codes Ann. § 48-113 (1947) (first enacted 1887); Neb. Rev. Stat. § 42-119 (1952); N.M. Stat. Ann. § 57-1-4 (1953) (first enacted 1862); N.D. Rev. Code § 14-0308 (1943) (first enacted 1895, residents excepted); S.D. Code § 14.0103 (1919); Utah Code Ann. § 30-1-4 (1953) (first enacted 1898); Wyo. Comp. Stat. Ann. § 20-21 (1957) (first enacted 1876). On the international scene, Article 2(3) of the Hague Convention of May 29, 1900, followed a similar approach by permitting, under each spouse's national law, the validation of marriages invalid at the place of celebration. *Acts de la 3^eme Conférence de la Haye pour le droit international privé* 346 (1900). See also, for the English version, *Baty, Polarized Law* 13 (1914).

⁷⁷ Field, *Outlines of an International Code* 383 (2d ed. 1876).

tion was "invalid everywhere."⁷⁸ To be sure, in its Restatement Second, the Institute now seems willing to concede validating effect at least to the law of the state of continued and intended domicile.⁷⁹ But law and reason demand a fundamentally different answer. For the result of the alleged invalidity rule, even within this now more limited scope, is wholly unacceptable in those cases in which the ground of invalidity is one obnoxious, or at least indifferent, to the forum, as in cases of non-age, in most cases of so-called incest, and particularly in cases of miscegenation.

In a California court a "Negro" woman claims California property left by her "white" husband. The couple had lived in California ever since their marriage, which had been celebrated in Nevada where they were then domiciled. Under the Institute's proposed "rule" the California court would have to deny her claim because Nevada then invalidated such marriages and California was not the state of the continued and intended domicile. Indeed, under this formula the result would be the same even if the widow, before going to Nevada, had been domiciled in California or, in the absence of such prior domicile, had, like her husband, intended to settle in that state at the time of her marriage.

This "rule" lacks support in authority and is objectionable on policy grounds. First, it would deny validating effect to the law of the state of the spouses' first (intended or actual) domicile if that state was not also the state of either party's prior, and thus continued, domicile. The justification for this result offered in the Institute's Draft is unsatisfactory. It is true that otherwise "the validity of the marriage might on occasion be governed by the law of a state where the parties have never been." But it is irrelevant that that state, "as of the time of the marriage, [has] little interest in them."⁸⁰ All that would be needed to avoid the rejected result would be to eliminate the "intention" test (also otherwise objectionable as largely fictitious and fortuitous), and to give validity to any marriage valid under the law of the parties' first actual postnuptial domicile. The assumption underlying the Draft of an exclusive "paramount interest" of "legislative jurisdiction" of the state of the parties' prenuptial domicile has precluded this simple solution.

Second, the "rule" of the Draft would deny validating effect to the

⁷⁸ Restatement, Conflict of Laws § 122 (1934). 2 Beale, Conflict of Laws 674 (1935) cites only one case for this proposition. *Schaffer v. Krestnovnikow*, 88 N.J. Eq. 192, 102 Atl. 246 (1917), motion to receive record in evidence denied, 88 N.J. Eq. 523, 103 Atl. 913 (1918), *aff'd*, 89 N.J. Eq. 549, 105 Atl. 239 (1918). But all that this case held was that one assailing the validity of a second marriage had not "overcome the powerful presumption of the legality of the marriage" by proving the validity of a previous marriage allegedly invalid under the law of celebration.

⁷⁹ Rest. Second, Tent. Draft § 132.

⁸⁰ Rest. Second, Tent. Draft 120.

law of the state of the parties' present domicile (*i.e.*, their domicile at the time of the litigation). The Draft defends this denial on the ground that "after the marriage the parties might change their mind, and, after having gone to their intended domicile, decide to make their home in another state."⁸¹ Indeed, they might. It may certainly be doubted, to quote the Draft, "whether a state where the parties do not intend to live has a sufficient interest to outweigh the general policy in favor of upholding the validity of marriages."⁸² But the same doubt should have been acknowledged as to the state of either party's domicile at the time of marriage, the so-called state of "paramount interest," and as to the state of celebration itself. Or, in other words, a marriage may be upheld not only under the law of the state of celebration, but also under the law of either party's domicile at the time of marriage or of the parties' domicile at the time of the commencement of the suit. The last state, if any, has the paramount interest in the parties' marital status. Several techniques are available for reaching this result within the traditional framework.

