T H E L A W R E F O R M C O M M I S S I O N
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 19-1985)

REPORT ON PRIVATE INTERNATIONAL LAW ASPECTS OF CAPACITY TO MARRY AND CHOICE OF LAW IN PROCEEDINGS FOR NULLITY OF MARRIAGE

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CHAPTER 1 INTRODUCTION

In our Report on Nullity of Marriage,[1] published in 1984, we made detailed proposals for the reform of the law of nullity of marriage. These proposals covered such matters as the ground for annulment, bars to a decree, and the property effects of granting a decree. In that Report we were concerned with reform of the Irish law of nullity of marriage. In the present Report we are concerned with a related, but different, subject: the validity and nullity of marriage in private international law.[2] What we are now considering are marriages with an international dimension. For example, an Irishman habitually resident in Edinburgh may marry a New York woman who is habitually resident in Rome. The wedding takes place in London. Several questions may arise in relation to this marriage. By the law of which country or countries should the formal and essential validity of the marriage be determined? What court should have jurisdiction to annul the marriage? In what circumstances should a foreign nullity decree be recognised? In the present Report we examine the private international law aspects of capacity to marry and choice of law in proceedings for nullity of marriage. In our next Report (LRC 20-1985) we will examine questions relating to jurisdiction, recognition of foreign divorces and the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978).

A point worth stressing at the outset is that, however

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[1] LRC 9-1984.

[2] Cf. our First Programme for Examination of Certain Branches of the Law with a View of Their Reform, paras. 2 and 8 (Prl. 5984, 1977). The subject as a whole falls within the scope of our First Programme. The specific question of the application of foreign law in cases in which the courts of this country have jurisdiction to grant a decree of nullity of marriage was referred to the Commission by the Attorney General on 26 August 1976. The question of the jurisdiction of Irish courts in matters was addressed in an Discussion Paper by the Office of the Attorney General in August 1976: The Law of Nullity in Ireland, para. 32 (Prl. 5628). In our Report on Nullity of Marriage (LRC 9-1984), p.ix, we stated that the question of choice of law in nullity proceedings would be considered in a forthcoming Report.

difficult it is to frame family laws that will operate satisfactorily in every case within one country, it is at present impossible to frame private international law rules on the validity and nullity of marriage which can be guaranteed to operate satisfactorily in every case.

There are several reasons for these limitations. There is a wide divergence among the laws of different countries as to the circumstances in which a marriage will be valid or null. Some countries categorise invalid marriages as either void or voidable; others have no concept of a voidable marriage; still others have a third category of "non-existent" marriage (Nichtehe or mariage inexistant).[3] The effects of a decree of nullity also differ widely in different countries. In some countries, including our own, there is a high degree of retrospection; in others a decree of nullity in at least some instances operates prospectively.[4]

There is also a very wide disagreement internationally as to what private international law rules should apply to the subject of marriage.[5] In some countries,[6] the lex loci celebrationis predominates in respect of all or most issues of validity; in others there is agreement that the lex loci celebrationis should determine whether a marriage is formally valid,[7] but disagreement as to which connecting factor - nationality, domicile or habitual residence -

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[3] See our Report on Nullity of Marriage, p. 91, and Müller-Frienfels, Family Law and the Law of Succession in Germany, 16 Int. & Comp. L. Q. 409, at 431 (1967).

[4] Cf. Actes et documents de la Treizième session 4 au 23 octobre 1976, Tome III, Mariage, p. 63 (1978), Cohn, The Nullity of Marriage: A Study in Comparative Law and Legal Reform, 64 L.Q.Rev. 324, 533 (1948).

[5] See L. Pålsson, Marriage and Divorce in Comparative Conflict of Laws (1974), L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions (1981), Rabel, vol. 1, chs. 7-8, 14.

[6] Notably the United States of America: see Scoles & Hay, 421, Weintraub, 168, Reese & Rosenberg, 803, Storke, Annulment in the Conflict of Laws, 43 Minn. L. Rev. 849, at 866 (1959).

[7] See Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp. L. Q. 217 (1958).

should determine questions of essential validity of marriage.

Further divergences relate to choice-of-law in nullity proceedings. Some countries have well developed choice-of-law rules; others have paid little attention to this question. Widely differing approaches to the recognition of foreign nullity decrees also are part of the international scene today.

Against this international background of important differences in the substantive law of nullity of marriage and in the private international law aspects of the subject, it is obvious that, however much our legislators and judges may wish to overcome these differences, they simply cannot, of themselves, do so since they have no control over the approach to be taken in other countries.

As long as there are differences among the substantive and private international law rules of countries throughout the world, this problem will exist, to a greater or a lesser degree.

International harmonisation of private international law rules relating to marriage can go some way towards improving the position but again it is important to stress the practical limitations on progress. It is noteworthy that the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978) goes only a short distance towards removing the differences among states on this subject.

A further and more intractable difficulty should be mentioned. Several competing policies must be balanced when formulating private international law rules for marriage. Some of these[8] may be mentioned briefly.

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[8] The competing policies are helpfully analysed in the English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.35 (1985).

1. Preventing "limping marriages"

There is much to be said in favour of international uniformity in relation to a person's marital status. Practical inconvenience and hardship can result for people who are treated as married according to the law of one country but not married according to the law of another.[9] Nevertheless, discouragement of "limping marriages" is not the supreme policy goal: there may be situations where it would be quite unjust and inappropriate for the law of one country to be bound by a determination by the law of another country as to a person's marital status.

2. The favor matrimonii principle

It may be argued that our law should adopt an approach which would tend to uphold as valid marriages unions entered into by persons with a genuine matrimonial commitment. Too zealous an adherence to "black-letter" private international law rules at the expense of a sound regard to the human realities of the situation would be socially damaging and potentially unjust. The favor matrimonii principle reflects the policy that marriages "should be held to be valid unless there is some good reason to the contrary".[10]

3. The legitimate expectations of the parties

It is undesirable that private international law rules relating to marriage should frustrate the legitimate

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[9] Cf. Leflar, 531 (referring to the position in the United States of America): "It would be messy to have a couple married in one state and not in another, or to be uncertain of their status pending litigation to determine if they are married or unmarried. A mobile society such as ours needs clear and uniform answers to validity of marriage problems."

[10] English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private Interantional Law: Choice of Law Rules in Marriage, para. 2.35, clause (e) (1985).

expectations of the parties to a marriage.[11] If a particular legal rule is applied to them in circumstances where they could not prudently have anticipated this, there are grounds for doubting the appropriateness of the outcome. Of course, parties whose marriages have an international dimension often make only rudimentary enquiries as to the position according to the law of the various interested states. It would not be sensible or fair to require of private international law rules relating to marriage that they satisfy the expectations of those who take no trouble to examine, and be guided by, these rules.

4. The policies of the forum

Private international law rules must, to a greater or a lesser extent, harmonise with the forum's domestic policies in relation to marriage. It is generally accepted, for example, that the forum has a strong interest in specifying the formal requirements for marriages celebrated within its jurisdiction: this is the basis of the principle that formal requirements are to be determined by the lex loci celebrationis. It is also accepted that considerations of public policy[12] should enable the forum to modify the application of otherwise determinative rules of private international law with regard to marriage, either by ignoring foreign prohibitions or other limitations on the right to marry (based on differences of race or ethnic origin, for example) which are obnoxious to the lex fori or by introducing limitations not contained in the foreign law where, for example, the foreign law would grant a capacity to marry to persons of the same sex.

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11 See Neuner, Policy Considerations in the Conflict of Laws, 20 Can. Bar Rev. 479, at 482-483 (1942), Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, at 970-972 (1952), Leflar, 531.

12 Defining the scope of a state's public policy is not an easy task. "In one sense, almost any law may be described as the outcome of public policy. Positive law, no doubt, is the expression of principles related to community life and reflects the policies, the views and the prejudices of the community. Almost any code, statute or court decision may, in this way, be thought of as an act of policy". Baxter, Recognition of Status in Family Law, 39 Can. Bar Rev. 301, at 307 (1961).

Whether the domestic policies of the forum should play a further role in choice-of-law questions is a matter of debate. At present the lex fori is applied in some countries, in certain instances (it must be admitted) as a result of a lack of considered analysis. Even after considered analysis, fashioning the appropriate role of the lex fori is a difficult and uncertain task.

5. Predictability and practical convenience

In a matter of such practical importance as marriage there is a clear benefit in private international law rules being certain and easy to administer. The issue of the validity of a person's marriage may, of course, arise in judicial proceedings, where adequate evidence and sophisticated legal analysis are available. But the same issue arises far more frequently in everyday, non-judicial contexts, where customs officials, social welfare authorities and commercial institutions will be called on to reach a view on the marital status of persons claiming an eligibility that depends on their being validly married. If the private international rules relating to marriage are obscure and complicated, this may result in a considerable amount of practical difficulty for all concerned.

6. Appropriateness of Applicable Laws

We have already mentioned that the private international law rules relating to marriage should, so far as possible, harmonise with the legitimate expectations of the parties. More generally it may be argued that these rules should be appropriate, that is to say, that an objective bystander, on being informed that the law of a particular country was being applied to the parties, would agree that it was an appropriate law to be applied in the circumstances. It would be difficult, in the abstract, to defend the application of a rule that could not be said to be appropriate in the circumstances.

Nevertheless, translating this criterion of "appropriateness" into practice may cause considerable difficulties. In the United States, for example, section 283 of the Restatement of Conflict of Laws (Second) provides as follows:

> "(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 section 6.[13]

(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."

Whatever problems may confront a court in the application of this "vague or flexible"[14] rule, the practical difficulties

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[13] Section 6 provides as follows:

"(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied."

[14] So described by the English and Scottish Law Commissions, op. cit., para. 2.35, clause (a). See further Reese, Conflict of Laws and the Restatement Second, 28 L. & Contemporary Problems 679, at 682ff (1963).

for immigration and social welfare officials are likely to be far greater than if a less flexible, but potentially less appropriate, private international law rule were applicable.

All these competing policy considerations make the task of reform a difficult one. Nevertheless, this task must be undertaken if some of the present uncertainty and potential for injustice is to be removed.

In Chapter 2 we set out the existing law on the subject, and in Chapter 3 we make proposals for reform. Chapter 4 contains a summary of these proposals.

CHAPTER 2 THE PRESENT LAW

Formal Validity[1]

It has for long been accepted[2] that, as a general rule, the lex loci celebrationis is the appropriate law for determining the formal validity of a marriage. As Lord

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[1] See generally L. Pålsson, Marriage and Divorce in Comparative Conflict of Laws, ch. 6 (1974) Jackson, 209-250, Falconbridge, 715-724, North, 118-119, Rabel, vol. 1, 223-262, Sykes, The Formal Validity of Marriage, 2 Int. & Comp. L. Q. 78 (1953), Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp. L. Q. 217 (1958), Keyes, The Validity of the Law Common Marriage in Ontario, 1 Osgoode Hall L. J. 58 (1958), English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, paras 2.1-2.3 (1985).

[2] The first clear recognition of the principle was by Lord Hardwicke, obiter, in Omychund v Barker, 1 Atk. 22, at 50, 26 E.R. 15, at 33 (1744). Thereafter the authorities followed in quick succession: see Scrimshire v Scrimshire, 2 Hag. Con. 395, 161 E.R. 7782 (1752), Butler v Freeman, Amb. 301, at 303, 27 E.R. 204, at 205 (per Lord Hardwicke, 1756), Compton v Bearcroft, 2 Hag. Con. 444n, 161 E.R. 799 (Court of Delegates, 1769), Dalrymple v Dalrymple, 2 Hag. Con. 54, 161 E.R. 665 (1811), Lady Herbert v Lord Herbert, 3 Phill. Ecc. 58, 161 E.R. 1257 (1819), Lacon v Higgins, 3 Stark 178, 171 E.R. 813 (Abbott, L.C.J., 1822) (especially at 183 and 815, respectively). See generally Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp. L. Q. 217, at 218-220 (1958).

Cranworth stated in Brook v Brook,[3] in 1861:

> ".... in the case of marriage celebrated abroad the lex loci contractus must quoad solemnitates determine the validity of the contract ...."

This means, as a general principle, that if a marriage is valid according to the lex loci celebrationis, then it "is good all the world over",[4] even though it would not constitute a valid marriage in the country of the domicile of either of the spouses; conversely, if a so-called marriage is not a valid marriage according to the lex loci celebrationis, then "there is no marriage anywhere",[5] even in a case where the same marriage, if celebrated in the place of the parties' domicile, would have been a perfectly valid marriage.

In the Irish case of In re Estate of M'Loughlin[6] it was clearly accepted that the lex loci celebrationis should apply to formal requirements. There the parties, both

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[3] 9 H.L.C. 193, at 224, 11 E.R. 703, at 715 (1861). See also, to similar effect, Ussher v Ussher, [1912] 2 I.R. 445, at 523 (K.B.Div., per Gibson, J.), Re Alison's Trusts, 31 L.T.R. 638, at 639 (per Malins, V.C., 1874), Sottomayer v De Barros, 3 P.D. 1, at 5 (C.A., per Cotton, L.J., 1877), Bertiaume v Dastous, [1930] A.C. 79, at 83 (per Viscount Dunedin, 1929). In accord are Hyde v Hyde, L.R. 1 P. & D. 130 (1866) and Ogden v Ogden, [1908] P. 46. Canadian decisions are in accord: see Forbes v Forbes, 30 W.N. 557, 20 O.W.R. 924, 3 D.L.R. 243 (High Ct., Latchford, J., Johnson v Hazen, 43 N.B.R. 154 (Chy. Div., McLeod, 1912), 1914), Re Howe Lewis, 14 D.L.R. (3d) 49 (B.C.C.A., J., 1970), Hunt v Hunt, [1958] O.W.N. 332, 14 D.L.R. (2d) 243 (High Ct., Ferguson, J., 1958) Sedgewick v Sedgewick, 9 W.W.R. (N.S.) 704 (Sask. Q. B. Taylor, J., 1953), Frew (otherwise Reed) v Reed, 69 W.W.R. 327, 6 D.L.R. (3d) 617 (B.C. Sup. Ct., Harvey, C. Ct. J., 1969).

[4] Berthiaume v Dastous, [1930] A.C. 79, at 83 (per Viscount Dunedin, 1929).

[5] Id.

[6] 1 L. R. Ir. 421 (1878). Cf. Steele v Braddell, 6 Milw. 1 (1838). See also the broad statement by Crampton J. in Reg. v Burke, 5 I.L.R. 549, at 557 (1843) and cf. id., at 552 (per Burton, J.) and 558 (per Perrin, J.).

domiciled in Ireland, went through a ceremony of marriage in Wales, celebrated by a Catholic clergyman. By the law of England and Wales at the time the marriage was void as the parties had wilfully consented to its performance when it neither complied with Lord Hardwicke's Act nor was performed in a Protestant church. Flanagan, J. accepted without serious question that the marriage was void for the purposes of Irish law. He relied strongly[7] on the evidence that the parties themselves had admitted that the ceremony was null and void and had subsequently contracted another marriage with each other. He did not discuss the argument[8] of counsel seeking to uphold the validity of the marriage, to the effect that Lord Hardwicke's Act was merely territorial, and that it did not bind parties domiciled in Ireland; on this argument the common law of England and Wales would continue to apply and the marriage would accordingly be valid.

Similarly, in Du Moulin v Druitt,[9] the court accepted the general rule that the lex loci celebrationis should apply.

In Swifte v Attorney General for Ireland,[10] the House of Lords, affirming the order of the Irish Court of Appeal,[11] held that section 1 of the statute 19 Geo. 2, c. 13 (Ir.) was not extra-territorial in its operation. That section provided that any future marriage

> "between a Papist and any person who hath been or hath professed to him or herself to be a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Papish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment or sentence of law whatever."

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[7] Cf. id., at 427.

[8] Cf. id., at 424-425.

[9] 3 I.C.L.R. 212 (Q.B., 1860).

[10] [1912] A.C. 176 (H.L.(Ir.)).

[11] [1910] 2 I.R. 140 (C.A., 1909).

In Swifte, a marriage between a domiciled Irish Protestant and an Austrian Catholic, celebrated according to the rites of the Catholic Church in Austria, was held to be unaffected by the Irish provision. Earl Loreburn, L.C. said:

> "it is obviously and admittedly a valid marriage unless it is made invalid by the operation of the Act of 19 Geo. 2 c. 13 (Ir.). Now, if that Act was only an intra-territorial Act in its operation, it is clear that the marriage was good. Was it an intra-territorial Act in its operation and no more? It was a statute not only not forbidding marriages between Protestants and Roman Catholics, but recognising that such marriages might be lawful, in accordance with the law of Ireland. All that it did was to say that they should be invalid if celebrated by a Roman Catholic priest. In other words the Act related not to the capacity of the parties to the marriage contract to enter upon a matrimonial contract, but it related to the form and ceremony, however solemn and important, of its celebration.
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> Now, my Lords, I cannot suppose that the Irish Parliament intended to prescribe what was to be done by an Austrian priest[12] in Austria, or that it intended to affect the rule that a marriage which might be validly made in one country is good when made in compliance with the lex loci of its celebration."[13]

Earl Loreburn considered to be "perfectly right"[14] Walker, L.C.'s endorsement[15] of Porter, M.R.'s summary:[16]

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[12] Quaere if the priest had been Irish, and the parties (both Irish nationals, domiciliaries and residents) had deliberately sought to overcome the statutory obstacle by going abroad for a few days? Cf. [1910] 2 I.R., at 157 (per Holmes, L.J.), id., at 160 (per Cherry, L.J.).

[13] [1912] A.C. at 179.

[14] Id., at 280.

[15] [1910] 2 I.R., at 154-155.

[16] Cf. id., at 145-146.

> "(1) That while mixed marriages were discouraged by the law and rendered void without any judgment or process, if celebrated after 1st May, 1746, by a Popish priest, this does not in terms extend to the case of a marriage abroad; (2) that mixed marriages are nowhere declared by the law to be contrary to the law of God; (3) that there is not and never was any prohibition of such marriages; or (4) any personal incapacity to contract them. On the contrary, these are, and always have been, good and valid (if unimpeachable upon other grounds unconnected with the mode of celebration) unless celebrated within territorial jurisdiction by a Roman Catholic clergyman."

It is worth recording Walker, L.C.'s clear statement that:

> "The capacity of the parties to contract marriage is governed by the law of the domicile, and the mode by the lex loci contractus."[17]

Similarly, Cherry, L.J. said:

> "This view of the effect of this statute accords .... with the general rule of law as laid down in Brook v Brook, 9 H.L. Cas. 193, that although the essentials of the contract of marriage, e.g., the capacity to contract, depend upon the lex domicilii, the forms of entering into the contract are to be regulated by the lex loci contractus, a convenient rule from which it would not be wise (even if it were permissible) to depart, unless we were constrained by the actual words of a statute to do so."[18]

Holmes, L.J. was:

> "prepared to construe the Act as applying only to a marriage celebrated by a priest in Ireland, or celebrated elsewhere, by a priest who was an Irish subject."[19]

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[17] Id., at 154.

[18] [1910] 2 I.R., at 160-161.

[19] Id., at 157.

