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§ 283. Validity of Marriage

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Comment:

a. Scope of section. The rule of this Section is concerned with what law governs the validity of a marriage as such, namely with what law determines, without regard to any incident involving the marriage, whether a man and a woman are husband and wife. As stated in the Introductory Note to this Chapter, the validity of a marriage as such may be exclusively involved in an action for an annulment, in an action for a declaratory judgment that a marriage does or does not exist and in a criminal prosecution for bigamy. As also stated in the Introductory Note, the courts have usually acted on the assumption that a decision of questions involving the incidents of a marriage should be preceded by a determination of the validity of the marriage.

Comment on Subsection (1):

b. Rationale. The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, of the potentially interested states to the transaction and the parties. The factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote harmonious and beneficial relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern in having their rules applied. The factors in this second group are at times referred to as “state interests” or as appertaining to an “interested state.”

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The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. The fourth group is directed to the implementation of the basic policy underlying the particular field of law, such as torts or contracts, and the fifth group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied.

The factors listed in Subsection (2) of § 6 vary somewhat in importance from field to field and from issue to issue. Thus, the protection of the justified expectations of the parties is of considerable importance in the case of marriage, whereas it is of little importance in torts (see § 145, Comment b). Parties enter into marriage with forethought. To the extent that they think about the matter, they would usually expect that the validity of their marriage would be determined by the local law of the state where it was contracted. In situations where the parties did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said that they expected the marriage to be valid.

The need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability and uniformity of result. For unless these values are attained, the expectations of the parties are likely to be disappointed.

Protection of the justified expectations of the parties by choice-of-law rules in the field of marriage is supported both by those factors in Subsection (2) of § 6 which are directed to the furtherance of the needs of the parties and by those factors which are directed to implementation of the basic policy underlying the particular field of law. Protection of the justified expectations of the parties is a basic policy underlying the field of marriage.

Another factor listed in Subsection (2) of § 6 which is of great importance in the area of choice of law with respect to marriage is implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue. Marriage is a matter of intense public concern, and all states have rules stating how marriages may be contracted and prohibiting certain marriages. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule (see Comment c) and of the issue involved (see Comment d) and by the relation of the marriage and the parties to the state.

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c. *Purpose of rule.* The interest of a state in having one of
its marriage rules applied will depend upon the purpose sought
 to be achieved by that rule and upon the relation of the state
to the marriage and to the parties. So the state where the
spouses were domiciled before the marriage and where they
make their home immediately thereafter has an obvious interest
in the application of a rule forbidding the marriage of persons
within certain degrees of relationship. On the other hand, such
a state may have little interest in the application to an out-of-
state marriage of a rule regulating the form in which a marriage
should be celebrated. By way of contrast, the state where the
marriage was celebrated may have a real interest in the appli-
cation to non-residents of a rule regulating the form that a mar-
riage ceremony should take and little interest in the application
of a rule directed to incestuous marriages.

d. *The issue involved.* The courts have long recognized
that they are not bound to decide all issues under the local law
of a single state. Thus, in an action involving the validity of a
marriage contracted in one state by persons domiciled in an-
other state, a court under traditional and prevailing practice
applies its own state's rules to issues involving process, plead-
ings, joinder of parties, and the administration of the trial (see
Chapter 6), while deciding other issues, such as the capacity
of the parties to marry, by reference to the law selected by ap-
lication of the rule of this Section. The rule of this Section
makes explicit that selective approach to the choice of the law
governing particular issues.

Each issue is to receive separate consideration if it is one
which would be resolved differently under the local law rule of
two or more of the potentially interested states.

Comment on Subsection (2):

c. By "state where the marriage was contracted" is meant
the state where the marriage was celebrated or where some
other act was done that is claimed to have resulted in the cre-
aton of a marriage status. In some states, the status can be cre-
ated by an act other then a formal ceremony, such as in the case
of a common law marriage (see Comment g).

f. *Formalities.* The state where the marriage was cele-
brated, or, in the case of a common law marriage, the state where
the parties cohabited while holding themselves out to be man
and wife, is the state which will usually be primarily concerned
with the question of formalities. These includc such matters as:

1. the necessity of a license;

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2. the necessity of a formal ceremony;
3. the person to perform the ceremony;
4. the manner of the performance of the ceremony.