In the first place, the forum, at least where it coincides with the spouses' present domicile, can simply disregard any foreign invalidity law and apply the primary validity law of the forum in the absence of a compelling reason to the contrary.⁸³ Decisions to this effect have usually been concerned with the violations of foreign form requirements⁸⁴ and have reached this result whether or not such requirements were "mandatory" in Restatement parlance.⁸⁵ Fraud⁸⁶ and lack of capacity at the

⁸¹ *Ibid.* For a forceful, but apparently unsuccessful, attack against the Draft on this point see Judge Maris' remarks in ALI Proceedings 437 (1957). But see also *id.* at 444.

⁸² Rest. Second, Tent. Draft at 120.

⁸³ This general thesis I have tried to develop in my forthcoming paper on "The Lex Fori—Basic Rule in the Conflict of Laws," 58 Mich. L. Rev. 637 (1960). For a preliminary talk on this topic, see Ehrenzweig, "Lex Fori—Exception or Rule?," 32 Rocky Mt. L. Rev. 13 (1959). See also note 69 *supra*.

⁸⁴ In *Ferret v. Ferret*, 55 N.M. 565, 237 P.2d 594 (1951), the validity of a Spanish civil marriage, though contrary to present Spanish law, was upheld as conforming with the law in effect at the time of the ceremony. The underlying policy sustaining the validity of marriages which violate mere form requirements of the place of marriage is illustrated by *Starkowski v. Attorney General*, [1953] 2 All E.R. 1272, where the House of Lords, in the converse case, upheld an Austrian religious marriage invalid under the German law then in force by conceding retroactive effect to a subsequent validating Austrian law. On the problem of intertemporal conflicts in general, see Gavalda, *Les conflits dans le temps en droit international privé* (1955). Where Commonwealth courts have to deal with marriages violating form requirements of the law of the place of contracting, they now seem inclined, at least in such situations as those involving members of occupying forces, to give validating effect to the English law of the forum. See e.g., *Taczanowska v. Taczanowska*, (1957) P. 301, 2 All E.R. 563, where a marriage between foreign domiciliaries in Italy was upheld under English common law though it was invalid under the laws of both marriage and domicile; and see generally *Mendez da Costa*, "The Formalities of Marriage in the Conflict of Laws," 7 Int'l & Comp. L.Q. 217 (1958); Andrews, "The Common Law Marriage," 22 Modern L. Rev. 396 (1959).

⁸⁵ Restatement, Conflict of Laws § 122 (1934); Rest. Second, Tent. Draft § 122.

⁸⁶ Such decisions as *Levy v. Levy*, 209 Mass. 230, 34 N.E.2d 650 (1941), upholding a New York marriage, and *Damaskinos v. Damaskinos*, 325 Mass. 217, 89 N.E.2d 766 (1950),

place of celebration have occasionally been treated in the same manner. Thus, marriages alleged to be invalid or voidable because of non-age⁸⁷ or remarriage prohibitions⁸⁸ have been upheld, on varying grounds, without reference to either the law of celebration or domicile.

In the second place, those states which have held or will yet hold

annulling a New York marriage, can, though both purport to rely on New York law, probably be most easily reconciled on an evaluation of the facts in the light of forum policy concerning fraud. The treatment of duress has been similar. See, e.g., *Lyon v. Lyon*, 230 Ill. 366, 82 N.E. 850 (1907).