This was because in his view "[t]he statutes on this subject were especially directed against the priest who celebrated the marriage. For him, as declared in the Act of 1745, it was a hanging matter; and that Act seems to have been levelled more against him than against the parties...."[20]

WHERE IS THE LEX LOCI CELEBRATIONIS?

Determining where the marriage is contracted may in some instances raise difficulties. Discussion has centred around three particular types of case: (a) marriages by correspondence; (b) proxy marriages; and (c) marriages by habit and repute. Let us look briefly at each of these cases.

(a) Marriages by Correspondence

In the United States, there is some support for the view that a common law marriage may be contracted by the exchange of consents, without the necessity of the parties being physically present together, and that this exchange may be made by correspondence.[21] Difficulties surround the question of where the contract is concluded in such circumstances.[22] An issue also arises as to whether it

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20 Id.

21 See L. Pålsson, Marriage and Divorce in Comparative Conflict of Laws, 208ff. (1974), Rabel, vol. 1, 242-243, Leflar, 534, Lorenzen, Marriage by Proxy and the Conflict of Laws, 32 Harv. L. Rev. 473 (1919).

22 According to Irish and English law, by way of exception to the general rule that a contract is made where the offeror receives notification of the acceptance, the "postal" rule is to the effect that the acceptance is complete as soon as a letter is put into the post-box, and that is the place where the contract is made: Dooley v Egan & Co., 72 I.L.T.R. 155 (High Ct., Meredith, J., 1938), Sanderson v Cunningham, [1919] 2 I.R. 234 (C.A.), Entores Ltd. v Miles Far East Corporation, [1955] 2 Q.B. 327 (C.A.), Clark, 9-11. In the Federal Republic of Germany, Switzerland, Austria and some other European countries, the place of contracting is where the letter

should suffice to comply with the law of the place where the contract is concluded (however that place is determined) or whether it should be necessary to comply with the requirement of the laws of both places.

Some commentators have argued in favour of the latter option. Wolff, for example, states:

> "The contract is completed when the acceptance of the offer of marriage is dispatched. Can it be inferred from this that it suffices if the law of the place where the acceptance was dispatched permits marriage by correspondence? Certainly not. The marriage contract demands two valid declarations; it is therefore necessary that marriage by correspondence should also be admitted by the law of the place where the 'offerer' is staying at the time when he sends his offer."[23]

Dicey & Morris are somewhat less certain. They consider that the English courts:

> "[p]robably .... would require to be satisfied that a marriage could be concluded in this manner by the laws of each of the two countries; but it is just possible that they might apply the rules as to contracts made by correspondence or over the telephone."[24]

Fn. 22 Cont'd

reaches the addressee: Wolff, 134-135. The authorities would support the view that the Irish rule should apply to determine where the contract of marriage comes into force through correspondence: cf. Wolff, 138, Pålsson, supra, 209.

23 Wolff, 344.

24 Dicey & Morris, 265. See also the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, para. 2.38 (1985).

Dicey & Morris's latter suggestion appears to be that only one law should apply: in the case of an acceptance by letter, this would be the law of the place where the letter is posted. There is some support for this approach in the United States[25] and in some Continental European countries.[26]

Pålsson has criticised this approach, however, on the basis that its reasoning:

> "seems almost incredibly artificial and conceptualistic. An exchange of letters embodying an agreement to marry cannot without using sheer force be made to fit into the usual contractual patterns of 'offer' and 'acceptance'. The results of such a system are very likely to be accidental, because they will depend on the order in which the parties declared their consent."[27]

(b) Proxy Marriages[28]

Proxy marriages are permitted by several countries. Their characteristic feature is that

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25 Great Northern Ry. Co. v Johnson, 254 F. 683 (8th Cir. 1918), noted 32 Harv. L. Rev. 848 (1919). See also Scoles & Hay, 425, Beale, Progress of the Law, 1918-1919, 33 Harv. L. Rev. 1, at 13 (1919), Pålsson, supra, 209, Anon., Comment, The Validity of Absentee Marriage of Servicemen, 55 Yale L. J. 735, at 743-744 (1946). Johnson was followed in Commonwealth v Amann, 58 Pa. D. & C. 669 (1947).

26 Pålsson, supra, 209-210.

27 Pålsson, supra, 210.

28 See Pålsson, supra, 218-230, Scoles & Hay, 425-426, Wolff, 334, Dicey & Morris, 264, 265,305, Lorenzen, Marriage by Proxy and the Conflict of Laws, 32 Harv. L. Rev. 473 (1918), Anon., Comment, The Validity of Absentee Marriage of Servicemen, 55 Yale L. J. 735 (1946), Carter, Proxy Marriages, 35 Can. Bar Rev. 1195 (1957), Anon., Comment, Recognition of Marriages by Proxy Abroad, 33 Yale L. J. 777 (1924).

> "one or both of the contracting parties [is or] are not personally present at the celebration, the consent of the absent party or parties being delivered by a specially authorised agent or proxy participating in the marriage ceremony on behalf of his or her principal."[29]

Pålsson states that:

> "[a]ccording to the 'orthodox' view, which appears to be espoused by the overwhelming majority of courts and writers everywhere, such marriages take place (only) in the country where the proxy participates in the marriage ceremony. Hence, where the marriage is valid by the law of that country, it will also be held good in other countries recognising the locus regit actum rule for proxy marriages."[30]

Pålsson notes however that:

> "[a]ccording to a minority view .... which has been put forward and received some support in West Germany, [proxy] marriages should be considered (also) to have taken place in the country where the proxy was appointed."[31]

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29 Pålsson, supra, 218.

30 Id., supra, 225.

31 Id. Cf. Anon., Comment: Recognition of Marriages by Proxy Abroad, 33 Yale L. J. 777, at 778-779 (1924):

> "It is .... suggested that complications might ensue from a revocation of the proxy's authority without the knowledge of the other party, but rarely indeed will there be a rapid change of heart on so momentous an decision, which is more likely to be well-deliberated when arrived at away from the enchantress."

The argument in favour of this view is that it is the consent of the parties which makes a marriage, and that the appointment of the proxy is the key manifestation of that consent rather than the proxy's mechanical execution of his principal's orders. Nevertheless the practical problems which this approach would entail[32] make it an unattractive solution.

(c) Marriages by Habit and Repute

Marriages by habit and repute present particularly intractable problems so far as the place of contracting is concerned. These spring from the fact that, of their nature, these marriages cannot be created instantaneously, and require the passage of some unspecified period of time before they are established. Pålsson states that:

> "[u]sually, when the law of a country validates common law marriages, it will only be prepared to so so if all requirements for such marriages have been fulfilled within the boundaries of that country itself. This appears generally to be the position taken by those American states by whose laws cohabitation etc. is necessary for a common law marriage. In the same way the constitution of a marriage 'by habit and repute' under Scottish law presupposes cohabitation at bed and board in Scotland.[33] This does not mean that the parties must have been domiciled in Scotland. Nor, it seems, would such domicile be sufficient if the cohabitation had occurred elsewhere. The essential thing is that the parties have in fact lived as husband and wife in Scotland so as to have established their 'habit and repute' there."[34]

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[32] Cf. Pålsson, supra, 226-227.

[33] Citing Anton, 284.

[34] Pålsson, supra, 212.

The Lex Loci Celebrationis and the Problem of Time

In referring the question of formal validity to the lex loci celebrationis, it is not sufficient merely to state that the lex loci celebrationis determines the issue: this "lex" is "not a static conception, but is a changing body of rules".[35] The choice of law rule must therefore not merely point to a particular legal system: it should tell us at what particular moment (or moments) in its development is such reference to be made.[36]

At first sight, the answer may appear simple: the date the marriage is contracted would appear to be the obvious reference point. In the ordinary case, of course, this moment will be the one that counts; but what is the position where a country enacts retrospective legislation purporting to validate an invalid marriage, or to invalidate a valid marriage, already celebrated in that country? It is useful to examine each of these possibilities separately.[37]

(a) Retrospective Validating Legislation

First we must consider the position where legislation in the place of celebration purports retrospectively to validate a marriage that was formally in valid at the time of celebration. In England, in Starkowski v A.G.,[38] in 1953, the House of Lords held that a marriage formally invalid by Austrian law (the lex loci celebrationis), but subsequently validated by retrospective legislation in Austria should be recognised as valid by English law. The House of Lords preferred to leave to another day the troublesome question as to the effect of retrospective legislation validating a formally invalid marriage on a second marriage contracted before the legislation, on the basis (then correct) that the

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35 Mendes da Costa, supra, at 251.

36 Cf. id.

37 We will consider on p. 30 below the question of retrospective legislation purporting to invalidate a validly contracted marriage.

38 [1954] A.C. 155 (H.C. (Eng.), 1953).

first marriage was invalid. On this question the English and Scottish Law Commissions have noted that:

> "the balance of academic opinion[39] is that the legislation should not be given effect so as to invalidate either the second marriage or an English nullity decree annulling the first marriage for informality before the foreign legislation took effect: it would be unjust to deprive a person of a status acquired by him or her on the basis of the then existing state of the law."[40]

As we shall see[41] the problem is somewhat more complicated than may at first appear.

In the British Columbia decision of Re Howe Lewis,[42] in 1970, retrospective legislation in Saskatchewan validating a marriage celebrated there according to Chinese custom was held effective in British Columbia. The Court was influenced by Starkowski but also by the federal status of Canada.

The earlier case of Ambrose v Ambrose (otherwise Harnish or Hornish),[43] in 1969, also from British Columbia, raised some fascinating issues. Briefly, the facts were as follows. In 1935, the petitioner, a man domiciled in British Columbia, married the respondent in Washington. At the time the respondent was still married to a Californian-domiciled man: a divorce was in the process of being obtained but had not been finalised. In the events that

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39 Citing Dicey & Morris, 263-264, Cheshire & North, 315, Mann, 31 B.Y.B.I.L. 217, at 243 (1954), Mendes da Costa, 7 I.L.C.Q. 127, at 257 (1958), Thomas, 3 I.C.L.Q. 353 (1954).

40 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.10 (1985).

41 Infra, pp. 22ff.

42 14 D.L.R. (3d) 49 (B.C.C.A., 1970).

43 32 W.W.R. 433, 25 D.L.R. (2d) 1 (B.C.C.A., 1960).

transpired, the full divorce was not obtained until 1939. In 1958, benefitting from nunc pro tunc Californian legislation which came into effect around 1955, the respondent obtained in California a new decree of divorce in relation to her first husband. This decree was retrospective in its effect, extending to a time before the respondent went through the ceremony of marriage with the petitioner.

The petitioner successfully sought an annulment of his marriage with the respondent. Sheppard, J.A. (Sidney Smith J.A. concurring) noted that Starkowski related to formal invalidity, where the proper law was the lex loci celebrationis, rather than in the instant case, where the court was dealing with the personal law of domicile. As long as the respondent had remained married to her first husband, she retained a Californian domicile, but once she had been divorced in 1939, her Californian domicile had ended.

Moreover, Starkowski had not involved a situation where a second marriage had taken place in the interim period between the initially invalid marriage and its subsequent retrospective validation. This was an element on which Lords Morton, Cohen and Tucker had reserved their position. Sheppard, J.A. said:[44]

> "The alleged marriage of the respondent with this petitioner did occur before the enactment of the statute of California and the making of the order pursuant thereto. The respondent in the meantime had gone through the alleged marriage with the petitioner and as a result of that ceremony having been entered into, and the lack of capacity of the respondent, the petitioner had the right to treat that marriage as a nullity. The subseqent legislation and order of the State of California, if here recognised, would divest that right from the petitioner, notwithstanding that the petitioner had not been subject to the legislative jurisdiction of California by reason of his having been resident and domiciled throughout in the province of British Columbia.
>
> Also that legislation and order purport to confer retroactively on the respondent, then resident and

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[44] 32 W.W.R., at 450.

> domiciled in British Columbia, the capacity to have married, and in consequence to make valid the alleged marriage which was initially void and performed, not in California, but in the state of Washington. In effect, the statute and order purport to define the marital status of two parties neither of whom was domiciled or subject to the state of California at the time of such statute or order. Under the circumstances, the Starkowski case can have no application to the case at bar."

The Lourdes Marriages[45]

At this point it is useful to refer briefly to the "Lourdes marriages". For a period in the 1950's, the practice developed of Irish couples marrying each other in Lourdes by a Catholic ceremony only. This was in breach of French law, which recognised only civil marriages as valid.[46] The practice was eventually halted in 1960 when the legal problems became known to the religious authorities. By then, thirty three such marriages had been celebrated.[47]

According to Irish law, the validity of these marriages was in serious doubt. The general rule is that the lex loci celebrationis should determine the formal validity of a marriage, and here the law of France holds such marriages void.[48] Possibly, a liberal application of the "common law" exception could have upheld the validity of the

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[45] See Shatter, 53-54, Binchy, 21-22.

[46] It is worth noting that although, according to French law these marriages were invalid, they would have been valid by French conflict of law rules had they been celebrated by Irish nationals in another country which required a civil ceremony. This is because according to French conflicts of law, a marriage may be normally valid if celebrated either according to the lex loci celebrationis or to the national law of the parties. Cf. Rabel, vol. 1, 254.

[47] 263 Dáil Debates, col. 834 (speech of the Minister for Health, Mr Erskine Childers, 7 November 1972). Cf. id., col. 840 (speech of Mr James Tully, T.D.).

[48] Cf. Rabel, vol. 1, 235, fn. 68.

marriages, but there was a considerable doubt as to whether this would be so.

To remedy the position section 2 of the Marriages Act 1972 was enacted. It provides as follows:

> "(1) This section applies to a marriage -
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> (a) which was solemnised before the passing of this Act solely by religious ceremony in the département of Hautes Pyrénées, France, and
>
> (b) was between persons both or either of whom were or was citizens or a citizen of Ireland on the day of the marriage.
>
> (2) A marriage to which this section applies shall be and shall be deemed always to have been valid as to form if it would have been so valid had it been solemnised in the State.
>
> (3) An tArd Chláraitheoir may, on production of such evidence as appears to him to be satisfactory, cause a marriage to which this section applies to be registered in a register to be maintained in Oifig an Ard-Chláraitheora.
>
> (4) The register in which a marriage is entered under subsection (3) of this section shall be deemed to be a register maintained under the Registration of Marriages (Ireland) Act, 1863, and that Act shall apply and have effect accordingly."

Some points may be noted about this section. First, it purports to validate the marriages retrospectively. There is nothing particularly unusual about this type of legislation. There are examples in the State's domestic law,[49] and in the domestic and conflicts law of other countries.[50] An important feature of the legislation, however, is that it involves the lex patriae, rather than the lex loci celebrationis, validating marriages that were (or may have been) formally invalid according to the lex

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[49] Cf. the Marriages Act 1936, section 4, and the Marriages Act 1972, section 3.

[50] Cf. Starkowski v A.G., [1954] A.C. 155.

loci celebrationis. This differs from the position in Starkowski, where the retrospective legislation was that of the lex loci celebrationis itself.

Section 2 of the Marriages Act 1972 is an interesting example of the constitutionally complex issues that retrospective legislation may raise. The effect of the legislation is to render valid marriages that were (let us assume) void. Many of the parties in all probability had become aware of the problem before the legislation was enacted. Apart altogether from the particular difficulty concerning cases where a party had contracted a second marriage in (justified) reliance on the invalidity of the first,[51] it is necessary to consider whether the Constitution permits legislation to "foist" the status of marriage on a person who does not then wish to accept the status. In favour of the view that the legislation is unconstitutional it may be argued that the essence of marriage is the full consent of the parties at the time of the marriage, subject only to modification by the doctrines of approbation and ratification, both of which are under the substantial control of the parties concerned. In other words, a person who marries under duress has the option whether or not to approbate or ratify[52] the marriage, and normally approbation or ratification cannot easily be foisted from outside upon the parties. But where legislation changes the status of a person who is not validly married, without his or her consent or acquiescence, then it may be argued that this wrongfully interferes with his or her right to marry[53] as well as (one may presume) the right not to marry, both in general and in respect of the particular partner concerned. Other constitutional rights, including those in relation to property and the rights of association and of privacy, might also be regarded as having been improperly disturbed.

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51 As to which, see infra, p. 28.

52 There is some uncertainty as to whether marriages invalid for consent are subject to approbation or ratification. Cf. the Law Reform Commission's Report on Nullity of Marriage, p. 73 (LRC 9-1984).

53 Cf. Ryan v A.G., [1965] I.R. 294, at 313 (High Ct., Kenny, J., 1962; affirmed by Sup. Ct., 1964), McGee v A.G., [1974] I.R. 284, at 301 (Sup. Ct., per FitzGerald, C.J., dissenting, 1973). See further Kelly, 486.

It would have been possible for the validating legislation to have limited the retrospective validation to cases where both[54] spouses concurred, possibly manifesting their concurrence by an external act, such as registration, whether as a pre-condition, or as evidence, of their concurrence.

The argument in favour of the constitutionality of section 2 is that it gives retrospective effect to what must have been the presumed intention of the parties when marrying. It cannot credibly be suggested that any of them went through the ceremony of marriage with the intention of creating a void marriage. The legislation merely removes the invalidating effect of a technicality of an abstruse area of law which clearly was not in their minds at the time they married.

It seems fair to say that if, per impossibile, the legislation could have been enacted before any party had become aware of the problem of the invalidity of his or her marriage, then the legislation would have raised scarcely a constitutional ripple.[55] But since this did not in fact happen, it is necessary to consider the question of constitutionality complicated by the factors of detrimental reliance and of interference with justified expectations. Once a party became aware of the invalidity of his or her marriage then inevitably he or she must have given effect to a decision based on this information. In many cases, of course, the decision will have been to treat the marriage as valid, but in other cases there will have been conduct based on the premise of the invalidity of the marriage.

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54 Where only one of the spouses was willing to accept the retrospective validation, particular difficulties would inevitably ensue.

55 If, however, a party subsequently learned of the initial invalidity but, remaining in ignorance of the validating legislation, were thereafter to marry, a new constitutional difficulty would arise. Cf. L. Pålsson, Marriage and Divorce in Comparative Conflict of Laws, 310-311 (1974): "... [O]ne may ask the question why the courts of the domicile should try to 'revivify' the first marriage rather than to uphold the new one. The answer to this may be that a simple rule is preferable to the many distinctions that would be necessary if all factors of some importance had to be taken into account and that hard cases should not be altered to make bad law."

It is possible that a court would take the view that, in the large majority of cases, a party who availed himself or herself of the invalidity of the marriage and ceased to live with the other spouse was behaving in an inequitable manner, or at all events was a person whose "sharp practice" estopped him or her from making a serious constitutional case. But it is possible to consider cases where a spouse's conduct would not be inequitable, as, for example, where an Irish woman, deserted by her husband who divorced her in Canada, subsequently learnt of the invalidity of their marriage contracted in Lourdes. If on finding out this fact she (prior to the 1972 legislation) were to treat herself, in matters relating to property, for example, as a single woman, it would be difficult to treat her conduct as being other than sensible and fair.