If the requirements of this state have been complied with, the marriage will not be held invalid in other states for lack of the necessary formalities except in the unusual situation where such a result is required by the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

g. "Common law" marriage. Whether a marriage can be created without formal ceremony is a question relating to formalities. If the acts relied upon to create the marriage meet the requirements of the state where the acts took place, the marriage will not be held invalid for lack of the necessary formalities except in the unusual circumstances stated in Comment f. A marriage without ceremony is commonly called a common law marriage.

h. Validity in respects other than formalities. The interest of the state where the marriage was contracted relates primarily to the question whether there has been compliance with the formalities prescribed by its local law. Other considerations lead to the upholding of the validity of a marriage which meets the requirements of this state in other respects. The validity of a marriage is of utmost concern to the parties and their children; so the choice of the applicable law should be simple and easy in application and should point to the law most likely to have been consulted by the parties. Furthermore, there is a strong inclination to uphold a marriage because of the hardship that might otherwise be visited upon the parties and their children. Finally, differences among the marriage laws of various states usually involve only minor matters of debatable policy rather than fundamentals. All of these factors together support the general rule that a marriage which meets the requirements of the state where the marriage was contracted will be held valid everywhere. So, for example, a marriage will usually be valid everywhere if it complies with the requirements of the state where it was contracted as to such matters as:

1. the capacity of either party to marry;
2. whether the consent of a parent or guardian is necessary;
3. whether the parties are within one of the forbidden degrees of relationship;
4. physical examination before marriage.

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i. Marriage which does not meet the requirements of the state where it was contracted. Upholding the validity of a marriage is, as stated in Comment b, a basic policy in all states. The fact that a marriage does not comply with the requirements of the state where it was contracted should not therefore inevitably lead to the conclusion that the marriage is invalid. To begin with, the requirement that was not satisfied may not be mandatory, at least in the case of a marriage between nonresidents, in the state where the marriage was contracted with the result that the marriage would be valid even under the local conceptions of that state. But even if the requirement is a mandatory one, the marriage should not necessarily be held invalid in other states provided that it would be valid under the local law of some other state having a substantial relation to the parties and the marriage. The marriage should not be held invalid in such a case unless the intensity of the interest of the state where the marriage was contracted in having its invalidating rule applied outweighs the policy of protecting the expectations of the parties by upholding the marriage and the interest of the other state with the validating rule in having this rule applied.

The state where the marriage was contracted has a substantial interest in having persons who marry within its territory comply with its local requirements as to formalities at least to the extent that these requirements are mandatory. As to such mandatory requirements, the state where the marriage was contracted may well be the state of dominant interest and, if so, there is good reason for its invalidating rule to be applied.

The state where the marriage was contracted will probably have no similar interest in the application to a marriage between non-residents of such of its marriage rules as do not relate to formalities. So, for example, there would seem to be little reason to invalidate a marriage between first cousins by application of a rule of the state where the marriage was contracted if such a marriage would be valid under the local law of the state where the parties were domiciled both before and immediately following their marriage. Upholding the validity of the marriage in such a case by application of the validating rule of the state of domicil would seem required by the fact that the latter state has the dominant interest in the issue to be decided and by the choice-of-law policy which favors protection of the justified expectations of the parties by upholding the marriage.

j. Marriage which does not satisfy requirements of state of most significant relationship. The interplay of the two factors mentioned in Comment b—protection of the justified expecta-
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Conceptions of the parties and implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue—leads to the rule that a marriage which meets the requirements of the state where the marriage was contracted will everywhere be recognized as valid except when to do so would violate the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. To date, a marriage has been held invalid in such circumstances only when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter. Such a state may have an interest sufficiently great to justify the invalidation of a marriage which meets the requirements of the state where it was contracted. Only a strong policy of this state, however, would justify application of its rule to invalidate a marriage. Upholding the validity of marriages is a basic policy in all states, and the courts of the state of most significant relationship would not themselves invalidate an out-of-state marriage between local domiciliaries which met the requirements of the state where it was contracted except when required to do so by a strong policy. As to the criteria for determining whether a policy is a strong one, see Comment k.

k. Marriage contrary to strong policy of state of most significant relationship. For reasons stated in Comment j, a marriage which satisfies the requirements of the state where it was contracted will be held valid everywhere except when its invalidation is required by the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. To date, as stated in Comment j, a marriage has only been invalidated when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter. The forum will apply its own legal principles in determining whether a given policy is a strong one within the meaning of the present rule.

The problem arises in a situation where the marriage does not satisfy the requirements of the state of most significant relationship and where as a result the marriage would have been invalid if it had been contracted in that state. The task of the forum is to determine whether the requirement or requirements that were not satisfied represent a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the marriage. The prime question for the forum

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to determine in that connection is whether the courts of the state of most significant relationship would themselves have invalidated the marriage if the question had come before them. For if these courts would not have invalidated the marriage, it is apparent that in the eyes of these courts themselves the policy represented by the local rule or rules that were not satisfied is not sufficiently strong to warrant invalidation of the marriage. The forum should not give greater weight to this policy than would the courts of the state of most significant relationship.