⁸⁷ In *Portwood v. Portwood*, 109 S.W.2d 515 (Tex. Civ. App. 1937), a marriage concluded in Oklahoma, where it was void or voidable, was upheld in open reliance upon the law of the forum as such. *Id.* at 522, 523. In *Parks v. Parks*, 218 N.C. 245, 10 S.E.2d 807 (1940), a marriage of North Carolina citizens, concluded in Virginia, was upheld after ratification, because under the law of the forum (rather than that of celebration) a non-age marriage was only voidable. In *Dowdell v. Dowdell*, 3 Bucks Co. L. Rep. 140 (Pa. 1954), the law of celebration was presumed to be identical with that of the forum which upheld the marriage. Such holdings are often based on forum statutes which specify grounds for annulment and which are interpreted as statutes establishing a compulsory overriding choice of law rule. See, e.g., *Capasso v. Colonna*, 96 N.J. Eq. 385, 124 Atl. 760 (1924), upholding a marriage voidable for non-age under the New York law of celebration but valid under the law of New Jersey, the law of the forum and domicile. To the same effect is *Du Pont v. Du Pont*, 47 Dcl. (8 Terry) 231, 90 A.2d 468, cert. denied, 344 U.S. 836 (1952), where a marriage voidable under the New York law of celebration [in the opinion of the lower court more readily than at the forum, *Anon. v. Anon.*, 46 Del. (7 Terry) 458, 85 A.2d 706, 715 (1951)], was upheld on the ground, *inter alia*, that, although New York law was applicable, the court had no "power" to decree an annulment under it (at 90 A.2d 493). It may be hoped that *Cruickshank v. Cruickshank*, 193 Misc. 366, 82 N.Y.S.2d 522 (Sup. Ct. Monroe County 1948), does not state the law of New York. In that case the California marriage of a 19-year old New Yorker with a 22-year old California "divorcee" was annulled as violating the California consent requirement, although the marriage would have been valid if celebrated in New York, the plaintiff's own domicile. The court distinguished *Bays v. Bays*, 105 Misc. 492, 174 N.Y. Supp. 212 (Sup. Ct. Cortland County 1918), which had upheld a marriage voidable under the Pennsylvania law of celebration, on the untenable ground that plaintiff in the case at bar was only 19 years old (rather than 20 as in *Bays*), defendant only 22 years old (rather than 30), and that plaintiff in the case at bar was "far removed from the stabilizing influence of his parents and his home surroundings." The only other case that could be found which seemingly supports this approach is *Von Felden v. Von Felden*, 212 Minn. 54, 2 N.W.2d 426 (1942), where a marriage voidable under the Iowa law of celebration was annulled, although it would have been valid in the state of forum and domicile. But the decision was apparently equivalent to a divorce by consent (annulled as of the time of the annulment) and was based upon a "mutual error of selection" and lack of consummation. [On the relevance of the last fact, see *Beale, et al.*, *supra* note 5, at 519]. *Travis v. Travis*, 19 D. & C. 505 (Pa. 1934) is obscure. West Virginia law there was quoted as establishing minimum ages of 18 and 16, and the spouses' ages exceeded this minimum. In *Sirois v. Sirois*, 94 N.H. 215, 50 A.2d 88 (1946), conflicts rules were unnecessarily invoked. See generally *Comment*, 49 *Colum. L. Rev.* 693 (1949).

⁸⁸ When upholding foreign marriages concluded in contravention of marriage prohibitions of third divorcing states, some courts have purported to defer to the laws of celebration or domicile. But usually they have referred to the law of the divorcing court and have declared it inapplicable as penal or lacking extraterritorial effect. See, e.g., *People v. Woodley*, 22 Cal. App. 674, 136 Pac. 312 (1913); *Means v. Means*, 40 Cal. App. 2d 469, 104 P.2d 1066 (1940); *In re Winder's Estate*, 98 Cal. App. 2d 78, 219 P.2d 18 (1950); *In re Tersip's Estate*, 86 Cal. App. 2d 43, 194 P.2d 66 (1948); *Fisch v. Marler*, 1 Wash. 2d 698, 97 P.2d 147 (1939); *In re Peart's Estate*, 277 App. Div. 61, 97 N.Y.S.2d 879 (1st Dep't 1950); *King v. Klemp*, 26 N.J. Misc. 140, 57 A.2d 530 (Ch. 1947); *Henderson v. Henderson*, 199 Md. 449, 87 A.2d 403 (1952); *Bauer v. Abrahams*, 73 Colo. 509, 216 Pac. 259 (1923). But see, e.g., *Huard v. McTeigh*, 113 Ore. 279, 232 Pac. 658 (1925) (British Columbia marriage in violation of Washington prohibition invalid under British Columbia law). See generally *Tintor*, "Marriage in the Conflict of Laws," 9 *Vand. L. Rev.* 607, 625 (1956); *Kingsley*, "Reinmarriage after Divorce," 26 *So. Cal. L. Rev.* 280 (1953); *Annot.*, 32 *A.L.R.* 1116, 1142 (1924).