The question becomes still more difficult where a spouse, having learnt of the invalidity of the marriage, has married another person before the retrospective legislation is enacted.[56] In the English decision of Starkowski v A.G.,[57] to which we have already referred, this issue was specifically left unresolved. But a passage from Lord Reid's speech is of particular interest in relation to the problem of the Lourdes marriages. He considered that there was:

> ".... at first sight compelling force in the .... argument that a person ought at any time to be able to find out with certainty whether he or she is married or not, and that the law of England ought not to recognize a principle which may result in a person being for the moment unmarried in law but knowing that he is liable to become married retrospectively. If there were any substantial likelihood of this happening I would be inclined to agree, but one must look at realities. I find it difficult to suppose that in any country there

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[56] See Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp. L.Q. 217, at 257 (1958), Thomas, Note, 3 Int. & Com. L.Q. 353, at 355 (1954), Morris, The Time Factor in the Conflict of Laws, 15 Int. & Comp. L. Q. 424, at 434 (1966).

[57] [1954] A.C. 155, at 172. See further Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp.L.Q. 217, at 257-258 (1958).

> would be substantial delay in deciding whether to legislate retrospectively once the reason for the invalidity had come to light, and I cannot think that any one who had discovered that his marriage was formally invalid would for long be in any real doubt whether there was to be remedial legislation."[58]

Of course, in Ireland there was a long delay. It could perhaps be said that the parties could always have sought a decree of nullity of their marriage, but it is doubtful whether this is a sensible suggestion, in view of the high cost of such proceedings at the time, coupled with the fact that the parties might well have been influenced by the fact that under canon law, the marriage was valid.

Some other features of the section should be noted. It is only retrospective: thus parties marrying in Lourdes after the passage of the Marriages Act 1972[59] must take their chances without this statutory assistance. So far as the legitimacy of children is concerned the statutory provision is silent. But this does not necessarily mean that children born before then are illegitimate. It could be that, even before the legislation, the children were already legitimate, on the basis that the invalidity of their parents' marriage did not necessarily consign them to the status of illegitimacy.[60] On the other hand, if the children were illegitimate before the legislation, it may well be that the legislation would be interpreted as conferring legitimate status on them. Although it may be argued that merely changing the marital status of the parents does not of itself necessarily change the status of the children, it seems more probable that the courts would be disposed to interpret the legislation as impliedly conferring legitimate status on them; the latter result could also be reached by the alternative route of applying ordinary conflicts principles regarding legitimacy[61] to the marriage so retrospectively validated.

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58 [1954] A.C. 155, at 172. See further Mendes da Costa, The Formalities of Marriage in the Conflict of Laws, 7 Int. & Comp. L.Q. 217, at 157-158 (1958).

59 On 20 December 1972.

60 Cf. Dicey & Morris, Rule 62.

61 Or legitimation, though quaere whether this is a case of legitimation per subsequens matrimonium.

A more difficult question concerns the issue of legitimacy of children of a Lourdes marriage where, before the Marriages Act 1972, the parents have married again (with other partners). If, as the body of academic opinion considers,[62] the validity of the second marriage should not be disturbed, that might suggest that the children of the Lourdes marriage, if illegitimate before the Act, would have to remain so afterwards. The inherent unfairness of this outcome suggests that no court would be likely to endorse it. The reason why, exceptionally, the validating legislation does not affect the validity of the second marriage is that it is considered just and sensible to protect the parties to that marriage (and, we may presume, their children). Certainly, there is no suggestion that keeping the children of the first union illegitimate, when they would otherwise not be, serves any purpose so far as justice or social policy is concerned. One possible solution[63] would be to interpret the legislation as validating the Lourdes marriage up to the time the second was contracted, and as having no retrospectively "illegitimating" effect on the children of the first union. In view of the broad implications[64] for the parents which this solution would involve, it may not be an approach which would be accepted by the Courts.

It should be noted that Section 2 of the Marriages Act 1972, being a provision of Irish conflicts of law, cannot, of itself, confer validity on these marriages under the conflicts rules of other countries. Thus, for example, if the validity of one of these marriages were to be determined by an English court, the fact that the Irish legislation has been enacted would not override the normal rule that the lex loci celebrationis should be applied. But in applying the lex loci celebrationis, the English court would probably include a reference to the conflicts of law rules of France, and according to those conflicts of law rules it is possible, though far from certain, that the retrospective validation by the Irish legislation would be recognised. The case against such recognition, of course, is that these marriages offended against the French public policy of requiring a civil ceremony there, and, however much the Irish legislature may wish that these marriages should be

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62 See the several authorities cited by Pålsson, op. cit., 311, fn. 513.

63 Cf. Pålsson, op. cit., 311.

64 On such matters as maintenance and succession for example.

recognised, French law does not owe the parties concerned an obligation to set aside this important public policy. If such foreign retrospective legislation were to be recognised, it may be argued, why should not prospective legislation also be recognised? To do so would obviously damage French public policy on this issue.

It may, however, be argued that the human realities of the situation are so strong and unusual that French public policy could well bear the strain of recognising as valid thirty-three marriages celebrated on French soil by foreign nationals acting entirely in good faith, especially where their national legislature has gone to the trouble of enacting retrospective validating legislation on their behalf.

It should also be noted that, according to the conflicts of law rules of some other countries, the Lourdes marriages either were always valid or were retrospectively validated by the legislation. Article 7 of the Hague Convention on the Celebration of Marriages, 1902 provides that a marriage void as regards form in the country where it was celebrated shall be considered valid in the other countries adhering to the Convention if the form prescribed by the national law of each of the parties has been observed. This approach had already been adopted in Switzerland since 1891 and in Germany since 1900. It is interesting to note that in the German Democratic Republic the same approach prevails.[65]

On account of the fairly widespread support among many European countries for the option of the national law of the spouses as an alternative to the lex loci celebrationis, it was probably, on balance, preferable that section 2 refers to nationality rather than the domicile. To have used domicile would have gained little so far as the conflicts of law rules of other countries are concerned, as well, perhaps, as alienating such support as may exist among the countries favouring the lex patriae. Moreover, in view of the background to, and the purpose of, the legislation, the test of domicile could well have proved a more arbitrary and less satisfactory one than nationality.

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[65] Cf. Cohn, p. 300 (section by J. Tomass).

(b) Retrospective Invalidating Legislation

We must now consider the converse case where legislation in the country of celebration purports retrospectively to invalidate a marriage for lack of due formality where the marriage was formally valid when contracted. There are no judicial authorities on this question in Ireland, England or Scotland. However, the "preponderance of academic opinion"[66] is against recognising the foreign invalidating legislation on the grounds of public policy.

Certainly the stress on the policy of favor matrimonii[67] would run against recognition. Thus no principle of legal symmetry would require our law to recognise invalidating legislation merely because it (quite rightly) recognises validating legislation.

Lex Loci Prevails Over Personal Law

It should be noted that the lex loci celebrationis prevails even in cases where the sole object of the parties in celebrating the marriage abroad was to avoid some irksome requirement of their personal law: this is the effect of Ogden v Ogden,[68] Scrimshire v Scrimshire[69] and Simonin v Mallac.[70] But in such circumstances, it appears that a decree of nullity obtained in respect of the marriage in the country of their common domicile will be recognised[71]

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66 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.11 (1985).

67 See, e.g., Starkowski v A.G., [1954] A.C. 155, at 180 (H.L.(Eng.), per Lord Cohen, 1953).

68 [1908] P. 46.

69 (1752) 2 Hag. Con. 395.

70 (1860) 2 Sw. & Tr. 67.

71 Salveson v Administrator of Austrian Property, [1927] A.C. 641.

subject to certain exceptional limitations.[72]

Renvoi[73]

When we speak of the lex loci celebrationis, do we mean the internal law of the country of celebration or do we mean the whole of that law, including its choice of law rules? There is no clear answer to this question in the Irish decisions. In the Estate of M'Loughlin[74] would appear to favour the internal law, since as we have seen, Flanagan, J. did not even address himself to counsel's argument that the formal requirements under the law of England and Wales were merely territorial and did not bind parties marrying in Wales but domiciled in Ireland.

In a number of English decisions, reference was made to the whole law.[75]

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72 Considered in our forthcoming Report (LRC 20-1985).

73 Dicey & Morris, 65, explain that:

> "[T]he problem of renvoi arises whenever a rule of the conflict of laws refers to the 'law' of a foreign country, but the conflict rule of the foreign country would have referred the question to the law of the first country or to the 'law' of some third country."

The problem may be resolved in a number of ways. The court may apply the internal law of the foreign country, or may "accept the renvoi" from the conflict rules of the foreign country, or may decide the case in the same way as the foreign court would have decided it: Dicey & Morris, 65-67.

74 1 L. R. Ir. 421 (1878).

75 Taczanowska v Taczanowski, [1957] P. 301, Hooper v Hooper [1959] 1 W.L.R. 1021. The English and Scottish Law Commissions note, however, that there is no English case in which a marriage has actually been upheld as formally valid by applying the renvoi doctrine: op. cit., at p. 13, fn. 34.

Whether the renvoi doctrine may be used only to sustain a marriage is "not entirely clear".[76] There is no clear authority on this question in this country or in England;[77] the academic commentators[78] consider that a marriage should be valid if it complies with the formal requirements of either the internal law of the lex loci or the law of the country denominated by the application of the renvoi doctrine, as required by the law of the country of the celebration. The effect of this approach, of course, is that a limping marriage may be created.

Exceptions to Application of Lex Loci Celebrationis

A common law marriage is not valid if contracted in England or Ireland: R. v Millis[79] - a highly controversial and historically dubious decision. This case holds that in England or Ireland a marriage must be performed by an episcopally ordained priest or deacon; under canon law prior to the Council of Trent parties could marry each other without the necessity of a priest or deacon witnessing the marriage.[80]

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76 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.13 (1985).

77 Cf. Hooper v Hooper, [1959] 1 W.L.R. 1021, as interpreted by the English and Scottish Law Commissions, op. cit., at p. 13, fn. 34.

78 Dicey & Morris, 76, Cheshire & North, 76.

79 10 C. & Fin. 534 (1844).

80 The Tametsi Decree of the Counsel of Trent regarding clandestinity was issued in 1563 but promulgated in different dioceses at different times. In Ireland the dates of promulation in the various dioceses ranged from the middle of the Seventeenth Century until 1827, when it came into force in Dublin, Kildare, Ferns and Ossory, Meath and Galway: see Murphy (Deceased); Byrne v A.G., High Ct., Dixon, J., 20 December 1955 (evidence of Professor Patrick Francis Cremin, D.D.). See generally Jackson, 16-17, Ussher v Ussher, [1912] 2 I.R. 445.

In two cases in the conflict of laws a common law marriage will be recognised. First, where the common law is in force in the foreign locus celebrationis. The common law was considered to apply to settlers in English colonial territories, but only to the extent that it was suitable to the local conditions. Thus, it seemed only reasonable that the presence of an episcopally ordained clergyman should not be required as a condition of the validity of marriages contracted[81] in the early period of British colonisation before the Church had been established in outlaying areas - for example, in Australia many years ago.[82] The same rule applied "where the crown by capitulatory agreement exercised extraterritorial jurisdiction over British subjects",[83] as, for example, arose in China[84] and Singapore[85] earlier this century. In other cases, where compliance with the local formalities was prevented by some insuperable difficulty, the parties could also resort to the common law - i.e. marry whether with or without an episcopally ordained priest simply by pledging their troth to each other.

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81 Cf. Beamish v Beamish, 9 H.L. Cas. 274, at [348], [352] (1861), Lightbody v West, 18 Times L. Rev. 526, at 529 (P.D.A. Div., Jeune, P., 1902).

82 Catteral v Catteral, 1 Rob. Ecc. 580, 163 E.R. 142 (1847).

83 English and Scottish Law Commission Working Paper No. 89 and Consultative Memorandum No. 64, Choice of Law in Marriage, p. 18, fn. 60.

84 Wolfenden v Wolfenden, [1946] P. 61, Phillips v Phillips, 38 Times L. R. 150 (P.D.A. Div., Sir Henry Duke, P., 1921) ("a remote part of China").

85 Isaac Penhas v Tan Soo Eng, [1953] A.C. 304 (P.C.), where the Privy Council held (at 319) that, "in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary" that a marriage between a member of the Jewish faith and a non-Christian Chinese should be contracted in the presence of an episcopally ordained clergyman. The English and Scottish Law Commissions consider that this "would appear to afford some support for th[e] view [that the requirement of the presence of an episcopally ordained clergyman would not apply] perhaps, where it would be unreasonable to expect compliance, e.g., where the parties are non-Christian": op. cit., para. 2.21, p. 20, fn. 67.

The English and Scottish Law Commissions, having referred to the requirement of the presence of an episcopally ordained clergyman, add:

> "But does it apply where there is no difficulty in securing the services of an episcopally ordained priest? The position is not entirely clear. Taczanowska[86] suggests that in such circumstances the requirement must be complied with, but in Preston[87] Russell, L.J., albeit obiter, took a contrary view.[88]
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> Finally it is to be noted that the domicile or nationality of the parties is irrelevant for the purpose of the common law exception: 'the common law conception of marriage knows no distinction of race or nationality'[89]."[90]

What amounts to "insuperable difficulty"? In the early part of the 19th century, Lord Eldon held that a marriage between Protestants in Rome solemnized by a Protestant priest was valid since no Catholic priest would be allowed to perform the ceremony.[91] Australian courts have upheld[92] as valid marriages contracted in Germany in 1945 at a time when no registry offices were open and the registrars had left their posts, and in Russia in 1942 as the German army advanced. In England for some years from 1957 the courts

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86 [1957] P. 301, at 326. The Commissions also refer to Collett v Collett, [1968] P. 482, at 487.

87 Preston v Preston, [1963] P. 411, at 436.

88 The Commissions note that, in Australia, the balance of authority favours the view that the presence of an episcopally ordained priest is required.

89 Taczanowska v Taczanowski, [1957] P. 301, at 326 (per Hodson, L.J.).

90 Op. cit., paras 2.21-2.22.

91 Lord Cloncurry's Case (1811), cited by Cruise on Dignities and Titles of Honour, 276, which in turn is cited by Cheshire & North, 9th ed., p. 327, fn. 6. See also Ruding v Smith, 2 Hag. Cons. 371, 161 E.R. 774 (1821).

92 Kuklycz v Kuklycz, [1972] Q.R. 50.

went very much further, taking a far more lax view of when the test of insuperable difficulty had been fulfilled. In Taczanowska v Taczanowski,[93] the English Court of Appeal held that the doctrine locus regit actum rests on the presumption that parties who marry in a foreign country intend to submit themselves to the local law so far as formalities are concerned; if such is not their intention, the presumption is rebutted and they are free to fall back on the common law. The court considered that there is often no submission by a member of the military forces in the occupation of a country and such was the case in Taczanowska. The parties were Polish nationals and domiciliaries. The husband was serving in the Polish army and he married in Italy in 1946, the ceremony being performed by a Polish priest but not in compliance with Italian law because the relevant articles of the Italian civil code were not read to the parties and the marriage was not recorded in the register of marriage. The marriage would have been valid under Italian private international law if it had complied with the law of Poland, the national law of the parties; but under Polish law the marriage was invalid. The marriage was upheld by the Court of Appeal. Commenting on the decision, Cheshire & North[94] say:

> "The result was that the Court of Appeal, animated perhaps by a desire to save other similar marriages, said to number between three and four thousand, recognised as valid at common law a marriage void both by the lex loci celebrationis and by the personal law of the parties."

English law went still further in Kochanski v Kochanska.[95] There Sachs, J. upheld the validity of a marriage celebrated by Polish nationals, occupants of a displaced persons' camp in Germany, which did not comply with the formal requirements of German law. Neither party to the marriage was a member of the armed forces of occupation, nor was it impossible to comply with the local law. Nevertheless the marriage was held valid because:

> "[a]ny presumption that the recently liberated members

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93 [1957] P. 301.

94 Cheshire & North, 324.

95 [1958] P. 147.

> of this community had, at the material time, subjected themselves to the laws of a country which they then hated fervently and at whose violent hands they had suffered severely is, to my mind, clearly rebutted."[96]

The central principle endorsed by Kochanski v Kochanska was that parties might or might not at their option submit to the lex loci celebrationis; if they did not so submit, then the common law was applied. The same principle was applied in Lazarewicz v Lazarewicz[97] in 1962.

Cheshire & North object strongly to this general principle of submission. They argue along the following lines.

First it is not supported by authority. It would be wrong to conclude from the judgment of Sir Edward Simpson in Scrimshire v Scrimshire[98] that the judge was implicitly supporting a general principle of submission, and the great volume of explicit judicial authority is that the effect that the lex loci celebrationis applies imperatively rather than at the option of the parties.

Secondly, the principle of submission would introduce an intolerable degree of uncertainty into the law since it would in each case be necessary to find out what was the express or presumed intention of the parties on the matter. (Moreover, it may be asked, what law would apply in cases where the parties differed among themselves as to intention?)

Thirdly, the idea that the English common law should be the natural substitute for the lex loci celebrationis strikes Cheshire & North as being very curious:

> "A marriage that is void by the lex loci celebrationis and by the personal law of the parties will scarcely attract universal recognition merely because it satisfies the law of England, a country with which they

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96 Id., at 153.

97 [1962] P. 171. See Cheshire & North, 325.

98 2 Hag Con. 395 (1752).

> had no connexion at the time of the ceremony; more especially when it is not the existing law of England that is called in aid, but that which was abolished in 1753 by Lord Hardwicke's Act."[99]

In Taczanowska v Taczanowski,[100] Hodson and Parker, L.JJ. rejected the law of domicile in such circumstances by pointing (somewhat unconvincingly) to the problem raised by the two spouses having different domiciles - a difficulty which has not proved insuperable to the rules relating to capacity to marry. It is worth noting that in Maksymec v Maksymec,[101] Myers, J. had resolved the problem of differing domiciles by holding that:

> "the proper law is the law of the domicile of the husband, for, since by marriage the wife acquires her husband's domicle the intention should be imputed to her of contracting a marriage which will be valid according to the law of the place where her husband has his home."

Of course this approach would have no appeal today; but that is not a reason for rejecting the application of the test of domicile (or other factor, such as habitual residence), without any trace of sex discrimination, rather than the English common law.

In the decisions of Merker v Merker,[102] and Preston v Preston,[103] the English courts have adopted what Cheshire & North describe as "a less dangerous" approach. In Merker v

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99 Cheshire & North, 327.

100 [1957] P. 301, at 326, at 331 (C.A.). See, however, Kochanski v Kochanska, [1958] P. 147, at 155 (1957), where Sachs, J. considered that the door might possibly have been left slightly ajar, and contrast Preston v Preston, [1963] P. 141, at 153 (1962), where Cairns J. was equally satisfied that it was firmly closed.

101 72 W.N. (N.S.W.), at 525.

102 [1963] P. 283.

103 [1963] P. 411.

Merker, Simon, P. held that the lex loci celebrationis should be subject to exception only in respect of marriages within the lines of a foreign army of occupation or of persons in a strictly analogous situation to the members of such an army, "such as members of an organised body of escaped prisoners of war".[104] In Preston v Preston[105] a similar interpretation was suggested, somewhat more ambiguously.