In determining whether the courts of the state of most significant relationship would have invalidated the marriage the forum will first consult the statutes of that state. Some states have statutes which invalidate in specified circumstances the out-of-state marriage of local domiciliaries. If the marriage comes within the provisions of such a statute, it is clear that it would be held invalid in the state of most significant relationship and the forum will hold it invalid likewise, subject to the considerations stated below. If the state of most significant relationship has no such statute, the forum will next inquire whether the marriage would be held invalid by the courts of that state by application of their choice-of-law rules. If it can be determined from the prior decisions of these courts that they would have held the marriage invalid, the forum will do likewise, subject again to the considerations stated below. If, however, no clear answer can be obtained from the statute or from the decisions of the courts of the state of most significant relationship, the forum must use its own judgment in determining whether the rule that was not satisfied represents a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the marriage. Rarely, if ever, would the forum find such a policy in a rule relating to formalities (see Comments f-g). Indeed in the absence of explicit statute or judicial precedent in the state of most significant relationship, the only rules that the forum would be likely to find embody a sufficiently strong policy of that state to warrant invalidation of an out-of-state marriage are rules which prohibit polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age. The fact that the marriage was incestuous under the local law of the state of most significant relationship would not of itself be enough to cause the forum to invalidate the marriage. In the absence of explicit statute or judicial precedent to the contrary in the state of most significant relationship, the forum would be unlikely to find that a rule against incest represented a sufficiently strong policy to warrant invalidation of
the marriage except where the persons involved were in so close a relationship as brother and sister and perhaps uncle and niece.

The time of the bringing of the action which questions the validity of the marriage may have an important bearing upon whether a strong policy of the state of most significant relationship is involved. If the action is brought at a time when both spouses are still domiciled in that state, the interest of that state in the spouses is apparent and its strong policy may be involved in the circumstances discussed above. The situation may well be different, however, if the action involving the validity of the marriage is brought at a time when both of the spouses have moved from the state. Here the interest of this state in the application of its invalidating rule would, usually at least be less than it was at the time when the spouses were still in the state. It is unlikely that, unless required to do so by statute, the courts of this state would invalidate the marriage by application of their local rule. And even if these courts would do so, whether by reason of statute or otherwise, it is probable that the forum would find that by reason of the removal of the spouses the state no longer had a sufficient interest in the application of its rule to warrant invalidation of the marriage.

Illustrations:

1. H and W, uncle and niece by the half blood, are domiciled in state X under whose local law their marriage would be incestuous and void. They are married in state Y, where marriages between uncles and nieces are not invalid, and then return immediately to X. Some years later, while H and W are still domiciled in X, the validity of their marriage is brought into question in a court of state Z. The question for the Z court to determine is whether the policy embodied in the X prohibition against marriages between uncles and nieces embodies a sufficiently strong policy to warrant invalidation of the marriage. The Z court will hold the marriage valid if it concludes, by reason of judicial precedent or otherwise, that the X court would do the same. On the other hand, the Z court will hold the marriage invalid if it concludes that the X courts would do so.

2. H and W, who are domiciled in state X at the time, desire to marry. They cannot lawfully do so in X since W had only recently been divorced from her first husband and under X local law a remarriage by a divorced person within one year after the divorce is "null and void."
Accordingly, H and W go to state Y, which has no similar prohibition, and there are married. They return immediately to X and live there as husband and wife for a period of years. Eventually, H and W move to Y where H dies and W seeks to be appointed administratrix of his estate. Under Y local law, W is entitled to this appointment if she is H's lawful wife but not otherwise. The question for the Y court to decide is whether invalidation of the marriage is required by a strong policy of X. If the X courts would not have invalidated the marriage, the Y court will not do so. But even if the X courts would have invalidated the marriage, perhaps on the ground that this result was required by statute, the Y court must still determine for itself whether a sufficiently strong policy of X is involved to warrant this result. The fact that H and W have moved away from X and that X accordingly has little interest in them would strongly support the view that no sufficiently strong policy of X is presently involved.

Comment:

1. Remarriage after one or both parties forbidden to remarry. A statute of the divorce state, or the divorce decree itself, may forbid one or both of the parties to marry again for a certain time or during the life of the other party. It is possible that, as a result, the marriage tie is not actually severed at the time of the divorce decree. This is so in the case of a decree nisi, or interlocutory decree, which does not become absolute until after further proceedings or the lapse of a certain time. This is also so of a divorce decree rendered in a state where such a decree does not become final until the time to appeal therefrom has expired. In such situations, neither party ceases to be married until the occurrence of further proceedings or the lapse of the given time. Until then, neither party can marry again in any state, since the marriage would be bigamous.