their miscegenation statutes unconstitutional, may and should disregard on this ground such foreign statutes. The only case which has been found to raise this issue has so held. In *Gregory v. Gregory*,⁸⁹ the trial court, without reference to the parties' premarital domicile, upheld an interracial marriage which had been concluded in Nevada, disregarding the miscegenation statute of that state as unconstitutional by virtue of the decision of the California Supreme Court invalidating a similar forum statute.⁹⁰ English courts would reach the same result by characterizing the foreign statute as "penal."⁹¹ Finally, in this country, the reasoning of a leading court in a comparable, though distinguishable, case may be applicable to the validation of marriages invalid where celebrated, without resort to constitutional rulings. In *In re Lund's Estate*,⁹² the California Supreme Court upheld the inheritance claim to California property of an illegitimate nonresident son of a California resident by virtue of a "public acknowledgment" effected in Minnesota or New Mexico. The acknowledgment, though ineffective under Minnesota or New Mexico law, was held to satisfy the requirements of California law and thus to have legitimated the claimant. The legal significance of this act, or "lack thereof, in Minnesota and New Mexico is not binding on California. It is its factual significance which is controlling." Judge Goodrich finds this decision "difficult to explain."⁹³ And, similarly, a dissenting judge in *Guevara v. Inland Steel Co.*⁹⁴ found a departure from "any known pattern of the authorities on conflict of laws" in the theory of the Supreme Court of Indiana which could find five years' common law widowhood, for the purposes of workmen's compensation, of a woman who had lived with the deceased as his common law wife in Illinois and Indiana for the the statutory period. "Upon every consideration of logic" the dissent denied the existence of a married status during the couple's stay in Illinois since that state did not recognize common law marriages and since "a pretended marriage void at the place of celebration or origin cannot be made valid by the law of another state."⁹⁵ The majority of the court, deciding the case for plaintiff without opinion, apparently rejected this argument.

⁸⁹ 2 Los Angeles Daily J.R. 234 (Super. Ct. Los Angeles County, July 3, 1951). For a recent case declaring unconstitutional the statute of a sister state, see *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871, 875 (1959).

⁹⁰ *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948). See 1 Armstrong, Family Law 26 (1953).

⁹¹ Dicey's Conflict of Laws 266 (7th ed. 1958).

⁹² 26 Cal. 2d 472, 493, 159 P.2d 643, 655 (1945). See also *Colpitt v. Cheatham*, 267 P.2d 1003 (Okla. 1954). But cf. *Nevarez v. Bailon*, 287 S.W.2d 521 (Tex. Civ. App. 1956).

⁹³ Goodrich, Conflict of Laws 436 (3d ed. 1949).

⁹⁴ 228 Ind. 135, 90 N.E.2d 347 (1950).

⁹⁵ Id. at 90 N.E.2d 349.

Whichever technique the court may choose, marriages can and will be upheld though invalid at the place of celebration, not only if a spouse was then, and intended to remain, domiciled in a state recognizing such marriages, as the Institute would have it, but also if the marriage would have been held valid in the state of either party's domicile at the time of marriage whether or not the spouses intended to make their home there, or in the state of the parties' domicile at the time the action was commenced.