Australian decisions have provided some helpful discussion. In Sarenis v Sarenis and Szmeck,[106] Mayo, J. said:

> "With foreigners, where a marriage cannot be legally carried out in the country where they happen to be, on account of some insuperable difficulty, some indication may be found that a celebration in accordance with the law of their domicil will be regarded as effective in our courts: Dicey, 6th ed., 1949, p. 772, Ruding v Smith, 2 Hag. Con. 371, 161 E.R. 774 (1821). If the situation be dealt with on a purely rational basis it might well be accepted that marriage in accordance with the only medium available, that is to say by the rites of a recognised church, has validity, rather than that the accomplishment of a lawful wedded state should be treated as completely incapable of achievement. It seems hardly credible that the law of this country would refuse to recognise as valid any ceremony whatsoever whereby lawful marital union is attempted in such circumstances. If the latter be the correct view, marriage, for the time being until chaos is brought to an end, will be beyond human powers in the territory so affected."

He continued:

> "If the matter be res integra, in circumstances where a marriage cannot be lawfuly solemnized in accordance with the laws of some territory owing to chaotic conditions brought about (inter alia) by warfare, and if the country in which the parties are, or were

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104 [1963] P., at 295.

105 [1963] P. 411.

106 [1950] S.A.S.R. 309, at 311 (Sup. Ct., Mayo, J.).

> formerly, domiciled is itself overrun, the government being taken over by an alien power,[107] then in such a case so far as our courts are concerned I think it would be proper to extend (if it be necessary) the area of legal recognition to marriages that conform to our common law: compare Lord Herschell's remarks in Alexander v Jenkins,[1891] 1 Q.B. 797 at 801."[108]

In Fokas (orse Milkalauskiate) v Fokas[109] it seemed to Napier, C.J. that:

> "the same right, of resorting to the law of their domicile, must be accorded to others [i.e. Non-British] in the same situation [i.e. where conformity with the local law is impossible, as, for instance, where there is no law of monogamous marriage]."

Napier, C.J. was not an unqualified supporter of this approach and was well conscious of its limitations. He was doubtful as to whether a first marriage so recognised would support a charge of bigamy if either party married a second time in South Australia. (This, of course, is not of any particular concern to the mainstream of conflicts analysis.) Moreover it seemed to him that:

> "if parties find themselves in a situation where a lawful marriage is absolutely impossible, the only course that may be open to them may be to exchange their vows in the manner that satisfies their consciences and to contract a marriage in due form of law when the opportunity offers."[110]

He also noted the problem of legitimacy of the children, apparently taking the view that the legitimate status of the children would depend on the "per subsequens matrimonium" legislation of the particular country concerned.

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[107] The plaintiff's domicile was Lithuanian.

[108] [1950] S.A.S.R., at 311.

[109] [1952] S.A.S.R. 152 (Sup. Ct., Napier, C.J.).

[110] Id.

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In the New South Wales decision of Maksymec v Maksymec,[111] in 1954, Myers, J. said that he did:

> "not think that it is part of the jus gentium that the status of persons is or can be governed by the laws of a country which is not their own and to which they could not on any basis be deemed to have submitted themselves, to which they have no relation by nationality, residence or domicile, and whose laws could not have been within their contemplation at the time of the transaction in question."

But if the English common law is not to apply, what law should govern the formal validity of the marriage where there is no available lex loci celebrationis? Myers, J. considered that the law of the domicile should control, on the basis that:

> "[t]he principle that the validity of a marriage is governed by the lex loci celebrationis is an exception to the principle that persons are governed by the law of the place where they are domiciled. When there is no lex loci celebrationis or what is the equivalent of no such law then I can see no reason why the law of the domicile should not continue to attach. That result is conformable to the intention of the parties and is certain and invariable."[112]

This approach has received some academic support,[113] but there is also much judicial and academic[114] opposition to it.

Marriages celebrated on the high seas present more difficulties. In the Irish decision of Du Moulin v

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111 72 W.N. (N.S.W.) 552, at 523, (Myers, J., 1954).

112 Id., at 525.

113 Cf. Donovan, Formal Validity of Foreign Marriages, 25 Austr. L. J. 165 (1951); but see Fleming, Correspondence, 25 Austr. L. J. 406 (1951).

114 Cf., e.g. Sykes, 83 ("a lost cause").

Druitt,[115] a marriage celebrated between a woman stowaway and a soldier on board a troop ship headed for Australia was held void (in the absence of a clergyman), the court holding that the marriage was not one of necessity since the vessel would be putting in at places where a clergyman would be available.

The Foreign Marriages Act 1892

We must now consider the possible relevance of the general provisions of the Foreign Marriages Act 1892.[116] This Act applied to Ireland. After the establishment of the State, it could be argued that the Act should continue to apply, by virtue of section 3 of the Adaptation of Enactment Acts 1922, which provides that, for the purpose of the construction of any British statute, the name Ireland "whether used alone or in conjunction with the expression 'Great Britain' or by implication as being included in the expression 'United Kingdom' shall mean Saorstát Eireann." As against this, it could be argued that the Act, of its nature, was not susceptible to modification through interpretation and that it does not apply to Ireland. This view is the one that has commanded support in official circles, since there are no procedures for foreign marriages to be performed by "marriage officers" or army chaplains or officers.

It is useful to examine the provisions of the legislation, as a guide to our consideration of the broader issues raised by requirements of formal validity of marriages with an international dimension. Section 1 of that Act provides that:

> "All marriages between parties of whom one at least is a British subject solemnised in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all form required by law."

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115 13 I.C.L.R. 212 (1860).

116 The specific issue of soldiers' marriages is considered infra, p. 46.

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"Marriage officers" are any officers authorised by a Secretary of State by authority in writing (referred to as a marriage warrant) and any officers authorised under marriage regulations made pursuant to the act[117] to act as marriage officers without any marriage warrant.[118] The Act empowers a Secretary of State to authorise any of the following persons to be a marriage officer:

> "(a) A British ambassador[119] residing in a foreign country to the government of which he is accredited, and also any officer prescribed as an officer for solenmizing marriages in the official house of such ambassador;
>
> (b) the holder of the office of British consul[120] in any foreign country or place specified in the warrant; and
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> (c) a governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident, and this Act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorised by the warrant, and in such application shall not be limited to places outside Her Majesty's dominions."[121]

The Act provides for the making of marriage regulations covering several aspects of the scope and administration of the Act. Most important is the power to make regulations:

> "prohibiting or restricting the exercise by marriage officers of their powers under this Act in cases where

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117 Section 21(1)(b).

118 Section 11(1).

119 The expression "ambassador" includes a minister and chargé d'affaires: section 24.

120 The expression "consul" means a consul-general, consul vice-consul, pro-consul, or consular agent: section 24.

121 Section 11(2).

> the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations, or in places where sufficient facilities appear to her Majesty to exist without the exercise of those powers, for the solemnization of marriages to which a British subject is a party."[122]

Section 19 reflects the same policy. It provides that a marriage officer is not required to solemnize a marriage, or to allow one to be solemnized in his presence, if in his opinion the solemnization would be inconsistent with international law or the comity of nations.

Dicey & Morris observe, in relation to section 19:

> "It is impossible to say what this imprecise phrase means; it can hardly mean that the invalidity of the marriage by the local law is a sufficient ground for refusing to solemnise it."[123]

It has, however, been argued[124] by the English and Scottish Law Commissions that this provision would appear designed to present limping marriages. They base this interpretation on the fact that regulations[125] made in 1970 under section 21 of the Act prevent a marriage officer from solemnizing a marriage unless satisfied (inter alia) that the authorities of the foreign country will not object to the solemnization and that the parties "will be regarded as validly married by the law of the country to which each party belongs".[126] Of

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122 Section 21(1)(a).

123 Dicey & Morris, 9th ed., 1973, 248.

124 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.18 (1985).

125 Foreign Marriages Order 1970, Article 3(1) (S.I. 1970 No. 1539).

126 The English and Scottish Law Commissions point out (op. cit., para. 2.18, fn. 54) that it is not clear whether this phrase envisages the national law or the law of the parties' domicile or domiciles.

course, regulations made nearly 80 years after the Act came into force and nearly half a century after Ireland gained its independence can, of themselves, throw little light on the meaning and scope of the provision, but the terms of the 1970 regulations do seem to provide reasonable substance to the notion of "consistency with international law and the comity of nations".

The Act sets out provisions, similar to those in the Marriages (Ireland) Act 1844, the Matrimonial Causes and Marriage Law (Ireland) Amendment Acts 1870 and 1871 and the Marriages Act 1972 concerning such matters as the requirement of giving notice,[127] obtaining consent to marry[128] and the laying of caveats.[129] Each of the parties, before the marriage is solemnized, is required to appear before the marriage officer and make an oath to the effect that he or she believes that there is not any impediment to the marriage "by reasons of kindred or alliance, or otherwise",[130] that both of the parties have had their usual residence within the district of the marriage officer for the past three weeks,[131] and,

> "where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent to the marriage is required by law has been obtained thereto, or, as the case may be, that there is no person having authority to give such consent."[132]

If no impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has

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127 Sections 2-3.

128 Section 4. Section 4(1) provides that "[t]he like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England".

129 Section 5.

130 Section 7(a).

131 Section 7(b).

132 Section 7(c).

not been forbidden "in manner provided by this Act",[133] then, fourteen days after notice of an intended marriage has been entered, the marriage may be solemnised.[134] Section 8(2) provides that:

> "Every such marriage shall be solemnized at the official home[135] of the marriage officer, with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnized by the marriage officer."

Where the marriage is not solemnized according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties must make a declaration (in words specified by the Act)[136] that he or she does not know of any lawful impediment why he or she may not be married to the other party and each (again in words specified by the Act)[137] must call on those present to witness that each is taking the other to be his or her lawful wedded wife or husband.

After the marriage has been solemnized, "it shall not be necessary, in support of the marriage, to give any proof of the residence for the time required by or in pursuance of this Act of either of the parties previous to the marriage, or of the consent of any person whose consent thereto is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage".[138] Moreover, once the marriage

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133 Section 8(1).

134 Id.

135 Defined in section 24.

136 Section 8(3).

137 Section 8(3).

138 Section 13(1).

is solemnized "it shall not be necessary in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnized and registered, nor shall any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or of any prohibition or restriction under the marriage regulations or otherwise, be given in any legal proceeding touching the validity of the marriage".[139]

Section 22 deals with the validity of marriages solemnized "within British lines". It declares that all such marriages solemnized by any chaplain or officer or "other person officiating under the orders of the commanding officer of a British army serving abroad are to be "as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law".

Section 23 provides that:

> "Nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided ...."

The failure to comply with the provisions of the Act will thus not invalidate a marriage that is valid according to the lex loci celebrationis or a marriage falling within the exceptional cases (where the use of the local form is impossible[140] or the "belligerent occupation" category).

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[139] Section 13(2).

[140] Cf. Wolfenden v Wolfenden, [1945] 2 All E.R. 539, at 543 (P.D.A. Div., Lord Merriman, P.).

Capacity to Marry[141]

Assuming that the parties comply with the formal requirements of the lex loci celebrationis,[142] we must now consider what law or laws should determine the essential requirements for marriage. Until about the middle of the nineteenth century, courts[143] applied the lex loci celebrationis to all aspects of the validity of marriage - formal and essential. In 1861, however, a new approach was adopted, somewhat unclearly, by the House of Lords in Brook v Brook.[144] In that decision Lord Campbell L.C. said:

> "There can be no doubt of the general rule that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the lex loci celebrationis, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated .... [I]f the contract of marriage is such, in essentials, as to be contrary to the law of the country of the domicile and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated."

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141 See generally Dicey & Morris, 285ff. In this Report we do not consider the specific aspects of the subject relating to capacity to enter a polygamous marriage. This question is one raising distinctive and complex policy issues which require special treatment in their own right.

142 Cf. pp. 9ff., supra.

143 Scrimshire v Scrimshire, 2 Hag. Con. 295, 161 E.R. 7782 (1752), Dalrymple v Dalrymple, 2 Hag. Con. 54, 161 E.R. 665, Ruding v Smith, 2 Hag. Con. 371, at 389-392, 161 E.R. 774, at 780-781 (1821), all cited by English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, p. 56, fn. 167 (1985).

144 9 H.L. Cas. 193 (H.L.(Eng.), 1861).

As may be seen, this statement of the new approach adopted by the House of Lords was ambiguously expressed. It could mean that the essentials of marriage must comply with the law of the country or countries in which the parties are domiciled at the time of the marriage, or it could mean that the essentials of marriage should be determined by reference to the parties' contemplated matrimonial domicile.

In Ireland, the reported decisions favour the former approach, which is generally referred to as the "dual domicile" test. We will examine these decisions in detail below,[145] but first we will consider briefly the position in other common law jurisdictions.

In England "the balance of authority"[146] also supports the "dual domicile" test. This test is not a cumulative one. It is sufficient that each spouse should have capacity to marry according to the law of his or her domicile at the time of the marriage; it is not necessary that he or she should also pass the test of the law of the other party's domicile.[147]

In Mette v Mette,[148] in 1859, Sir Cresswell Cresswell held void a marriage contracted by a naturalized domiciled Englishman with his deceased wife's half sister, domiciled

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145 Infra, pp. 58ff.

146 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.4 (1985). The supporting footnote (p. 58, fn. 174) reads:

> "Re Paine, [1940] Ch. 46, Pugh v Pugh, [1951] P. 482, R. v Brentwood Superintendent Registrar of Marriages ex parte Arias, [1968] 2 Q.B. 956, Padolecchia v Padolecchio, [1968] P. 314, Szechter v Szechter, [1971] P. 286; and see Dicey & Morris, 285-296 ...."

147 See English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.3 (1985), at p. 58, fn. 172 explaining Pugh v Pugh, [1951] P. 482.

148 1 Sw. & Tr. 416, 164 E.R. 792 (1859).

in Germany, in breach of English, but not German, law. He said:

> "if Bernard Mette was incapacitated from contracting such a marriage, this latter distinction cannot have any effect. There could be no valid contract unless each was competent to contract with the other. The question rests upon the effect of domicil and naturalization."[149]

In Re Paine,[150] in 1939, Bennett, J. accepted that this statement of the law was consistent with Dicey's statement that a marriage is valid when "each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other".[151]

In Pugh v Pugh[152] in 1951, Pearce, J. applied the antenuptial domicile test. He said:

> "It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicile."[153]

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149 1 Sw. & Tr., at 423, 164 E.R., at 795-796. Cheshire & North, 336, refuse to accept that Mette v Mette is an unambiguous authority for the dual domicile theory. They state:

> "The ratio decidendi is in fact rather doubtful. After remarking that 'there could be no valid contract unless each was competent to contract with the other', words which suggest a preference for the dual domicil doctrine, Sir Cresswell Cresswell finally concluded that since the husband had remained domiciled in England and the marriage was with a view to subsequent residence there, the English prohibition was necessarily operative."

150 [1940] Ch. 46, at 49. Cheshire & North, 336, citing 1 Sw. & Tr. 416, at 432-424, 164 E.R., at 796.

151 Dicey, 5th ed., 732. See now Dicey & Morris, 285.

152 [1951] P. 482.

153 Id., at 491.

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He considered that Brook v Brook and Mette v Mette "show that the law of domicile is the law which regulates the essentials of the marriage ...."[154]

In the Court of Appeal decision of R. v Brentwood Superintendent Registrar of Marriages, ex parte Arias,[155] in 1968, Sachs, L.J. observed that:

> "any question relating to marriage ipso facto involves status, and status is particulary a matter for the law of the country in which the parties are domiciled. As is stated in one section of Dicey and Morris, Conflict of Laws, 8th ed., (1967), p. 257: '.... a person's capacity to marry is a matter of public concern to the country of his domicile'.
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> That passage reflects what has been stated over many generations to be the law and policy of this country on that subject. It is only necessary to refer to a passage in the speech of Lord Campbell, L.C., in Brook v Brook[156] where he said:
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> > 'It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile and contrary to religion, or morality, or to any of its fundamental institutions.'
>
> The fact that the parties to a proposed marriage cannot marry according to the law of the country in which they are domiciled is, as a normal rule, a lawful impediment to their being married in this country. That follows from what in Dicey and Morris, Conflict of Laws, 8th ed., p. 254, is stated as rule 31: 'Capacity to marry is governed by the law of each party's antenuptial domicile'."[157]

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154 [1951] P., at 493.

155 [1968] 2 Q.B. 956.

156 9 H.L. Cas. 193, at 212, 11 E.R. 703, at 711 (1861).

157 [1968] 2 Q.B., at 967-968.

R. v Brentwood Superintendent Registrar of Marriages, ex parte Arias is a decision that is of some significance in the development of the Irish law on the subject, as shall be mentioned.[158]

In Padolecchia v Padolecchia,[159] in 1967, Sir Jocelyn Simon, P. said:

> "Each party must be capable of marrying by the law of his or her respective antenuptial domicile: see Dicey and Morris, [Conflict of Laws,] 8th ed., [1967], p. 254, r. 31."

In Szechter (orse. Karsov) v Szechter[160] in 1970, Sir Jocelyn Simon, P. said:

> ".... I respectfully agree with the suggestion in rule 32 of Dicey and Morris, Conflict of Laws, 8th ed., (1967), p. 271, that no marriage is valid if by the law of either party's domicile one party does not consent to marry the other. This accords with the old distinction between, on the one hand, 'forms and ceremonies', the validity of which is referable to the lex loci contractus, and on the other hand, 'essential validity', by which is meant (even though by, as the editors of Rayden on Divorce, 10th ed., (1967), p. 121 remark, 'not a happy terminology') all requirements for a valid marriage other than those relating to forms and ceremonies, for the validity of which reference is made to the lex domicilii of the parties: Rayden on Divorce, 10th ed., paras. 49 and 50, pp. 120, 121; De Reneville v De Reneville, [1948] P. 100, 114, by Lord Greene M.R. So far as capacity (also a matter of 'essential validity') is concerned, there can be no doubt that no marriage is valid if by the law of either party's domicile one of the parties is incapable of marrying the other: Re Paine, [1940] Ch. 46; Pugh v Pugh, [1951] P. 482.

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158 Infra, p. 64.

159 [1968] P. 314, at 336.

160 [1971] P. 286.

Moreoever, in Way v Way,[161] Hodson, J. said:

> 'Questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made. This view is not covered by direct authority, but it is, I think, supported by the judgment of Lord Merriman, P. in Apt v Apt[162] ....
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> When giving the judgment of the Court of Appeal dismissing the petitioner's appeal in [Apt's] case, Cohen, L.J. said: "In our opinion the method of giving consent as distinct from the fact of consent is essentially a matter of lex loci celebrationis and does not raise the question of capacity." Marriage is essentially a voluntary union and as Dr Idelson put it (and I cannot improve on the phrase) "consent is an emanation of personality". It is therefore, I think, justifiable and consistent with authority to apply the matrimonial law of each of the parties.'

When that case went to the Court of Appeal, under the name of Kenward v Kenward,[163] Sir Raymond Evershed, M.R., at 133, assumed that what Hodson, J. had said about the relevant law to be applied was correct.

Both Nina and the respondent were domiciled in Poland at the time of the ceremony of marriage on 2 February 1968. It is therefore for Polish law to answer whether, on the facts as I have found them, the marriage was invalid by reason of duress."[164]

We must now refer to the degree of judicial support[165] for the "intended matrimonial home" test. In De Reneville v De Reneville,[166] there were some obiter statements approving of this test by Lord Greene, M.R.:

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161 [1950] P. 71, at 78-79.

162 [1947] P. 127, at 146.

163 [1951] P. 124.

164 [1971] P. 286.