More frequently, the prohibition against remarriage contained in the statute of the divorce state, or in the divorce decree itself, does not affect the finality of the divorce decree, but is intended only to prohibit one or both of the parties from marrying for a given period of time. Such a prohibition will not affect the validity of a remarriage contracted in another state except when the divorce is rendered in the state where the party against whom the prohibition was directed was domiciled at the time of and immediately following the remarriage. In such a case, the remarriage will be invalid, even though it satisfies the requirements of the state where it was contracted.

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if, but only if, this result is required by the strong policy of the state where the divorce was rendered. Except when required to do so by statute, the courts of the divorce state would rarely apply a local prohibition of this sort to invalidate an out-of-state marriage. If the prohibition was directed against one party alone, such as when the guilty party is forbidden to marry his paramour, the courts of the divorce state would be motivated in part by the notion that such a prohibition should be strictly construed since it is in the nature of a penalty. But even when the prohibition cannot properly be considered a penalty, such as when it prohibits both parties from remarrying and is intended to protect the institution of marriage by deterring quick remarriages, the courts of the divorce state would rarely apply their local rule to invalidate an out-of-state remarriage by one of the parties that was contracted within the forbidden time. These courts would rarely apply their rule, because they usually would find that the policy embodied in the rule is not sufficiently strong to outweigh the general policy which favors upholding the validity of marriages. But even if the courts of the divorce state would have applied their rule to invalidate the marriage, the forum would still be free to refuse to do so on the ground that in its view the policy underlying the rule was not sufficiently strong to justify such action.

m. Choice-of-law rules of state of most significant relationship. As stated above (see Comment k), the forum will look to the choice-of-law rules of the state of most significant relationship for whatever light these rules may shed on whether invalidation of the marriage is required by a strong policy of that state. The fact that these courts would not have applied their rule to invalidate the marriage provides conclusive evidence that no sufficiently strong policy of this state is involved. On the other hand, the fact that these courts would have invalidated the marriage by application of their rule provides persuasive evidence that the rule does embody a policy of the required sort (compare § 8, Comment k).

On the other hand, this is not a situation where the forum applies the choice-of-law rules of the state of most significant relationship. The fact that the courts of that state would have applied their rule to invalidate the marriage does not mean that the forum should necessarily do so. The forum should only apply this rule to invalidate the marriage if it is its own judgment that the rule embodies a sufficiently strong policy to warrant doing so (see Comment k).
n. When rule of two or more states is the same. When certain contacts are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state.

REPORTER'S NOTE

Comments e-i: A marriage which satisfies the requirements of the state where it was contracted will usually be held valid everywhere. See 2 Beale, Conflict of Laws 665-674 (1935); Ehrenzweig, Conflict of Laws 377 (1962); Goodrich, Conflict of Laws 228-229 (Scoles, 4th ed. 1964); Stumberg, Conflict of Laws 279-280 (3d ed. 1963); Annotation, 71 A.L.R.2d 687 (1960).

Marriage by correspondence: To date, two cases have held a marriage by correspondence valid as to form which complied with the requirements of the state from which the acceptance of the offer of marriage was dispatched. Great Northern Ry. Co. v. Johnson, 254 F. 683 (8th Cir. 1918); Commonwealth v. Amann, 58 Pa.D. & C. 669 (1947). In Ray v. Ray, 193 Misc. 131, 83 N.Y.S.2d 126 (S.Ct. 1948), a marriage by correspondence was held invalid because it did not comply with the requirements as to form of the state from which it was presumed the acceptance of the offer of marriage had been dispatched; the marriage did comply, however, with the requirements of the state in which the acceptance of the offer had presumably been received. This last decision would appear unfortunate in view of the policy favoring the validity of marriages.