Some states will continue to let their "overriding policy" invalidate marriages valid in one of those states. But in law and reason, and contrary to both Restatements, there is no indication whatsoever that a third state would follow such a policy even though it be the policy of a state of so-called "paramount interest." Even concerning problems other than those of miscegenation, invalidation under the laws of a state other than that of the forum and present domicile seems rare. And where such holdings occur doubts as to their soundness seem justified. Thus, many will regret the decision of the New York court by which it annulled, under the non-age rule of California, the California marriage of a nineteen year old New York domiciliary though New York law would have upheld a domestic marriage between the same parties.⁹⁶ But even if such decisions can occasionally be justified as supporting the anti-evasion policies of sister states, no such claim can be made with regard to interracial marriages.

Two criticisms of the solutions here proposed could be raised. It could properly be said that if the spouses had previously separated, such a solution would fail to give validating effect to the law of each spouse's domicile at the time suit is commenced. It seems impossible, however, to state a rule covering this case which could claim general applicability. There may be states reluctant to give validating effect to the law of a domicile conceivably chosen by either spouse for the very purpose of securing this effect against the other. And other states may consider maximum validation more desirable than prevention of forum shopping.

It might also be urged that a unitary status is the most important single aim of the conflicts law governing marriages, and that only general adherence to the law of the parties' first matrimonial domicile can secure achievement of this aim. To this there is a simple answer: It is the proposed solution, rather than the Restatement "rule," which would advance this aim. Nobody can seriously expect any majority state, particularly that of celebration or present marital domicile, to invalidate a marriage merely because a minority state would be so

⁹⁶ Cruickshank v. Cruickshank, *supra* note 87.

inclined. By encouraging the latter to do so, the Restatement would promote a multiple status. Under the proposed rule, however, invalidation by any state would presuppose invalidity under all three laws—that of celebration, that of the spouses' continued and intended domicile, and that of their present domicile—and thus would promote unity of status, though "it is impossible ever wholly to avoid the unpleasant possibility of a person being married in one jurisdiction and not in another."⁹⁷

CONCLUSION

Either of two ultimate solutions would remove most conflicts problems in the field of marriage law in general. Increasing participation of the state in the marriage ceremony could make feasible the application to sister state marriages of principles of full faith and credit to judgments.⁹⁸ Conversely, decreasing interference by the state with the parties' agreement may restore to that agreement its ancient standing under the common laws of England, Rome, and, indeed, the Church. Unless and until either solution is reached some states will continue to apply their restrictive standards to marriages of their domiciliaries validly concluded abroad. How far these states now do so, or should do so, cannot, at this time, be stated or "restated" with any assurance. On the other hand, it can be said, on both law and reason, that *third* states in which the spouses are domiciled at the time of the commencement of the suit have never considered themselves, and most certainly should not consider themselves, bound to apply these standards if contrary to their own conceptions. If any state is the state of "paramount interest" in this respect, it is the state of the spouses' present, rather than that of their premarital or intended, domicile. And courts of this state will validate a marriage under any law "properly" supporting an intended union.

Techniques now used to reach this result are not ready for consistent analysis. But if this result is to be restated, a rule emerges which, if it were to replace sections 121, 122, and 132 of the Second Restatement, could be formulated as follows:

A marriage is valid if it is valid according to the law of the state where the marriage took place, or where at least one of the parties was domiciled at the time of marriage, or where the parties were domiciled at the time suit was commenced; provided only that [to use the words of Lord Kames] "the will and purpose of the parties to unite in marriage clearly appears,"⁹⁹ and that the marriage is not offensive to an overriding policy of the forum.

⁹⁷ Note, 11 Colum. L. Rev. 767, 770 (1911). See also Deák, "Conflict of Laws: Recent Development Concerning Marriage," 27 Mich. L. Rev. 389 (1929).

⁹⁸ Note 15 supra.

⁹⁹ Note 65 supra.

I believe that such a rule would correctly restate existing law in marriage conflicts cases in general. If the proposed rule should not be acceptable at this time in its generality without a complete study and analysis of the case law as to each typical fact situation, this rule is, as I have attempted to show in this article, entitled to immediate recognition as to miscegenation cases. But the very least, I submit, that the American Law Institute now owes to the dignity of the nation and our profession is expressly to declare in its draft of a Second Restatement of the Law of Conflict of Laws that "marriages between persons of different races" are exempt from the new regime of the "state of paramount interest."