165 See Cheshire & North, 334ff.

166 [1948] P., at 114.

> "The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may be supposed to enter into the bond of marriage."

And Bucknill, L.J. said:

> "To hold that the law of the country where each spouse is domiciled before the marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail, and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together should be regarded as the law which controls the validity of their marriage."[167]

In Kenward v Kenward,[168] Denning, L.J. (in the words of Cheshire & North) "affirmed, with no ambiguity, that the 'substantial validity' of a marriage contracted between persons domiciled in different countries is governed by the law of the country where they intend to live and on the basis of which they have agreed to marry".[169]

In Radwan v Radwan (No.2),[170] in 1972 Cumming-Bruce, J. had to consider whether a woman's capacity to enter into a polygamous marriage abroad was governed by the law of her domicile at the time of marriage, or by the law of the country of intended matrimonial residence. He favoured the

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167 [1948] P., at 121-122.

168 [1951] P. 124, at 144-146.

169 9th ed., 1974, p. 342.

170 [1973] Fam. 35.

latter approach. This decision met with much criticism. Morris & North have observed that:

> "It seems safe to say that few cases on the English conflicts of laws decided in the last 50 years have had a worse press than this one. Academic lawyers are almost unanimous in regarding it as wrongly decided.[171] The chief grounds of criticism are (1) that the judge was wrong to prefer the dicta (for they were no more) in the early cases of Warrender v Warrender[172] and Brook v Brook[173] to the later decisions in Pugh v Pugh[174] and Padolecchia v Padolecchia;[175] (2) that his decision (as he conceded) made nonsense of section 4(1) of the Nullity of Marriage Act 1971[176] and (3) that he was more solicitous for what he called the 'common law rights of Miss Mary Mayson in 1951' than were her own counsel, who argued that the marriage was void, as did counsel for the Queen's Proctor."[177]

The English and Scottish Law Commissions have said in relation to Radwan:

> "the adoption of the intended matrimonial home test, as Cumming-Bruce, J. himself conceded would render s.11(d) of the Matrimonial Causes Act 1973 largely otiose. This decision has been subjected to considerable academic criticism: see, e.g., Dicey & Morris, 316-319; Cheshire & North, 349-350; Karsten, 36 M.L.R. 291 (1973), Pearl, [1973] Camb. L. J. 43, Wade, 22 I.C.L.Q. 571 (1973), but it is not without support: see Jaffey, 41 M.L.R. 38 (1978), Stone, 13 Family Law

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171 Referring to Cheshire & North, pp. 349-350, and Morris, p. 128, and articles there cited.

172 2 Cl. & Fin. 488, 6 E.R. 1239 (1835).

173 9 H.L.C. 193, 11 E.R. 703 (1861).

174 [1951] P. 482.

175 [1968] P. 314.

176 Now section 14(1) of the Matrimonial Causes Act 1973.

177 Morris & North, 285.

76 (1983); see also Hassan v Hassan, [1978] 1 N.Z.L.J. 385, 389-390."[178]

The Commissions noted that Cumming-Bruce, J. was careful to limit his decision to capacity to contract a polygamous marriage. They add:

> "Consequently this decision does not detract from and might even be construed as affording indirect support for the view that as a general rule capacity is determined by the dual domicile test."[179]

The Commissions consider that in the light of the conflicting authorities on the question, "the matter cannot be regarded as conclusively settled".[180] In a footnote they add:

> "There is no decision which prevents the Court of Appeal or the House of Lords from adopting either test. It may be noted that there is some support for applying a 'real and substantial connection' test to some issues of essential validity. In Vervaeke v Smith, [1983] 1 A.C. 145, 166, Lord Simon of Glaisdale suggested that such a test might be 'useful and relevant in considering the choice of law for testing, if not all questions of essential validity, at least the question of the sort of quintessential validity in issue in this appeal - the question which law's public policy should determine the validity of the marriage'...."[181]

In Lawrence v Lawrence,[182] the Court of Appeal did not resolve the question of capacity to marry. The issue concerned the validity of a second marriage contracted after

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178 English and Scottish Law Coms., op. cit., para. 3.4, p. 59, fn. 177.

179 Id., para. 3.4, p. 60, fn. 178.

180 Id., para. 3.4.

181 Id., para. 3.4, p. 60, fn. 179.

182 [1985] 2 All E.R. 733 (C.A.).

a divorce which was recongised in England but not in Brazil, the country of the divorced party's domicile at the time of both the divorce and the second marriage.

None of the members of the court expressed a final preference as between the general tests of ante-nuptial domicile and intended family home, since they were prepared to decide the case on narrower grounds.[183] Ackner, L.J. acknowledged that "[t]he traditional and still prevalent view is that the capacity to marry is governed by what may conveniently be called the dual domicile doctrine"[184] And Sir David Cairns observed:

> "On the question of whether, in English law, the validity of a foreign marriage should depend on the dual pre-marital domiciles of the parties or on their intended matrimonial domicile, the views of academic lawyers and also of judges are in such conflict that I should not be bold enough to seek to resolve the conflict unless compelled to do so. My own inclination would be to hold that either basis of recognition would suffice."[185]

Purchas, L.J. discussed the strengths and weaknesses of the two approaches. The test of the ante-nuptial domicile had "the advantage of certainty and the further advantage of applying a standard law of domicile both to capacity to marry, the recognition of the marriage for other purposes and other personal issues (such as status, legitimacy, succession, etc.) where these are governed by the lex domicilii".[186] But "[o]n the other hand, the rigid adherence to the concept of domicile in alone giving jurisdiction in the case of foreign divorces produces obvious anomalies...."[187]

The test based on the law of the intended domicile had "the

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183 Cf. infra, p. 64.

184 [1985] 2 All E.R., at 737.

185 Id., at 746.

186 Id., at 740.

187 Id.

advantage of applying a 'meaningful' law which is accepted in the area in which the parties are to live",[188] but had the disadvantage of uncertainty:

> "Parties may genuinely intend to live in a certain jurisdiction at the time they are entering the marriage but this may be overtaken by events, or perhaps, more naturally, the parties may change their minds."[189]

Purchas, L.J. noted that:

> "[o]ne view common to all protagonists in this field is that the validity of a marriage must be determined at the moment of celebration. It would be hopelessly inadequate if, before deciding on which system of law to apply it was necessary to wait to see in which jurisdiction the parties in fact settled down. The question immediately arises: how long would they have to establish their home before qualifying?"[190]

Purchas, L.J. noted that the trial judge had applied the law of the intended domicile. For the reasons just mentioned, Purchas, L.J. considered that he had to express "considerable doubt whether this would be justified as a general proposition".[191] But it was "happily"[192] not necessary to resolve this "extremely difficult but interesting academic controversy"[193] into which the trial judge had seen fit to enter. In his view, as in the view of the other members of the Court, the case could be disposed by on narrower grounds.

In other common law jurisdictions (apart from the United States, where a different approach has been taken) the

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188 Id.

189 Id., at 740-741.

190 Id., at 741.

191 Id.

192 Id.

193 Id.

balance of support appears to be in favour of the antenuptial domicile test rather than that of the intended matrimonial home. This appears most clearly in Canada[194] and New Zealand.[195] Decisions in Australia are scanty. In the Victoria decision of In the Will of Swan,[196] in 1871, Molesworth, J. considered that capacity to marry should depend "upon the laws of the country of the parties in which they are afterwards probably to live". It would seem wrong to place much weight on this statement as affording support for the intended matrimonial home[197] however, in view of the fact that immediately afterwards in his judgment Molesworth, J. referred with apparent approval to other decisions in which the antenuptial domicile test had been favoured.

Irish decisions, as we have mentioned, also support the dual domicile test. In Davis v Adair[198] 1985 the Court of Appeal, affirming Porter, M.R., applied this test to

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194 Cf. Crickmay v Crickmay, 60 D.L.R. (2d) 734 (B.C.C.A., 1966), Schwebel v Ungar (or Schwebel), 42 D.L.R. (2d) 622 (C.A., 1963), aff'd [1965] S.C.R. 148, 48 D.L.R. (2d) 644 (1964), Gray v National Trust Co., 8 W.W.R. 1061, 23 D.L.R. 608 (Alta. Sup. Ct., 1915), Ambrose v Ambrose (otherwise Harnish or Hornish), 32 W.W.R. 433, 25 D.L.R. (2d) 1 (B.C.C.A., 1960). In some cases, it is difficult to be certain which test was applied, in view of their facts and the manner in which the court disposed of the issue: cf. Miller v Allison, 24 B.C.R. 123, [1917] 2 W.W.R. 231, 33 D.L.R. 144 (Sup. Ct., Murphy, J.), Reed (otherwise Frew) v Reed, 69 W.W.R. 327, 6 D.L.R. (3d) 617 (B.C. Sup. Ct., Harvey, Co. Ct. J., 1969). Of particular interest is Dejardin v Dejardin, [1932] 2 W.W.R. 237 (Man. K.B., Macdonald, C.J.K.B.), which might seem on first reading to support the antenuptial domicile test, but may perhaps better be regarded as affording support for the intended matrimonial home test, in view of the facts (in particular, that the marriage took place before one of the parties could have acquired a domicile in Manitoba, whose law was applied).

195 Carter v Carter, [1932] N.Z.L.R. 1104. See, however, Hassan v Hassan, [1978] 1 N.Z.L.R. 385, at 389-390, where the issue was left open by Somers, J.

196 2 V.R. (I.E. & M.) 47, at 52 (Ecc., 1871).

197 See Sykes, 86, fn. 60. But cf. Nygh, 306.

198 [1895] 1 I.R. 379.

determine the validity of a marriage celebrated in New York between a man and his deceased wife's sister. The marriage complied with the provisions of New York law but was in breach of Lord Lyndhurst's Act[199] of 1835.

The wife (who stood to gain a small inheritance from her late husband's estate if she could successfully impugn the validity of her second marriage) sued the trustees of her late husband's estate, contending that both she and her husband had been domiciled in England or in Ireland at the time of the marriage. Her husband supported this action.[200] At trial, Porter, M.R., noted that:

> "[i]t would, however, be sufficient for her to show that one or other of them had a British or Irish domicil at that time; for a marriage cannot be valid if it is invalid as to one of the contracting parties, else one would be married and the other not, an obvious impossibility."[201]

The wife, on appeal relied on Brook v Brook[202] (also a case involving a marriage by a man with his deceased wife's sister) as authority for the proposition that "the contracting capacity of the parties is governed by the law of their domicil".[203] Counsel for the defendants conceded that the validity of the marriage depended on whether the

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199 Marriage Act 1835, section 2. See our Report on Nullity of Marriage, pp. 45-48 (LRC 9-1984).

200 Cf. id., at 459 (per Barry, L.J.):

> "The case is a remarkable one. It is certainly a curious circumstance that this wealthy man, for the sake of the few thousand pounds at which the life estate of his wife would be valued, would thus seek to establish the invalidity of their marriage."

201 Id., at 386.

202 9 H.L.Cas. 193, 11 E.R. 703 (H.L.(Eng.), 1861).

203 [1895] 1 I.R., at 407.

wife and the husband, "or either of them",[204] had on the day of the marriage "an English domicil".[205]

The Court of Appeal held that both the wife and her husband had an "American domicile" and that the marriage was accordingly valid;[206] it seems beyond doubt that if either of them had had an English (or Irish) rather than "American" domicile, the marriage would have been held invalid.

In K.E.D. (otherwise K.C.) v M.C.,[207] in 1984, Carroll, J. held that a person's capacity to marry "is determined by the law of his ante-nuptial domicile". The case concerned a marriage after a foreign divorce. This aspect of the subject of capacity to marry raises important issues, which we examine below.[208]

Exceptions to the General Rule

Whatever the general rule may be, whether antenuptial domicile or intended family home, it is clear that it is subject to a number of exceptions. Let us consider them in turn. In view of the paucity of Irish decisions, it is difficult to state with confidence whether these exceptions would command full support.

(i) The Rule in Sottomayor v De Barros (No.2)

Under the rule in Sottomayor v De Barros (No.2),[209] a marriage celebrated within Britain where one of the spouses

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204 Id., at 416 (per Walker, C., referring to counsel's argument).

205 Id.

206 Id. Cf. Dicey & Morris, 101-102.

207 High Ct., Carroll, J., 26 September 1984 (1983-No.3M), at p. 9 of judgment.

208 Infra, pp. 62ff.

209 5 P.D. 94 (1879). Sykes, 87, describes the decision as a "peculiar and somewhat deplorable" one.

is domiciled in one of the constituent jurisdictions will be valid in spite of the fact that the other spouse does not have capacity under his or her domiciliary law.

Sottomayor v De Barros (No.2) has received a generally unfriendly reception in Australia,[210] falling short, however, of outright rejection. A leading authority has submitted that, "if directly confronted with the decision, the High Court would not follow it".[211]

(ii) Incapacity by the lex loci celebrationis where this is also the lex fori

Where a marriage is valid or otherwise effective[212] by the personal law of the spouses but void by the lex loci celebrationis, and the lex loci celebrationis is foreign, then it would appear that Irish law should ignore any disability under the lex loci celebrationis.[213] The only

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210 See Miller v Teale, 92 C.L.R. 406, at 414 (H. Ct. of Austr., 1954), referring with some disdain to Pezet v Pezet, 47 S.R. (N.S.W.) 45 (1946) (in which Bonney, J.'s dissent is worthy of note). In Ungar v Ungar, [1967] 2 N.S.W.R. 618 (Sup. Ct.). Selby, J. distinguished Sottomayor v De Barros (No.2).

211 Sykes, 88. Cf. Nygh, 306, who, in view of a dictum in Miller v Teale, considers that an Australian court:

> "would in all probability hold invalid a marriage celebrated in Australia in accordance with Australian law in which one of the parties by virtue of a foreign personal law lacked capacity to marry the other, unless that lack of capacity could have been cured by a consent or dispensation under the foreign law concerned."

212 As, for example, where the marriage is voidable, and one of the parties to it dies. Cf. the facts of In the Will of Swan, infra.

213 Cf. In the Will of Swan, 2 V.R. (I.E. & M.) 47 (Ecc., Molesworth, J., 1871), Reed (orse. Frew) v Reed, 69 W.W.R. 327, 6 D.L.R. (3d) 617 (B.C. Sup. Ct., Harvey Co. Ct. J., 1969).

case[214] in which the contrary has been suggested is the much-criticised decision of Breen v Breen,[215] where Karminski J. looked to Irish law, as the law of the place of celebration.

Where the lex loci celebrationis is also the lex fori, however, it has been strongly argued[216] that a marriage valid by the parties' personal law (or laws) but void by the lex loci celebrationis would be considered void. There is no clear authority of this issue here or in other common law jurisdictions. The policy justification would seem to be that the forum should be entitled to protect its own laws from defiance by outsiders who come to the forum to marry.

(iii) Capacity to Marry After a Divorce

There is some considerable uncertainty as to the position regarding capacity to marry after a divorce so the present analysis is necessarily a tentative one. At common law it appears that capacity to enter a second (or subsequent) marriage is determined on the same principles as capacity to enter a first marriage, namely that ".... capacity to marry is governed by the law of each party's antenuptial domicile".[217] Two separate questions may arise. First, is the dissolution of the first marriage recognised under our law? And secondly, did the parties have capacity to marry under the law of each party's domicile? In some cases, the questions will seem to be interlocked, so that the answer to the first will appear to dictate the answer to the second. Thus, for example, if X, domiciled in Ireland, obtains a divorce in England and immediately thereafter remarries in England, we are tempted to conclude that

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214 Loose statements in Berthiaume v Dastous, [1930] A.C. 79, at 83 (per Viscount Dunedin) and Starkowski v A.G., [1954] A.C. 155, at 174 (per Lord Tucker) may safely be ignored.

215 [1964] P. 144, criticised by Unger, 24 Modern L. Rev. 784, Cheshire & North, 343.

216 Cf. Dicey & Morris, 299-300, the English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.8 (1985).

217 Dicey & Morris, 293.

because the divorce is not recognised in Ireland, the country of his domicile, neither will X's second marriage be recognised here. In this example, since capacity to remarry is determined by a person's ante-nuptial domicile, it is in fact the case that X's second marriage will not be recognised, because X was at the time of the second marriage domiciled in Ireland.

If we vary the facts somewhat, however, the issue will emerge more clearly. Let us take the case of Y, who, when domiciled in Ireland, obtains a divorce in England, and who remarries in England, not immediately, but some time later, by which time Y has acquired an English domicile. Clearly, the divorce will not be recognised here, but equally clearly the second marriage, let us assume,[218] is a valid marriage according to Y's ante-nuptial domicile. There is an important Canadian case[219] which holds that a marriage should be recognised where valid according to the ante-nuptial domicile even though preceded by a divorce decree which was not recognised by the law of the (then) domicile of the party concerned. As may readily be appreciated, some difficult consequential questions arise from severing the question of divorce recognition from that of capacity to remarry in this way. It would be necessary to determine whether the recognition of the validity of the second marriage necessarily extinguishes all the rights and obligations[220] relating to the first marriage.

The converse position arises where, following a divorce granted[221] under the law of the (then) domicile, a party marries in circumstances where the law of his new domicile, at the time of the marriage, does not regard the divorce as

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218 We need not here concern ourselves with how English law would actually determine this issue, since the example is given merely as a model to illustrate a general question.

219 Schwebel v Ungar, 48 D.L.R. (2d) 644 (Sup. Ct. Can., 1964), aff'g 42 D.L.R. (2d) 622 (Ont. C.A., 1963), approved by Simon, P., in Padolecchia v Padolecchia, [1968] P. 314, at 339.

220 In relation to such matters as maintenance, family property, residence in the family home and succession.

221 Or recognised by that law. For simplicity of analysis, the case of a divorce granted under the law of the domicile is being considered.

effective. There is English authority,[222] which is not directly in point but which would suggest that the validity of the second marriage should not be recognised since it conflicts with the ante-nuptial domicile. Later English decisions[223] are, however, difficult to harmonise with this approach.[224]

However uncertain the common law rules relating to capacity to remarry after a divorce may be, the position becomes even more complicated when we have regard to the constitutional dimension. Article 41.3 of the Constitution provides as follows:

> "1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack.
>
> 2° No law shall be enacted providing for the grant of a dissolution of marriage.
>
> 3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

In the Irish language, Article 41.3.3° provides:

> "I gcás pósadh duine ar bith a scaoileadh faoi dhlí shibhialta aon Stáit eile agus an pósadh sin, agus bail dlí air, a bheith ann fós faoin dlí a bheas i bhfeidhm

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222 R. v Brentwood Marriage Registrar, [1968] 2 Q.B. 956 (C.A.).

223 Perrini v Perrini, [1979] Fam. 84, Lawrence v Lawrence, [1985] 2 All E.R. 733 (C.A.).

224 Cf. Collier, Casenote, [1979] Camb. L. J. 289, English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.9 (1985).

> in alt na huaire taobh istigh de dhlínse an Rialtais agus na Parlaiminte a bhunaítear leis an mBunreacht seo, ní fhéadhfaidh an duine sin pósadh ar a mbeadh bail dlí a dhéanamh taobh istigh den dlínse sin an fad is beo don duine eile a bhí sa chuing phósta a scaoileadh amhlaidh."