Marriage on board a vessel: The general rule is that the law governing the validity of a marriage on board a vessel on the high seas is the local law of the vessel's flag. When the flag is that of the United States, this rule will not determine the applicable law, since in this country there is no national law of marriage. To date, the validity of a marriage celebrated at sea on a vessel flying the flag of the United States has been determined by...
application of the local law of some State or federal territory. On this score, three possibilities have been suggested by the few cases in point: the applicable law may be the local law of the state of (a) the shipowner's domicile or (b) the ship's registry or (c) the parties' domicile. The majority of the opinions are inconclusive because the courts found it possible to sustain the marriage without expressly deciding whether the marriage must comply with the requirements of a particular one of these three States (see, e.g., Bolmer v. Edsall, 90 N.J.Eq. 229, 106 A. 646 (1919); Hynes v. McDermott, 7 Abb.N.Cas. 98, aff'd on other grounds 91 N.Y. 451 (1898); Johnson v. Baker, 142 Or. 404, 20 P.2d 407 (1933). In Fisher v. Fisher, 250 N.Y. 313, 165 N.E. 460 (1929), however, the marriage was sustained by reference to the local law of the shipowner's domicile; a contrary result would have been reached had the local law of the ship's registry been applied. The local law of the state which was both the state of the parties' domicile and the place where they intended to live was applied to invalidate a marriage performed on the high seas for the express purpose of evading the prohibitions of this law. Norman v. Norman, 121 Cal. 620, 54 P. 143 (1898).

A similar problem may arise in the United Kingdom where there is but one flag for three territorial subdivisions (England, Northern Ireland and Scotland) with different systems of law.

Marriage before a consul: The practice of United States consuls is to be present officially only at such marriages as comply with the requirements of the country where celebrated. See Parry, A Conflicts Myth: The American "Consular" Marriage, 67 Harv. L.Rev. 1187 (1954).

A federal statute provides: "Marriages in the presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia shall be valid for all intents and purposes . . . " 12 Stat. 79, 22 U.S.C. 1172 (1947). This statute has not been applied literally. See Parry, supra.


Comment i: Authority involving the problem posed by this Comment is sparse. Court opinions frequently state by way of dictum that a marriage which does not comply with a mandatory requirement of the state where it was contracted is invalid everywhere. A number of cases, however, have arisen in a state where at least one spouse was domiciled at the time of marriage and where both made their home thereafter and where the marriage in question complied with the substantive requirements of that state but did not comply with the substantive requirements of the state where it was contracted. In the majority of these cases, the marriage was held valid. Anonymous v. Anonymous, 46 Del. 458, 85 A. 2d 706 (1951); Succession of Hernandez, 46 La.Ann. 962 (1894); Capossa v. Colonna, 95 N.J.Eq. 35, 122 A. 378 (1923), aff'd 96 N.J.Eq. 385, 124 A. 760 (1924); See Appendix f+ Court Citation and Cross References 244
Wilcox v. Wilcox, 46 Hun. 32 (N. Y. 1887); Bays v. Bays, 105 Misc. 492, 174 N. Y. S. 212 (S. Ct. 1918); In re Palmer’s Estate, 192 Misc. 385, 79 N. Y. S. 2d 404 (Surr. 1948), adhered to on rearg. 193 Misc. 241, 82 N. Y. S. 2d 818 (Surr. 1948), aff’d 275 App. Div. 772, 90 N. Y. S. 2d 179 (4th Dep’t 1949); Portwood v. Portwood, 109 S. W. 2d 515 (Tex. Civ. App. 1937); cf. Sullivan v. American Bridge Co., 115 Pa. Super. 536, 176 A. 24 (1935); Phillips v. Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158 (1840); De Fur v. De Fur, 166 Tenn. 634, 4 S. W. 2d 341 (1928); see Goodrich, Conflict of Laws 229 (Scoles, 4th ed. 1964); Note, 49 Colum. L. Rev. 693 (1949). In a few instances, however, the courts of the state of common domicil have held invalid a marriage, good under their own local law, on the ground that it did not meet the substantive requirements of the state where the marriage was contracted. Cruickshank v. Cruickshank, 193 Misc. 366, 82 N. Y. S. 2d 522 (S. Ct. 1948); Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (1918).

For a recent case holding invalid a marriage which did not meet the requirements of either the state of celebration or the state of common domicil, see Walker v. Hildenbrand, 243 Or. 117, 410 P. 2d 244 (1966).

No case has been found where the courts of a third state have been required to determine the validity of a marriage which did not comply with some mandatory requirement of the state where it was contracted but which would nevertheless be held valid by the courts of the state of most significant relationship. Support for the position adopted in this Section that such a marriage would be held valid in a third state can be found in Taczanowska v. Taczanowski, [1967] P. 301, 2 All E. R. 563 (formalities, dictum).

Compare Hooper v. Hooper, [1959] 1 W. L. R. 1021, which granted annulment of a marriage contracted in Iraq between British nationals domiciled in England because of a failure to publish the marriage banns as required by English local law. The court found that under Iraqi law the validity of a marriage celebrated in that country between British nationals depended upon English local law.

Comments j-k: Whether a marriage that would be held invalid by the courts of the state of most significant relationship will also be held invalid by the courts of other states is a question that to date has arisen but rarely. Cases holding the marriage invalid in such circumstances include People v. Steere, 184 Mich. 556, 151 N. W. 617 (1915); Meisenhelder v. Chicago & N. W. Ry. Co., 170 Minn. 317, 213 N. W. 32 (1927); Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312 (1917). Cases where the marriage was held valid in such circumstances can be explained on the ground that no sufficiently strong policy of the state of most significant relationship was involved. See, e. g., Boehm v. Rohlfis, 224 Iowa 226, 276 N. W. 105 (1937); In re Estate of Om-mang, 183 Minn. 92, 235 N. W. 529 (1931) (involving essentially the same facts as those stated in Illustration 2).
So far as is known, no American court has invalidated a marriage which complied with the requirements of the state where it was contracted, except by application of the local law of the state where at least one spouse was domiciled at the time of marriage and where both made their home thereafter. To date, the courts of the state of one party's domicile at the time of marriage, but where the parties did not make their home thereafter, have refrained from applying their local law to invalidate the marriage. See, e.g., People ex rel. Schutt v. Siems, 198 Ill.App. 342 (1916); State v. Ross, 76 N.C. 242 (1877); cf. Garrett v. Chapman, — Or. —, 449 P.2d 856 (1969) (quoting § 131 of Tent. Draft No. 4, 1957); Owen v. Owen, 178 Wis. 609, 190 N.W. 363 (1922); Taintor, Marriage to a Paramour After Divorce, 43 Minn.L.Rev. 889 (1959).

Cases where an out-of-state marriage was invalidated by the courts of the state of common domicile include Metropolitan Life Insurance Co. v. Chase, 294 F.2d 500 (3d Cir. 1961) (formalities—common law marriage); Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961) (incest); Davis v. Seller, 329 Mass. 386, 108 N.E.2d 656 (1952) (insanity); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1968) (nonage); Annotation, 71 A.L.R.2d 687 (1960). On the other hand, the courts of the common domicile have held valid a marriage, which was incestuous under their local law, on the ground that it satisfied the requirements of the state of celebration. In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953); cf. Petition of Lieberman, 50 F.Supp. 121 (E.D.N.Y. 1943).


Some states provide means for validating a marriage celebrated after the handing down of a divorce decree but prior to the time that the decree became final. So the California courts are authorized by statute to enter a final decree nunc pro tunc "as of the date when the same could have been given or made by the court if applied for" (Cal.Civ.Code § 133). Such a nunc pro tunc de-
cree has been held to validate a marriage previously celebrated in California (Bannister v. Bannister, 181 Md. 177, 29 A.2d 287 (1942)) or in another state. Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959). Contra: Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950). By way of further example, a Massachusetts statute (Mass.Gen.Laws, c. 207, § 6) provides for the validation of a marriage contracted by one party in good faith in the belief that the other party has been validly divorced once the impediment to the marriage has been removed, if the parties continue thereafter to live together as man and wife. This statute has been applied to validate an out-of-state marriage celebrated after a Massachusetts divorce. Arcand v. Flemming, 185 F.Supp. 22 (D.Conn.1960), Russo v. Art Steel Co., 21 A.D.2d 942, 251 N.Y.S.2d 238 (3d Dep’t 1964).

A prohibition against remarriage directed to one party alone will usually not be applied in the divorce state or elsewhere to invalidate a marriage celebrated in another state. See 2 Beale, Conflict of Laws 652 (1935); Ehrenzweig, Conflict of Laws 387 (1962); Goodrich, Conflict of Laws 234–235 (Scoles, 4th ed. 1964); Stumberg, Conflict of Laws 284–285 (3d ed. 1963). For a case where a court of the divorce state invalidated a marriage by reason of a prohibition directed to both parties to the divorce, see Lanham v. Lanham, 136 Wis. 300, 117 N.W. 787 (1908).

In a number of cases, the divorce state has invalidated an out-of-state marriage by application of a local statutory provision which prohibited the guilty party to a divorce from marrying his paramour. In these cases, the guilty party was domiciled in the divorce state at the time of the divorce and of the remarriage and remained domiciled there with his new spouse thereafter. See, e.g., Succession of Gabasso, 119 La. 704, 44 So. 438 (1907); In re Stull’s Estate, 183 Pa. 625, 39 A.16 (1898); Maurer v. Maurer, 163 Pa.Super. 264, 60 A.2d 440 (1948); Penegar v. State, 97 Tenn. 244, 10 S.W. 305 (1889); Bennett v. Anderson, 20 Tenn. App. 523, 101 S.W.2d 148 (1937); see Taintor, Marriage to a Paramour After Divorce, 43 Minn.L. Rev. 889 (1969).