Judicial interpretation of these provisions, especially of Article 41.3.3°, has concentrated on the circumstances in which the validity of a foreign divorce decree will be recognised under our law. This is so in spite of the express language of the subsection which (whatever it may mean precisely) clearly speaks of capacity to marry.[225]

This approach is apparent in In Re Caffin Deceased: Bank of Ireland v Caffin,[226] in 1971, Kenny, J. held that the second, rather than the first, wife of a divorced man was entitled under the Succession Act 1965 to elect to take a legal right, as surviving spouse in his estate. The man had divorced his first wife in England in 1956, when both he and his first wife were domiciled there. In the same year he married his second wife. At the time of the marriage he

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225 Cf. Duncan, The Future for Divorce Recognition in Ireland, 2 Dublin U. L. Rev. 2, at 4 (1971):

> "On the face of it this subsection appears to be laying down a rule governing the capacity of persons to contract a marriage in the Republic. What it says about the recognition of foreign divorces, it says only in relation to this question of marriage capacity, e.g. questions of succession or mutual property rights as between the divorced parties, or questions relating to the legitimacy of children of a second marriage occurring outside Ireland, would not seem to come within the subsection's ambit. Nor would the subsection appear to prohibit recognition of a subsequent marriage which takes place outside Ireland.
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> However, judges have not accepted that the subsection is thus limited."

226 [1971] I.R. 123 (High Ct.), analysed by O'Reilly, Recognition of Foreign Divorce Decrees, 6 Ir. Jur. (n.s.) 293 (1971), Duncan, Desertion and Cruelty in Irish Matrimonial Law, 7 Ir. Jur. (n.s.) 213, at 232-235 (1972).

was domiciled and resident in England, and his second wife was domiciled and resident in Ireland.

Kenny, J. stated:

> "As the marriage of Mr Caffin and [his second wife] took place in Dublin, it would have been invalid if on [that day] Mr Caffin's marriage to [his first wife] was a subsisting valid marriage under the law for the time being in force in the Republic of Ireland [sic]."[227]

Kenny, J. held that since the divorce was recognised here, the first marriage was not subsisting and accordingly that the second wife was entitled to the legal right. He provided no specific analysis of the issue of capacity to marry.[228] The reference to the fact that the marriage took place in Dublin, however, suggests that it was inspired by Article 41.3.3°. What precise relevance this sub-section had to the outcome of the decision is not clear.

Passages from Mayo-Perrott v Mayo-Perrott[229] merit extended quotation, since they raise (although they do not clearly resolve) the question of the exact effect of Article 41.3.3° on the capacity to remarry after a divorce.

O'Daly, J. said:

> "Article 41.3,3°. appears to put in the power of the Oireachtas to define from time to time what marriages dissolved by foreign civil tribunals are to be regarded as valid subsisting marriages under our Law, id est., what foreign civil divorces shall not be recognised as valid."[230]

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227 [1971] I.R., at 127.

228 Cf. North, 378.

229 [1958] I.R. 336 (Sup. Ct.).

230 Id., at 351. See also Gaffney v Gaffney, [1975] I.R. 133, at 150-151 (Sup. Ct., per Walsh, J.).

Kingsmill Moore, J. observed in relation to Article 41.3.3°:

> "The remaining words of Article 41.3, are not without difficulty. They apply only to persons whose divorce in a foreign country is not recognised as effectual by our Courts (e.g. where the divorced persons were not domiciled in that country), and where, therefore, the original marriage is considered to be still valid and subsisting. They say that a person whose marriage is thus considered by the law to be valid and subsisting 'shall not be capable of contracting a valid marriage within that jurisdiction (i.e. our jurisdiction) during the lifetime of the other party to the marriage so dissolved.' The words do not declare that such a person cannot anywhere contract 'a marriage valid within our jurisdiction,' but merely prohibit the contracting within our jurisdiction of a valid marriage. It is the contracting of the second marriage within the jurisdiction which is prohibited. There is nothing to make it invalid if contracted elsewhere.
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> The general policy of the Article seems to me clear. The Constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No person whose divorced status is not recognised by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law that dissolutions of marriage by foreign Courts, where the parties are domiciled within the jurisdiction of those Courts, will be recognised as effective here. Nor does it in any way invalidate the remarriage of such persons. It avoids the anomalous, if not scandalous, state of affairs stigmatised in the passages which I have already cited whereby legitimacy and criminality could be decided by a flight over St. George's Channel [sic]."[231]

This passage provokes the following question. Is Article 41.3.3° designed to modify or to replace the common law rules as to capacity to remarry? This question mirrors the question on which judicial attention has instead concentrated, namely, whether Article 41 modifies or replaces the common law rules relating to the recognition of foreign divorces.

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231 [1958] I.R., at 349-350.

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Although the answer to the question regarding capacity to remarry is not certain, it may be argued that Article 41.3.3° must modify and cannot replace the common law rules. If the sub-section were to be interpreted as replacing the common law rules by a single provision rendering persons who have divorced abroad in circumstances where the divorce would not be recognised here incapable of remarrying here but capable of remarrying anywhere else, regardless of their ante-nuptial domicile at the time of the second marriage, this would have the effect of removing any of the common law requirements for capacity to remarry, provided only that the marriage takes place outside the State. There appears to be no sound policy justification for such an interpretation. It seems more reasonable to interpret the subsection as providing that parties whose divorce would not be recognised under our law have not the capacity to marry here but that in all other respects the common law rules as to capacity to remarry should continue to apply.

It is, of course, possible that the Constitution has an impact on the common law rules, not by reason of the specific terms of Article 41.3.3°, but on account of broader policy norms reflected in Article 41. Thus, for example, it may be that in cases where a person's ante-nuptial domicile would permit a remarriage but the divorce obtained by that person is not recognised under our law, the validity of the second marriage will not be recognised. It may also be the case that, though a divorce is recognised under our law, a subsequent marriage that is invalid by the law of the ante-nuptial domicile by reason of that law's non-recognition of the divorce should result in the marriage also being invalid under our law. In the absence of clear judicial guidance, these and related issues must remain for the moment unresolved.

(iv) Public Policy

It seems clear that our courts should not give effect to a capacity or incapacity under the law of a party's ante-nuptial domicile if to do so would be contrary to Irish public policy.[232] Public policy can thus operate in two

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232 Cf. Dicey & Morris, 303-304, North, 131, the English Law Commission's Working Paper No. 89 and the Scottish Law Commission's Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage,

ways. Our courts should not recognise a foreign incapacity "of a penal or discriminatory nature",[233] such as one based on the grounds of race,[234] caste,[235] or religion,[236] for example, or one that "discriminates against or penalises a particular section of the population".[237] Conversely our courts should (in rare cases) refuse to recognise a foreign capacity to marry which offends our public policy: a "marriage" between persons of the same sex,[238] for example, or one between a brother and a sister,[239] would clearly appear to fall within this category.

It would be wrong to overstate the scope of the operation of public policy in this context: too frequent an application of the concept would serve to defeat the general goals of choice-of-law rules in the private international law of marriage.

Fn. 232 Cont'd.

para. 3.10 (1985), L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 191-197 (1981), Rabel, vol. 1, 265-266, 271-280, 297-307, Stimson, 58-69.

233 English & Scottish Law Commissions, op. cit., para. 3.10.

234 Sottomayor v De Barros (No. 2), 5 P.D. 94, at 104 (1879).

235 Chetti v Chetti, [1909] P. 67.

236 Sottomayor v De Barros (No. 2), 5 P.D. 94, at 104 (1879), Papadopoulos v Papadopoulos, [1930] P. 55.

237 English & Scottish Law Commissions, op. cit., para. 3.10, citing Scott v A.G., 11 P.D. 128 (1886), as explained in Warter v Warter, 15 P.D. 152 (1890).

238 See our Report on Nullity of Marriage, pp. 4-5, 90 (LRC 9-1984).

239 Cf Cheni v Cheni, [1965] P. 85, at 97, Brook v Brook, 9 H.L.C. 193, at 227-228 (1861).

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Consent to Marry

In England "the weight of authority"[240] favours the view that the issue of the reality of a party's consent (as opposed to the form in which that consent is expressed)[241] should be determined by the law of the parties' domicile.

Support for this approach is evident, albeit somewhat opaquely, in the Court of Appeal decision of Apt v Apt,[242] in 1947. In Way v Way,[243] in 1949, Hodson, J. placed some reliance on Apt v Apt when stating that ".... questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made". Hodson, J. considered that, since marriage is "essentially a voluntary union"[244] and since "'consent is an emanation of personality'",[245] it was "therefore .... justifiable and consistent with authority to apply the matrimonial law of each of the parties".[246]

English law, as the law of the petitioner's domicile, was accordingly applied. On appeal to the Court of Appeal (sub. nom. Kenward v Kenward[247]), Evershed, M.R. referred to Hodson, J.'s statement that the issue of the petitioner's

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240 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memberandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.9 (1985).

241 Cf. Apt v Apt, [1948] P. 83 (C.A., 1947).

242 [1948] P. 83, at 88 (C.A., per Cohen L.J. 1947).

243 [1950] P. 71, at 78 (Hodson, J., 1949).

244 Id., at 79.

245 Id., quoting Dr V.R. Idelson, K.C., counsel for the petitioner.

246 Id.

247 [1950] P. 71 (C.A.), noted by Jackson, 14 Modern L. Rev. 77 (1951). The Court of Appeal reversed Hodson, J. on a ground not of present relevance.

consent should be determined by English law, and added: "I assume that that is correct".[248]

In Szechter (orse. Karsov) v Szechter,[249] in 1970, the issue was whether a marriage contracted in Poland by Polish domiciliaries was void for duress. The marriage was a device adopted by the parties to secure the release of one of them from a prison, where she had been confined for "anti-state activities". Sir Jocelyn Simon P. held that Polish law, as the lex domicilii, was the proper law to apply. He quoted[250] the passage from Hodson, J.'s judgment (already mentioned) and referred[251] to Evershed, M.R.'s endorsement in the Court of Appeal.

Some discussion[252] has been provoked by the fact that, although he decided that Polish law applied, Sir Jocelyn Simon made an extensive examination of English law on the subject of duress. Sir Jocelyn Simon explained this on the basis that the expert witness on Polish law had (on account of illness) been able to give evidence only by way of affidavit and that "[i]f a party adduces no evidence, or insufficient evidence, of the proper foreign law, the court perforce looks to English law".[253] He did, however, note that counsel for the Queen's Proctor had not questioned the accuracy of the averment by the expert as to Polish law, which was to the effect that the marriage would be held

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248 [1950] P. 71 (C.A.), noted by Jackson, 14 Modern L. Rev. 77 (1951). The Court of Appeal reversed Hodson, J. on a ground not of present relevance.

248 [1950] P., at 133. Cf. id., at 144 (per Denning, L.J.).

249 [1971] P. 286 (Sir Jocelyn Simon, P., 1970).

250 Id., at 295.

251 Id., at 295.

252 Cf. Cheshire & North, 401, fn. 1, Hartley, The Policy Basis of the English Conflict of Laws of Marriage, 35 Modern L. Rev. 571, at 580 (1972).

253 [1971] P., at 195.

void.[254]

Hartley's comments are worth noting:

> "Even though expert evidence was given that the marriage was void for duress under Polish law it is quite inconceivable that a Polish court under the present regime would hold that the imprisonment by sentence of a court would constitute duress. It was therefore highly unrealistic to say that the marriage was void under Polish law if by this one means Polish law applied by the Polish courts. One also feels fairly confident that if the evidence had been that the marriage was valid under Polish law the court would have declared that public policy required the application of English law. This supposition is strengthened by the fact that the court seemed to be more concerned with considering the validity of the marriage under English law than under Polish law. It is in fact probable that whenever the law of the domicile is less liberal than English law it will be refused application on public policy grounds: one can hardly doubt, for example, that, if under a foreign system mistake as to the identity of the other party, or the insanity of one party, did not invalidate the marriage, public policy would require that English law be applied. The reason for this is that the policy of freedom of consent to marriage has a strong moral content which overrides normal conflict of laws consideration.
>
> If, however, the foreign law is more liberal than English law, public policy will not necessarily be opposed to its application. Thus if the law of the domicile provides that a mistake as to the financial and social standing of the other party is a ground for nullity the courts might be prepared to annul it on

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254 Cf. Feiner v Demkowica (falsely called Feiner), 42 D.L.R. (3d) 165, at 171 (Ont. High Ct. 1973), where, in the absence of acceptable evidence as to the law of Poland, the parties having intended at the time of the marriage to emigrate, and thereafter having done so (although to Canada rather than Israel, which the plaintiff had recorded as his intended destination), Van Camp. J. applied "the internal law of Canada". Although other parts of the judgment suggest that this may be in tune with the "intended matrimonial home" approach, it seems more easily reconcilable with the application of the lex fori.

> that ground. There would certainly be sound policy arguments for doing so: the expectations of the parties would be fulfilled and the legitimate interest of the domicile in the application of its domestic policies upheld."[255]

It is worth noting that in Szechter,[256] Sir Jocelyn Simon adopted Dicey & Morris's suggestion[257] that no marriage is valid if by the law of either party's domicile one party does not consent to marry the other. This approach does not coincide with that favoured by Cheshire & North:[258] in their view,[259] the issue of a party's alleged lack of consent to marry should be determined by reference to that person's ante-nuptial domiciliary law.[260]

Support for the lex domicilii as the relevant law to determine the issue of consent may also be gleaned from the English Court of Appeal's holding in Vervaeke v Smith[261] that the rule in Sottomayor v De Barros (No. 2)[262] applied to determine the validity of a marriage where consent was in issue.[263] The House of Lords, on appeal,[264] made no

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255 Hartley, supra, at 580.

256 [1971] P., at 294-295.

257 8th ed., 1967, p. 271.

258 Cheshire & North, 401.

259 See also Dicey & Morris, 304-305, Morris, 175.

260 Cheshire & North, 401. Cf. Hartley, supra, at 581: "Provided the parties consent by English law, the marriage should be valid unless there is no consent by the law of both parties' domiciles".

261 [1981] Fam. 77, at 122 (C.A., per Sir John Arnold, P. 1980).

262 5 P.D. 94 (1879).

263 See the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.9 (1985).

264 [1983] 1 A.C. 145.

observation on this issue.[265]

It should be noted that in several English cases the lex fori has been applied, without comment, not only where the lex fori coincided with the ante-nuptial domicile of the petitioner[266] or the lex loci celebrationis,[267] but also where neither supporting element was present.[268]

Moreover the lex loci celebrationis has been invoked in

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265 It could perhaps be argued that the issue of a "sham marriage", which confronted the court in Vervaeke, may more easily be regarded as falling within the general scope of capacity to marry (to which Sottomayor v De Barros (No.2) is a qualification) then with the "normal" type of consent case, which raises issues of individual, more than social, dimensions.

266 Hussein, (otherwise Blitz) v Hussein, [1938] P. 159 (Henn Collins, J.), Mehta (otherwise Kohn) v Mehta, [1945] 2 All E.R. 690 (P.D.A. Div., Barnard, J.).

267 Cooper (falsely called Crane) v Crane, [1891] P. 369 (Collins, J.), Valier v Valier (otherwise Davis), 133 L. T. 830 (P.D.A. Div., Lord Merrivale, P., 1925), Hussein (otherwise Blitz) v Hussein, [1938] P. 159 (Henn Collins, J.).

268 H. v H., [1954] P. 258 (Karminski, J., 1953), Kassim (orse Widmann) v Kassim (orse Hassim), [1962] P. 224 (Ormrod, J.), Buckland v Buckland (orse Camilleri), [1968] P. 296 (Scarman, J., 1965).

isolated English[269] and Australian[270] cases as well as in the only Scottish case[271] dealing (obiter) with the question of choice of law for consent.

An attempt has been made by one commentator[272] to spell out the "inarticulated (sic) premises"[273] on which the English courts have been working. In his view, the lex fori is to be applied where the case concerns a party who never intended to acquire the status, in law or reality, of a spouse. A mistake as to the nature of the ceremony or a case of duress would relate to the status in law of a spouse; a "sham marriage" would seek to deny the status, in reality, of a spouse. Where, however, the party did intend to acquire married status, but alleged that true consent was nevertheless lacking, whether because of a mistaken belief as to the legal effects of the marriage or of one as to the attitudes of the other spouse, then the issue should be referred to the law of that party's ante-nuptial domicile.

The policy justification put forward for this distinction is that, since in the case, where the party did not intend to acquire the status of a spouse, the court is acting as a mere fact-finding tribunal, it would necessarily have to apply English law as the lex fori in reaching its decision and there would be no need for it to refer to any other

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269 Parojcic v Parojcic (orse Ivetic), [1958] 1 W.L.R. 1280, at 1283 (P.D.A. Div., Davies, J.). Here the marriage was celebrated in England by two English domiciliaries. Davies, J., in deciding an issue of duress, considered it "plain that the law by which the validity of this marriage is to be tested is English law, the lex loci contractus". Carter, 45 Br. Y. Bk. of Int. L. 406, at 407 (1971) observes that, "[i]f this implies that English law was applicable as the law governing formal validity, it is wrong. If, however, it means that in matters of essential validity, at least so far as marriages celebrated in the forum are concerned, not only the lex domicilii but also the lex loci must be complied with, it is perhaps more readily explicable". See further Webb, Note, 22 Modern L. Rev. 198 (1959).

270 Di Mento v Visalli, [1973] 2 N.S.W.L.R. 199.

271 Di Rollo v Di Rollo, 1959 S.C. 75, at 78.

272 Webb, Note, 21 Modern L. Rev. 198, at 202-204 (1959).

273 Id., at 202.

law.[274] These considerations would not arise in cases where the party did intend to marry but was mistaken as to the effects of the marriage or the qualities of the other spouse.

Impotence[275]

Impotence is a ground of nullity which renders a marriage voidable in Irish law.[276] It consists of a condition of incapacity to have sexual intercourse with the other spouse.[277] This condition must be permanent[278] and must have existed at the time of the marriage.

A refusal by a party to consummate the marriage will not be a ground for annulment, unless the refusal may be traced to "such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation".[279]

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274 Id.

275 See generally our Report on Nullity of Marriage, 48-63, 144-147 (LRC 9-1984), Shatter, 68-75, Binchy, 82-96, Browne, 273-276, Shelford, 201-213, Poynter, ch. 8, Bromley, 83-87, Cretney, 63-72.

276 McM. v McM. & McK. v McK., [1936] I.R. (High Ct., Hanna, J., 1935).

277 McM. v McM. & McK. v McK., supra, S. v S., unreported, Sup. Ct., 1 July 1976 (1-1976), N.F. v M.T. (orse. known as F.), [1982] I.L.R.M. 545 (High Ct., O'Hanlon, J.).

278 Cf. A. v A. sued as B., 19 L.R. Ir. 403 (mat., Warren, J., 1897).

279 G. v G., [1924] A.C. 349, at 367 (H.L. (Sc.), per Lord Shaw). Cf. McM. v McM. & McK. v McK., supra, at 201. In S. v S., supra, Kenny, J. recognised as a ground of annulment a secret intention existing at the time of the marriage, not to consummate the marriage. Griffin, J. evinced little sympathy for this approach but Henchy, J. appears to have accepted that a petition based on this ground would lie if it could be shown that the party refusing to consummate had been aware of his "emotional and sexual capacity" at the time of the marriage. See further Duncan, Sex and the Fundamentals of Marriage, [1979-80] Dublin U.L.J. 29, and our Report on Nullity of Marriage, pp. 44-45.