§ 284. Incidents of Foreign Marriage

A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in § 283, that it gives to a marriage contracted within its territory.

Comment:

a. Scope of section. A marriage, like any other status, is important primarily on account of the incidents which arise therefrom. Among the normal incidents of a marriage are that the spouses may lawfully cohabit as man and wife and that the issue of their marriage will be legitimate. Other important

See Appendix for Court Citation and Cross References
incidents are the marital property interests which each spouse 

may have in the other's assets (see §§ 233-234, 257-259) and 

the forced share or intestate share which the surviving spouse 

has in the estate of the deceased spouse (see §§ 236, 241, 242, 

260, 265). Still another incident is that a party to the marriage 

is the "spouse" of the other, or as the case may be, the "hus-

band," "wife" or "widow" of the other within the meaning of 

these terms when used in a will, trust or other instrument.

b. A state will give the same incidents to a marriage, which 

is valid under the principles stated in § 283, that it gives to a 

marriage validly contracted within its own territory, except as 

stated in Comment c. This is true even though the marriage 

would have been invalid in the state if it had been contracted 

there. So a state will usually permit the parties to a valid for-

eign marriage to cohabit within its territory even though the 

marriage would have been invalid, perhaps by reason of the 

parties' relationship to one another, if it had been contracted in 

the state. Similarly, the courts of the state will usually give 

one of the spouses to a valid foreign marriage the same marital 

property interests or the same forced share, or intestate share, 

in the local assets of the other spouse that it would have given 

the spouse if the marriage had been contracted in the state. 

Such action by a state is called for by the factors listed in Sub-

section (2) of § 6.

c. When giving of incident would be contrary to strong 

policy of state. A state will not give a particular incident to a 

foreign marriage when to do so would be contrary to its strong 

local policy. The state will not do so even though the marriage 

is valid in the state where it was contracted and even though 

the incident in question would be granted in that state. A denial 

do not deny the validity of the marriage.

The mere fact that the marriage itself would have been 

invalid if contracted in the state is not a sufficient ground for 

the denial of a particular incident. An incident should not be 

denied except when such denial is required by a strong policy 

of the state.

A state may deny one incident to a foreign marriage and 

at the same time allow the marriage other incidents. So a state 

may prohibit the parties to a polygamous marriage from cohab-

iting within its territory. Yet it may recognize the legitimacy 

of the children of such a marriage and the economic interests 

of the spouses, such as a right to support on the part of one 

spouse against the other and the marital property interests or
forced share, or intestate share, of one spouse in the local assets of the other. Again, a state may not permit a wife to acquire her husband's nationality, and yet may permit the spouses to cohabit within its territory and enjoy normal economic interests in each other's property.

d. Invalid foreign marriage. On occasion, a state will give the same incident to an invalid foreign marriage that it would give to a marriage that has been validly contracted within its territory. This may be done when the foreign marriage complies with the local requirements.

A situation in point is where a man, A, dies intestate while domiciled in state X after having gone through a marriage ceremony with a woman, B, in state Y. B now seeks an intestate share in A's movables on the ground that she is A's widow. Under the rule of § 260, the X rules of intestacy determine the person, or persons, who shall share in A's movables. Assuming that under the X rules a widow is entitled to an intestate share in her deceased husband's movables, the question then becomes whether B is A's "widow" within the meaning of these rules. Usually these rules, as interpreted by the X courts, will make the answer to this question depend upon whether A and B were validly married under the law selected by application of the rule of § 283. On the other hand, it must be remembered that the X rules of intestacy control, and it is possible that the word "widow" in these rules refers to one whose marriage complied with the requirements of the X marriage law, or to one whose marriage in the alternative either complied with the X requirements or else is valid under the law selected by application of the rule of § 283. Similarly, the question may arise whether a woman, who was married in state Y, is a "widow" within the meaning of the workmen's compensation act of state X. Again the X statute, as interpreted by the X courts, will usually make the answer to this question depend upon whether the marriage is valid under the law selected by application of the rule of § 283. But it is the X workmen's compensation act which controls and it is possible that the word "widow" in this act refers to one whose marriage complied with the X marriage requirements or to one whose marriage in the alternative either complied with the X marriage requirements or else is valid under the law selected by application of the rules stated in this Topic. A similar question may arise in a case involving the construction of a will or other legal instrument. So B, who had previously gone through a marriage ceremony with A in state Y, may later claim that she is A's widow within the meaning of the will of C, A's brother, who died domiciled in state X. Under the rule
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of § 264, X law governs the construction of C's will insofar as it concerns movables, and it may be that the X courts would hold that, in the absence of evidence of a contrary intention, the word "widow" in C's will will referred to a person whose marriage to B complied with the requirements of X marriage law or to one whose marriage in the alternative either complied with the X marriage requirements or is valid under the law selected by application of the rule of § 283.

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Comment c: Cases permitting a party to a polygamous marriage to inherit the local assets of a deceased spouse include In re Dalmip Singh Bir's Estate, 83 Cal.App.2d 256, 188 P.2d 499 (1948); Yew v. Attorney General, [1924] 1 D.L.R. 1166.

In Baindail v. Baindail, [1946] P. 122, a polygamous marriage between Hindus living in India was recognized in England to the extent of invalidating a subsequent monogamous marriage in England between the Hindu husband and an English girl. In Royal v. Cudahy Packing Co., 195 Iowa 759, 190 N.W. 427 (1922), the wife of a Mohammedan marriage was allowed to recover as a widow under a workmen's compensation act.

For cases refusing to permit enjoyment of a particular incident, see In re Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942) (inheritance); State v. Bell, 7 Baxt. (Tenn.) 9 (1872) (cohabitation).

See generally the secondary authorities cited in the note to Comment b, supra.

§ 285. Law Governing Right to Divorce

The local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce.

Comment:

a. Rationale. The state of a person's domicil has the dominant interest in that person's marital status and therefore has judicial jurisdiction to grant him a divorce (see §§ 70-71). The same considerations which give a state judicial jurisdiction to divorce a domiciliary make it appropriate for the state to apply its local law to determine the grounds upon which the divorce shall be granted. The local law of the forum determines the right to a divorce, not because it is the place where the action is brought but because of the peculiar interest which a state has in the marriage status of its domiciliaries. For a statement of the circumstances in which a state has judicial jurisdiction to grant a divorce, see §§ 70-74.

Illustration:

1. A and B are married in state X and make that state their home for several years. A then abandons B and goes to state Y, where he acquires a domicil, and there brings suit against B for divorce on the grounds of mental cruelty. The Y court will apply its own local law, rather than the local law of X, in determining whether A is entitled to the divorce.

Comment:

b. In a few States of the United States, it is provided either by statute or by common law rule that the acts for which the divorce is sought must either have taken place in the state of the forum or else must be recognized as ground for divorce by the state where the plaintiff was domiciled at the time they occurred.

c. The rule of this Section is not applicable to determine the right to a decree of nullity of the type which declares that no valid marriage ever existed between the parties (see § 76).

d. Where divorce is obtained in a non-domiciliary state. As stated in § 72, Comment b, the domicil of a spouse in the state is not the only jurisdictional basis on which a divorce may be granted. A state where neither spouse is domiciled may not, however, have as great an interest in the marital status of the spouses as it would have if at least one of the spouses was domiciled in its territory. Likewise, the interest of such a state in the marital status may not be as great as the interest of some
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other state, such as the state where at least one of the spouses is domiciled. It is uncertain whether it would be appropriate for the courts of a state where neither spouse is domiciled but which does have jurisdiction to grant a divorce to apply their own local law in determining whether a divorce should be granted.

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Comment b: Some courts require that the acts for which the divorce is sought should have occurred in the state of the forum. Hockaday v. Hockaday, 182 La. 88, 161 So. 164 (1935); Norris v. Norris, 64 N.H. 523, 15 A. 19 (1888). Other courts have required that the acts should be recognized as a ground for divorce by the local law of the state where the plaintiff was domiciled at the time. Perzel v. Perzel, 91 Ky. 634, 15 S.W. 658 (1891); Fitzgerald v. Fitzgerald, 66 N.J. Super. 277, 168 A.2d 851 (1961), see 2 Vernier, American Family Laws 108-112 (1932) and at pp. 50-52 of the 1938 Supplement.

Comment d: The best discussion of the problem in a judicial opinion is the dissent by Judge Hastie in Alton v. Alton, 207 F. 2d 867 (3d Cir. 1953)

§ 286. Law Governing Nullity

The law governing the right to a decree of nullity is the law which determines the validity of the marriage.

Comment:

a. For the law which determines the validity of a marriage, see § 283. See also § 76, Comment c.

b. The nullity here considered is that which leads to a judicial determination that no marriage has ever existed.

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TOPIC 2. LEGITIMACY

Introductory Note: As stated in the Introductory Note to this Chapter, a status, such as legitimacy, can be viewed from two