In other countries, impotence is very frequently a ground for annulment.[280] In some countries,[281] however, it is a ground for divorce.

While the notion of impotence as an incapacity to consummate the marriage is at the base of the ground of impotence in most countries, in some countries a decree of nullity may also be obtained for a wilful refusal to consummate a marriage, whether that refusal is based on incapacity existing at the time of the marriage, a secret intention not to consummate existing at the time or a deliberation occurring after the marriage was celebrated. Where the ground depends exclusively on facts and conditions occurring after the marriage was celebrated, particular difficulties are occasioned for the conflicts of law.

There appears to be no reported decision in the State in which the issue of choice of law for impotence and related matters was considered.[282] The position in other common law jurisdictions is far from clear.

In other common law jurisdictions, support has at various times been given to the lex loci celebrationis, the lex fori and the lex domicilii. Each will be considered in turn. Before doing so, however, it is worth noting that, in

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280 See L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 304-305, 308ff. (1981).

281 In France in certain cases and in some United States jurisdictions: cf. the English Law Commission Working No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.42, fn. 420 (1985).

282 See Bishop, Choice of Law for Impotence and Wilful Refusal, 41 Modern L. Rev. 512 (1978), Jaffey, The Essential Validity of Marriage in the English Conflict of Laws, 41 Modern L. Rev. 38, at 49 (1978), Pålsson, Marriage in Comparative Conflict of Laws, paras. 100, 102 (1981), North, 125-129, Jackson, 326-330, Garner, Jurisdiction and the Choice of Law in Nullity Suits, 63 L.Q. Rev. 486 (1947), Fleming, Note: Choice of Law in Nullity Proceedings, 11 Modern L. Rev. 98 (1948).

England,[283] impotence and wilful refusal to consummate the marriage are often pleaded as alternative grounds for annulment. Thus, when in these cases choice of law is discussed, "there is a tendency to assume that the same choice of law rule applied to both, even though impotence may be regarded as a defect existing at the time of marriage whilst wilful refusal could be classed as a post nuptial defect".[284]

The lex loci celebrationis

The place of celebration of a marriage may have so little connection with the lives of the parties that it seems an odd reference point for choice of law on such an intimate question as impotence or wilful refusal. Nevertheless it has some English support. In Robert (otherwise de la Mare) v Robert,[285] a wilful refusal case, Barnard, J. applied the lex loci celebrationis, primarily[286] on the basis that wilful refusal "must be considered as a defect in marriage, an error in the quality of the respondent".[287] This approach has been roundly criticised. Error "in the quality of the respondent" is not as a general rule, a ground for annulment at all under English common law. Certain statutory grounds for annulment - pregnancy per

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283 And in other jurisdictions where wilful refusal is a ground for annulment: see, e.g. Addison v Addison, [1955] N.I. 1.

284 North, 126. See also Mendes da Costa, Divorce, ch. 7 of Mendes da Costa ed., Studies in Canadian Family Law, vol. 1, 482 (1972).

285 [1947] P. 164 (Barnard, J.), analysed, in respect of choice of law, by Garner, Jurisdiction and the Choice of Law in Nullity Suits, 63 L.Q. Rev. 486, at 489-490 (1947) and by Fleming, Note: Choice of Law in Nullity Proceedings, 11 Modern L. Rev. 98 (1948).

286 Barnard, J. considered that, if he was wrong to apply the lex loci, which was the law of Guernsey, the same result would be reached in applying the lex domicilii, which was also the law of Guernsey.

287 [1947] P., at 167-168.

alium[288] and venereal disease[289] - are, it is true, conditional on there being error as to the situation on the part of the petitioner at the time of marriage;[290] but, as Dicey & Morris note,

> "[t]here is some difficulty in accepting Barnard J.'s view that wilful refusal as a ground for nullity depends upon error, for there is no [statutory] requirement [with respect to wilful refusal] that at the date of the marriage the petitioner msut be ignorant of the facts alleged."[291]

Moreover, even assuming that wilful refusal raised an issue of error - which impotence will clearly do in most cases - the lex domicilii, rather than the lex loci celebrationis, would be the appropriate law to determine the issue.[292]

In the Northern Ireland decision of Addison v Addison,[293] the lex loci was again applied. Lord MacDermott said that he:

> "very much doubt[ed] if the question of capacity to marry which is to be determined by the law of the domicile has to do withmroe than juristic capcity. Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with the nature and quality of those obligations as to be, naturally and aptly, a matter for the lex loci contractus."

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288 Matrimonial Causes Act 1973, section 12(f).

289 Id., section 12(e).

290 Id., section 3(3). See Cretney, 83.

291 Dicey & Morris, 376, fn. 64. See also North, 126.

292 Cf. Dicey & Morris, 376, fn. 64, North, 126.

293 [1951] N.I 1. The House of Lords case of Ross Smith v Ross Smith, [1963] A.C. 280 overruled Addison v Addison on the question of jurisdiction but did not expressly dissent from it in relation to choice of law.

The lex fori

The lex fori has been applied in a number of English cases. In Easterbrook v Easterbrook (otherwise Jervis)[294] and Hutter v Hutter (otherwise Perry),[295] both decided before Robert (otherwise de la Mare) v Robert, the lex fori was applied without discussion, although in each case the husband was domiciled outside England and there was no evidence that wilful refusal was a ground for annulment in the foreign jurisdiction.[296] Foreign law was pleaded in neither case. In both cases the marriage had been celebrated in England; in Easterbrook, both parties had been resident in England at all material times, and in Hutter the respondent was an English national, domiciliary and resident and the petitioner, though a domiciled subject of the United States, was resident in England from the time of the marriage.

In Magnier v Magnier[297] in 1968, an undefended case, the facts were as follows.

The parties were married in Ireland[298] in 1942. Both were

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294 [1944] P. 10 (Hodson, J., 1943).

295 [1944] P. 95 (Pilcher, J.).

296 In Easterbrook, the report states merely that the husband was domiciled "in Canada", and in Hutter the report states that the husband's domicile was "in the United States of America". In Canada, wilful refusal to consummate was not in 1943 (and has not since become) a ground for annulment: cf. Hahlo, Nullity of Marriage, ch. 10 of D. Mendes da Costa, Studies in Canadian Family Law, vol. 2 at 679 (1972), Mendes da Costa, Divorce, id., vol. 1, ch. 7, at 481-482; but refusal to consummate for a period of a year, is a ground for divorce: Divorce Act 1968, section 4(1)(d).

297 112 Sol. J. 233 (P.D. & A. Div., Mais, J., sitting as a special commissioner, 1968).

298 Bishop, supra, at 513, fn. 14, notes that, though the report speaks only of Ireland, "it may be inferred that the Republic is meant since a Northern Ireland marriage would have presented the husband with no difficulty owing to the fact that wilful refusal has been a nullity ground there since 1939".

Catholics. The husband was of Irish birth and domicile and was still resident in Ireland when he brought proceedings for nullity of marriage in England, on the gorund of the wife's impotence or wilful refusal to consummate the marriage. The short report does not indicate the wife's nationality of domicile.

After the parties had married, the wife "steadfastly"[299] refused her husband's request for sexual intercourse, saying that she did not wish to have children. After two years the husband ceased to ask her to have intercourse with him. Shortly afterwards the wife left Ireland and went first to the United States and finally to England, where she was resident at the time of the proceedings, which she did not defend.

Judge Mais was satisfied that there was "abundant authority"[300] grounding jurisdiction and unhesitatingly applied the lex fori without prior analysis. He did, however, acknowledge that doing so "resulted in a situation where a party to a marriage who was domicile and resident in a foreign country could obtain a decree of nullity against the other party in the country of that other party's residence, but that decree might only be recognised in the country where it was granted and might not be binding on the courts of the petitioner's residence and domicile. That would bring into effect a 'limping divorce' whereby the respondent could re-marry but the petitioner could do so only at his peril".[301]

Finally, it may be noted that the House of Lords case of Ross Smith v Ross Smith[302] contains some leanings towards the lex fori. Dicey & Morris note[303] that in this decision

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299 112 Sol. J., at 233.

300 Id.

301 Id. Cf. Bishop's caustic observations, 41 Modern L. Rev., at 513.

302 [1963] A.C. 280.

303 Dicey & Morris, 377.

Lords Reid[304] and Morris[305] both gave as one of their reasons for declining jurisdiction the undesirability of granting relief on grounds unknown to the law of the parties' domicile:

> "This could be taken to imply that, had jurisdiction not been declined, the lex fori would have been applied."[306]

The lex domicilii

There is much support for the lex domicilii as the test for wilful refusal in English cases. In Robert (otherwise de la Mare) v Robert,[307] Barnard, J. was willing to fall back on the lex domicilii if his preference for the lex loci should prove to have been mistaken. In Way v Way[308] Hodson, J. favoured "the law of the matrimonial domicil" as the one appropriate to determine the question of wilful refusal. Way has been stigmatised as constituting "support of the weakest sort"[309] for the application of the law of the husband's domicile: counsel had not argued the point and there is no trace of the judgment of Barnard, J. in Robert (otherwise de la Mare) v Robert,[310] having been cited.[311] Nevertheless Hodson, J.'s judgment, in the opinion of Sachs, J. in Ponticelli v Ponticelli (otherwise Giglio),[312] retains "considerable persuasive force"

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304 [1963] A.C., at 306.

305 Id., at 313, 322.

306 Dicey & Morris, 377.

307 [1947] P. 164.

308 [1950] P. 71 (Hodson, J., 1949), reversed on other grounds, sub nom. Kenwood v Kenwood, [1951] P. 124 (C.A., 1959).

309 Bishop, supra, at 515.

310 Supra.

311 Ponticelli v Ponticelli (otherwise Giglio), [1958] P. 204, at 212 (Sachs, J.).

312 Id.

especially since Hodson, J. extra-judicially[313] rejected the argument, favoured in Robert (otherwise de la Mare) v Robert, that the lex loci should apply.

In Ponticelli,[314] Sachs, J. also favoured the lex domicilii although, in view of the coincidence between the lex domicilii and lex fori on the facts of the case, it was "not .... essential .... to come to a final conclusion as between the two".[315] Sachs, J. was certain that wilful refusal could "not be said to fall within the categories of form and ceremony".[316] The choice, in his view, was between the lex domicilii and the lex fori. The claim of the lex fori was based on the view of the ground of wilful refusal as "something akin to matters for which the true remedy is divorce".[317]

But against this could be marshalled the robust repudiation by Denning, L.J. in Ramsay-Fairfax (orse Scott-Gibson) v Ramsay-Fairfax.[318] Moreover, the authorities were, on

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313 In his Introduction to the 1st edition of Jackson, in 1951: cf. Ponticelli, supra, at 212.

314 [1958] P. 204, analysed by Webb, 21 Modern L. Rev. 416 (1958).

315 [1958] P., at 216.

316 [1958] P., at 214.

317 Id.

318 "No one can call a marriage a real marriage when it has not been consummated; and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it quite plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution ...." [1956] P.115, at 132 (C.A., 1955). Lord Denning, L.J. was speaking in the context of jurisdiction. It is interesting however, to note that, at trial, Willmer, J. had observed that "the proper law, i.e., the law of the domicile" ([1956] P., at 125) should be applied. See further Cheshire & North, 402, Matheson & Webb, A Note on the Recognition of Foreign Decrees of Nullity Granted to Scots Domiciliaries [1962] Jurid. Rev. 21, at 22-23, E. Clive, The law of Husband and Wife in Scotland, 111 (2nd ed., 1982).

balance, in favour of the lex domicilii.[319]

Sachs, J. considered it:

> "surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony to which a uniform general rule applies, be consistently decided according to the law of one country alone .... and that consistency cannot be attained if the test is the lex fori."[320]

Sachs, J. observed that the lex domicilii "normally coincides with the law pertaining to the country of the husband's domicile at the time of the marriage".[321] The reliance by Sachs, J. on the husband's domicile is, of course, out of harmony with contemporary notions of sex equality.[322]

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319 Cf. [1958] P., at 215, referring to Barnard, J.'s fall-back position in Robert (otherwise de la Mare) v Robert, to Way v Way, and to the judgments of Lord Greene, M.R. and Bucknill, L.J., in De Reneville v De Reneville [1948] P. 100, which, Sachs, J. considered, "clearly tend against the applicability of the lex fori". Cf. [1958] P., at 213.

320 [1958] P., at 215-216.

321 Cf. id., at 214.

322 See Bishop, supra, at 515. See also our Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, ch. 4.

CHAPTER 3 PROPOSALS FOR REFORM

Formal Requirements for Marriage

We must now consider what law or laws should be applicable to determine the formal requirements of marriage. There has been no criticism of the present general preference for the lex loci celebrationis, and there is much to be said in its favour. It offers a clear and simple rule, which encourages certainty, predictability and uniformity of result.[1] It is an easy and appropriate one for the parties to the intended marriage to fulfil.[2] If they choose to marry in a foreign country, they can normally find out the formal requirements of that country's law without any great difficulty.[3] As against this, there have been instances where Irish people married abroad in apparent ignorance of the formal requirements of the foreign law: the "Lourdes marriages" cases, as we have seen, required retrospective validating legislation.[4]

We are satisfied that the lex loci celebrationis should continue to afford the test for formal validity as a general rule. Later in the chapter we will examine whether it should be supplemented by any other law.

So far as determining which country is the "country of celebration", we consider it better for the courts to develop the law on this question than for the legislation to attempt to set out detailed rules.[5]

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1 Cf. the English Law Commission Working Paper No. 89 and Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 2.36 (1985).

2 Cf. id.

3 Cf. id.

4 Marriages Act 1972, section 2.

5 The English and Scottish Law Commissions took the same view: op. cit., para. 2.38.

When we speak of the lex loci celebrationis, should we refer only to the internal law of the place of celebration or should the term embrace the whole law of the place of celebration, including its choice of law rules?

The argument in favour of the internal law alone is that it would offer a simpler solution. The formal requirements of a country's internal law frequently are set out in clear statutory terms, and they must be widely known so that they can be applied for all marriages by marriage officials. Choice of law rules may be less easy to ascertain; they may depend on judicial decisions rather than broadranging statutory provisions; the relevant legal principles may be undeveloped and the decisions may be conflicting to a greater or a lesser extent. Moreover, it may prove very difficult for other countries to master the complex choice of law rules of particular countries, and the task could involve additional delay and cost in litigation.[6]

In favour of referring to the whole law of the place of celebration two important arguments have been made. First, it "would tend to promote greater uniformity of status".[7] One commentator[8] has observed that the acceptance of this approach would:

> "tend to relax the imperative nature of the rule locus regit actum and thereby also to bring about a certain rapprochement to those countries whose conflicts systems admit a choice between the lex loci and the personal law."

Moreover, this approach would give support to the favor matrimonii principle. As the English and Scottish Law Commissions have noted:

> "If the law of the country of celebration allows people the choice of following its own civil law or the forms

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[6] Cf. the English and Scottish Law Commissions' Working Paper and Consultative Memorandum, op. cit., para. 2.39.

[7] Id.

[8] Pålsson, International Encyclopedia of Comparative Law, vol. 3, p. 30.

> of their personal law, it would be unreasonable to hold a marriage invalid merely because the parties had availed themselves of this privilege."[9]

On balance we consider that it would be more desirable for reference to the lex loci celebrationis to be to the whole law of that country rather than to its internal law alone.

We must now consider whether it should be sufficient for the parties to comply with either the internal law or the choice of law rules of the lex loci celebrationis. If it were sufficient then, of course, the parties would be able to have the validity of their marriage recognised even where it was celebrated in defiance of the relevant law prescribed by the lex loci celebrationis; "[i]n other words, renvoi c[ould] only be used to validate a marriage, never to invalidate it".[10]

The advantage of this approach based on alternative references is that it gives effect to the favor matrimonii principle, but it does so at the expense of creating limping marriages. The English and Scottish Law Commissions have observed that:

> "[i]n principle, the relevant question in any given case should be whether the formalities prescribed by the law of the country of celebration have been complied with for that case; and there would seem to be something odd in upholding a marriage on the ground that it complies with the law of the foreign country of celebration when the courts of that country would regard the marriage as void."[11]

The English and Scottish Law Commissions also consider that there would be

> "something odd in distinguishing between the case where the law of the country of celebration itself contains special rules for the marriage of foreigners (in which

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[9] Op. cit., para. 2.39, citing Clive, 148.

[10] Op. cit., para. 2.41.

[11] Id., para. 2.42.

> case compliance with the rules of non-foreigners would not suffice) and the case where the country of celebration provides special rules for foreigners by reference to some other system (in which case compliance with the rules for non-foreigners would suffice). It does not seem satisfactory to make the validity of a marriage depend on the form which a special rule for foreigners happens to take in the country of celebration."

We are not convinced by the argument that parties should be entitled to refer to a particular law (the internal law) which the lex loci celebrationis expressly excludes from application by prescribing choice-of-law rules and we recommend that the legislation should contain no such rule. It remains true, of course, that the internal law may be easier for the parties to establish, but that is not a sufficient reason, in our view, to justify reference to the internal law as an alternative to the law prescribed by the choice of law rules.

We must now consider the argument that a different alternative reference should be made: that a marriage should be valid if it complies with the requirements of either the lex loci celebrationis (including its choice of law rules) or of the personal law of the parties. That personal law may be based on nationality, domicile, habitual residence or other factors. As we have seen, such a rule of alternative reference prevails in several countries, including the Federal Republic of Germany and France, where it is modified to the extent that it does not apply where the marriage is celebrated within the area of the forum.

Before we consider the merits of this general approach, it is worth noting that the English and Scottish Law Commissions summarily dismissed[13] its possible application (using domicile as the relevant personal law)[14] without a modification of the lines favoured in the Federal Republic of Germany or in France.

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[12] Id., para. 2.42.

[13] Id., para. 2.44.

[14] It should be noted that nothing hinges on the use of domicile, rather than nationality or habitual residence, for example, as the relevant personal law in this context.

They said:

> "There would seem to be little room for the view that a truly alternative rule should be adopted in this country. To allow compliance with the forms of the law of the domicile would enable foreign domiciliaries to marry here to evade the mandatory formal requirements imposed by our marriage legislation."[15]

They noted that Britain's domestic rules as to form

> "are, in part, designed to protect the public interest: clandestine marriages must be prevented and valid marriages must be properly recorded. This would be jeopardised if foreign domiciliaries were permitted to marry in a private ceremony according to their personal laws. The matter is of some importance since the validity of marriage can affect matters such as immigration, citizenship, income tax liability and social security benefits. The general public policy nature of our marriage laws has been emphasised by the House of Lords in Vervaeke v Smith.[16]"[17]

We see the force of this argument, but we doubt if the issue is so simple. It is no doubt true that the unmodified rule "would enable foreign domiciliaries to marry here to evade the mandatory formal requirements imposed by our marriage legislation" but the reference to evasion might give the impression that fear of evasion constitutes a primary objection to the unmodified rule. In fact there is no reason to believe that, so far as formal requirements[18] for marriage are concerned, evasion would be a substantial social problem. Of course, if the Commissions when referring to evasion merely advert to the fact that the

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15 Op. cit., para. 2.44.

16 [1983] 1 A.C. 145, esp. at 152-153 (per Lord Hailsham of St Marylebone, L.C.).

17 Op. cit., p. 37, fn. 125.

18 Parental consent requirements have raised particular problems of classification in common law jurisdictions. These are considered later in the Report.

parties will be permitted not to comply with the internal law, this of course follows inevitably from the unmodified rule.

Let us attempt to address the central policy issue raised by the unmodified rule. The formal requirements of marriage prescribe rules as to the degree of external societal manifestation and control which there must be of the parties' commitment to marry one another. As we have seen,[19] prior to the Millis[20] decision in 1843, the better view was that a valid marriage might be contracted by the parties themselves without the necessity of being in the presence of a clergyman or registrar of the marriage as a precondition of validity. This type of "common law marriage" is still part of the law of a number of countries today.

Can it be said that the policy of Irish law is so opposed to this type of marriage that it would be undesirable to require our courts to recognise as valid such a marriage taking place here where it is valid according to the personal law of the parties?

On balance we consider that it would be undesirable to give effect to the unmodified rule. It would tend to interfere with the administration of the forum's policy of requiring due publicity and ceremony for marriages. It could, moreover, cause uncertainty and confusion in some cases, although it would not be wise to overstress this difficulty, since under existing law, a "common law marriage" contracted (or, perhaps, recognised as formally valid)[21] in a foreign jurisdiction will be recognised as valid here. Thus, some of the practical inconvenience in establishing whether there has been a "common law marriage" already is part of our law.

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19 Supra, p. 32.

20 10 Cl. & Fin. 534, 8 E.R. 844 (1843).

21 On this assumption, it is worth noting in this context that, in cases where the lex loci celebrationis contains choice of law rules recognising marriages (including "common law marriages") contracted according to the parties' personal law, then the practical and administrative difficulties for our law apply in respect of such marriages already.

Having come to the view that the unmodified rule is too troublesome to command acceptance, we must now consider whether the modified rule (as in the Federal Republic of Germany or in France, for example) should be introduced into our law. The advantages of the modified rule include its support for the favor matrimonii principle, and its convenience for the parties.[22]

But the price would be the creation of limping marriages and the creation of the opportunity for the parties to avoid complying with the mandatory formal requirements of the lex loci celebrationis (where that law does not include a choice of law rule permitting reference to the parties' personal law).[23] In this context it is worth recording the English and Scottish Law Commissions' observation that:

> "[c]onsiderations of international comity indicate that we should recognise the strong and legitimate interest of the foreign country of celebration in the application of its own normal requirements to marriages celebrated within its borders, particularly when we ourselves insist upon compliance with our own standards in respect of marriages celebrated here."[24]

The modified rule would, moreover, involve enhanced complexity, since instead of having to refer merely to the lex loci celebrationis, it would be necessary also to refer to the parties' personal law. Where the personal law of one party was different from that of the other, the position could become still more complicated.[25] We appreciate the force of this argument but it should be borne in mind that, under existing law some of these difficulties may arise, if reference to the lex loci celebrationis includes a reference to its choice of law rules.

One social factor should be considered in this context. In a number of countries it is necessary to marry in a secular, civil form of marriage; a marriage celebrated according to

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[22] Cf. op. cit., para. 2.46, sub-para. (a).

[23] Cf. id.

[24] Id.

[25] Id., para. 2.46, sub-para. (e).

religious rites will be invalid (and, in certain instances, when contracted before the civil ceremony, will involve the parties or the clergyman in the commission of a criminal offence). Reference to the personal law of the parties as an alternative to the lex loci celebrationis may save the validity of such a religious marriage.[26]

Thus, the "Lourdes marriages" problem might not have arisen for Irish private international law if this law had

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[26] Cf. id., para. 2.45, citing Wolff, 342-343:

> "The most serious objection to the imperative character of the rule is in the lack of consideration it shows for the couples belonging to the Roman Catholic or the Orthodox church. Both churches treat a marriage between Christians concluded without the assistance of a priest as a nullity, as a mere concubinage. In their view the religious ceremony is not a mere 'form' but belongs to the essence, to the soul of the sacrament. The codex iuris canonici speaks with a certain scorn of the civil marriage as 'matrimonium civile ut aiunt', and sincere adherents of the Roman or the Eastern church must regard a civil contract concluded before a civil registrar, usually in a business-like fashion, as an act of irreverence to the Holy Sacrament. The ecclesiastical view has become state law in the Citta del Vaticano, in Malta, in Bulgaria, Yugoslavia, Greece, and other eastern countries. All the objections that in the sphere of municipal law can be offered to the compulsory civil form of marriage can be raised in private international law to the imperative rule of the lex loci celebrationis. It is, however, easy to understand that a country which has adopted the strict rule in municipal law is likely to adopt the similar, strict conflict rule. It is difficult on the other hand, to explain why England, a country which in internal law wisely refrains from accepting the narrow French-German principle and allows a certain, though limited, number of religious marriage forms, does not adopt an equally liberal attitude in the field of private international law. Here English law even surpasses the French-German rule in stringency. While France and Germany recognise marriages concluded outside their respective territories in the forms of the personal law of the parties, England insists on the compulsory nature of locus regit actum even in such cases."

permitted an alternative reference to the personal law of the parties.

We do not consider that the specific question of religious marriages would justify the establishment of an alternative reference to the personal law. Most countries which require a civil mode of contracting marriage do not prevent the religious celebration of marriage,[27] provided (in some countries) that the civil mode takes place before the religious ceremony. There is not, in our view, a problem of such serious dimensions as to call for the establishment of an alternative reference to the personal law.

Accordingly, we recommend that, save to the extent that renvoi may come into operation, reference to the lex loci celebrationis should not also include a reference to the personal law of the parties.

Exceptions to the Lex Loci Rule

(1) The Common Law Exception

We must now consider what changes, if any, should be made to the present common law exception of the lex loci rule. To some extent, the issue is made more difficult by reason of the uncertainty surrounding the scope of the exception under present law.

But rather than refer the question for all affected persons of every nationality and residence to the English common law in circumstances where this would be done at present, we think that instead it would be more desirable for the law in such cases simply to provide that a marriage would be formally valid if the parties each undertake thereupon to become man and wife. We are not attracted by the argument that reference should be made to the formal requirements of the parties' personal law (such as domicile, nationality or habitual residence). Such a reference would in our view place undue and impractical demands on many prospective spouses.

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[27] Op. cit., para. 2.46, para. (c).

(2) Consular Marriages and Marriages by Members of the Defence Forces

We do not consider that there is a sufficient social need to justify the establishment of special legislative provisions providing for consular marriages abroad or for marriages by members of the Defence Forces. We have no evidence that any hardship or injustice of any significant extent results from the absence of this legislative machinery.

Should Recognition be Denied to Marriages Contracted in a Country with the Intention of Evading the Formal Requirements of the Personal Law?

We must now consider whether recognition should be denied to marriages contracted in a particular country which the parties have selected in order to evade the formal requirements of their personal law.[28]

In most countries the lex loci principle applies even in cases of evasion.[29] This is clearly so in most common law

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[28] Whether that "personal law" be based on the domicile, habitual residence or nationality of the parties or on some other criterion need not be investigated now.

[29] Cf. L. Pålsson, Marriage and Divorce in Comparative Conflict of Laws, 192 (1974):

> "The recognition of marriages contracted in local form abroad is generally not made subject to any condition of the parties having had any real connection, by domicile, habitual residence or otherwise, with the country of celebration. Even if the parties went abroad for the very purpose of avoiding the formalities prescribed by their personal law - for example, because they thought those formalities repugnant to their religious convictions or too burdensome to comply with - returning to their home country immediately after the celebration, this is usually regarded as immaterial and will not prevent recognition of the marriage as formally valid in that country. True exceptions from this rule are rare."

jurisdictions;[30] it is also the general rule in civil law jurisdictions, but in France the concept of fraude à la loi plays a limited (and much debated) role in restricting recognition in cases of deliberate evasion.[31]

In theory the doctrine of evasion should have some advantages. For why should parties be permitted without any control to flout the policy of their own personal law on matters of form? If, for example, a country does not allow parties to contract a common law marriage within the boundaries, why should it be obliged either to recognise such a marriage contracted outside its boundaries or else to fall back on public policy in denying it recognition?

On balance, however, we do not consider it desirable to introduce a qualification denying recognition to marriages contracted in circumstances where the parties seek to evade the formal requirements of the personal law. If the lex loci celebrationis is as a general rule preferable to the personal law to determine the formal requirements (for reasons we have already mentioned) then this policy should, in our view, not be set aside merely because the parties who avail themselves of the rule do so with some satisfaction that the personal law will not apply. We agree with the statement of one commentator in this context that:

> "a doctrine of evasion, insofar as the formalities of marriage are concerned, is of more harm than good. Such doctrines, involving a subjective test of intention, are notoriously difficult to delimit and handle in practice and may easily lead to arbitrary results. Indeed, if the forum has no objection to the foreign form of marriage as such, so that recognition of it does not fail under the head of ordre public, it seems vain to refuse to recognise it merely because the choice of that form was intentional and involved evasion of some other, in the circumstances more 'legitimate', form."[32]

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[30] See Morris, 153:

> "The Gretna Green cases and Simonin v Mallac [2 Sw. & Tr. 67, (1860)] make it plain that English law has no common law doctrine of evasion of law, or fraude à la loi as the French call it."

[31] Cf. Pålsson, supra, 195-200.

[32] Pålsson, supra, 201.

Capacity to Marry and Choice-of-Law Rules in Relation to Marriage: Proposals for Reform

In this section we consider how the law relating to capacity to marry and choice-of-law rules in relation to marriage should be reformed. At the outset we should refer to the fact that these two issues have tended to be treated separately, to the detriment of a cohesive legal policy on the subject as a whole. In our analysis of the subject we strive to bring together the two questions, since we consider this approach will tend to encourage a simpler and more consistent approach.

Criticisms of the Present Law as to Capacity to Marry

Several criticisms may be voiced in relation to the present law as to capacity to marry. The very uncertainty as to what test applies is, of course, a source of criticism, although perhaps this can be attributed more to the paucity of modern case-law than to any inherent problem of principle. If we assume that the dual domicile test applies, it may be criticised for "lean[ing] too heavily in favour of invalidity"[33] since in cases where the domiciliary laws of the parties differ as to the validity of a marriage, at all events one celebrated abroad,[34] on a matter of capacity, the marriage will not be regarded as valid.

Nor has the test of the intended matrimonial home escaped criticism. We shall be examining these criticisms in greater detail later, but it is worth noting at present that the major objection to it is its uncertainty in practical application.

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[33] English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, para. 3.15, referring to Hartley, 35 Modern L. Rev. 571, at 578 (1972).

[34] Assuming that the rule in Sottomayor v De Barros (No.2), P.D. 94 (1879) is applicable. For criticisms of the rule, see Dicey & Morris, 202, Cheshire & North, 342, Morris, 163-164.

Options for Reform

If the present law is less than perfect, the question arises as to what approach would be better. We will consider a number of possible options in turn.

(a) The lex fori

The lex fori is, of course, simple to apply, and readily accessible to the court and to the parties' lawyers. It has, moreover, an important role in respect of refusing to recognise a foreign capacity or incapacity on the ground of public policy.[35]

Nevertheless, the drawbacks associated with the application of the lex fori in this context make it a most unsatisfactory option in our view. It promotes limping marriages, encourages forum shopping, and makes it impossible at the time of the marriage to know whether the marriage is valid or invalid, since the parties "cannot predict what is to be the future forum with whose law they must comply".[36]

(b) The lex loci celebrationis

We must now consider whether the law of the place of celebration would offer an appropriate test, whether in its own right or as one of a number of tests. As we have seen,[37] this test was formerly applied, when the courts drew no distinction between validity as to form and as to capacity respectively; this approach continues to apply as the basic rule in the United States, in most countries of

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35 Cf. supra, pp. 68-69.

36 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.19 (1985).

37 Supra, p. 47.

Latin America and other countries including Denmark and South Africa.[38]

The principal advantages of choosing the law of the country of celebration are its simplicity and clarity and the fact that it promotes the policy of upholding the validity of marriage, since marriages which do not comply with the lex loci celebrationis would be prohibited. The English and Scottish Law Commissions note, in support of the lex loci rule, that,

> "[i]t provides a clear, certain and simple solution, which would work easily in practice. It would be convenient for the parties since they can have recourse to the law of the place where they are at the time of the ceremony and easily seek, and rely upon, local legal advice: for legal advisers who can advise with certainty on the law with which they are most familiar; for marriage officials who will be relieved of the burden of examining foreign laws to see if parties have capacity; and for the courts since only one law[39] will need to be considered; and this would also have the important result of reducing the cost of litigation. Any problem of characterisation which may now arise because formal and essential validity are governed by different choice of law rules would disappear; and so would the problem of identifying the applicable law where two separate personal laws are involved. All these factors contribute to a rule which would be certain in its operation and predictable in its results."[40]

Nevertheless, although the Commissions concede that the lex loci may have some role to play in matters of capacity, they suggest that "we ought not to turn the forensic clock back

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[38] Cf. Rabel, vol. 1, p. 264, Scoles & Hay, 421, Leflar, 533.

[39] The Commissions, op. cit., para. 322, p. 76, fn. 244 note that at present three laws may need to be proved and considered where a marriage has been celebrated abroad: the separate laws of the parties' antenuptial domicile (under the dual domicile test) and, possibly, the law of the place of celebration.

[40] Op. cit., para. 3.22.

some 120 years"[41] by reverting to the lex loci as the basic applicable law for issues of capacity. The Commissions set out four main objections to the lex loci rule:

> "(a) The most serious objection to such a rule is that it would enable the parties to evade the restrictions imposed on them by their personal law,[42] i.e., the law of the country to which they belong and which has a more enduring concern with their marital status than the country of celebration, which may have a fortuitous or transient connection with the issue: the parties may never before have visited that country and may never again visit it.
>
> (b) The distinction between form and capacity is right in principle. Even though the distinction may give rise to problems, for example, of characterisation, it seeks to accommodate the proper interests of the legal systems concerned with the marriage - the law of the country of celebration in relation to formalities, and the personal law in matters of essential validity.
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> (c) In most countries including almost all countries in the Commonwealth and Western Europe, the essential validity of a marriage is governed by the parties' personal law(s). In general this distinction between formal and essential validity works satisfactorily in practice; to abandon it and adopt the lex loci rule would result in more limping marriages.

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[41] Op. cit., para. 3.23.

[42] In a footnote (op. cit., para. 3.23, p. 77 fn. 248) the Commissions state:

> "The main policy consideration underlying the present division between formal and essential validity is that of preventing the evasion of the essential requirements of the domiciliary law. 'It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions': Brook v Brook, 9 H.L.C. 193, at 212 (per Lord Campbell, L.C., 1861)."

(d) If the lex loci rule were to be adopted in this country it would clearly be necessary to devise exceptions to deal with the problem of evasion.[43] The public policy safeguard, which is at present invoked only in exceptional circumstances, would have to be given a much wider scope, thereby largely depriving the rule of its advantages of certainty and predictability."[44]

So far as considerations (a) and (d) are concerned, it is worth looking at experience in the United States in relation to evasion. The Uniform Marriage Evasion Act,[45] first approved in 1912, had provided:

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

2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."

The Act was fully adopted in only five states.[46] Eleven

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[43] This matter is considered on pp. 100-103.

[44] Op. cit., para. 3.23.

[45] See Scoles & Hay, 437, Fine, The Application of Issue-Analysis to Choice of Law Involving Family Matters in the United States, 26 Loyola L. Rev. 31, at 37-38 (1980), Taintor, Marriage in the Conflict of Laws, 9 Vaud. L. Rev. 607, at 629-630 (1956), Storke, The Incestuous Marriage - Relic of the Past, 30 U. of Colo. L. Rev. 473, at 484-485 (1964).

[46] Illinois, Louisiana, Massachusetts, Vermont and Wisconsin: Storke, supra, at 484.

other states adopted portions of it.[47] The Act was introduced at a time when the policy among states of counteracting evasion was strong.[48] But as this policy weakened the Act became more of a hindrance than an advantage.[49]

Accordingly, the Act was withdrawn in 1943. The Uniform Marriage and Divorce Act takes the opposite approach. Section 210 provides that:

> "[a]ll marriages contracted .... outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State."[50]

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47 Scoles v Hay, 437, Taintor, supra, at 629-630. Storke, supra, at 485 refers to nine States and the District of Columbia.

48 Taintor, supra, at 629, fn. 116.

49 Cf. id., citing [1943] Handbook National Conf. Comm'n Uniform State Laws, 64:

> "The Uniform Act can be effective only if it has widespread adoption; otherwise it merely tends to confuse the law."

50 It is interesting to contrast the approach of the American Bar Association Family Law Section. In its Draft of a Proposed Revised Uniform Marriage and Divorce Act, submitted on 9 November 1972, the Family Law Section proposed that section 210 should be accepted but with the addition of the following proviso:

> "except that a marriage contracted outside the State or an incident thereof may be denied recognition if the marriage violates a strong public policy of this State."

The Family Law Section considered that, without this proviso the section might be construed "to force recognition of brother-sister marriages or polygamous marriages. Moreover, all states that have faced the problem insist upon the 'strong public policy' exception; and the same is true of foreign countries": 18 S. Dak. L. Rev. at 696 (1973).

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Taintor attacks the policy of evasion statutes in strong terms:

> "It is improper for a court, unless compelled by an express statute, to give any effect to a subjective intention to avoid the application of a statute forbidding a particular kind of marriage.[51] Intention to evade may be material in a prosecution for marrying outside the state in violation of a statute, but is immaterial to a decision that the marriage is valid or void. A miscegenous, incestuous or progressively polygamous marriage is odious or not, depending on the strength of public policy. It is no less odious because the parties did not know of the prohibition and did not leave the state for their ceremony in order to get out from under the prohibition. A marriage which, without the intention to evade, is not sufficiently against public policy to demand a declaration of its nullity does not become more odious if it is entered into with the intention of avoiding the prohibition.
>
> Finally, it is impossible to 'evade' any law. One can avoid the application of one rule of law by invoking another, but he cannot evade the first.
>
> > 'We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When the act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.'[52"53]

Taintor's main point is a useful one, but it is far from self-evidently correct. It is one thing for our law to

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[51] The earlier Massachusetts opinions read into the first section of the Uniform Marriage Evasion Act a requirement of the subjective intention to evade the marriage law. See, e.g., Atwood v Atwood, 297, 8 N.E. 2d 916 (1937). But the later opinions considered only the intention to return and reside in the state. See e.g. Levanosky v Levanosky, 311 Mass. 638, 42 N.E. 2d 561 (1942).

[52] Mr Justice Holmes in Bullen v Wisconsin, 240 U.S. 625, at 630 (1916).

[53] Taintor, supra, at 630.

accept the realities of life in another state, whose law does not offend against public policy but which nonetheless is significantly at variance with the law of (say) the parties' domicile. But it is another thing entirely to permit persons to evade the policy of the law of their domicile and seek out a law which is not really "theirs" for the purpose of evasion. It seems quite legitimate to refuse to recognise the effects of this type of conduct. Whether this would be a prudent approach is a separate question.

The third of the English and Scottish Law Commissions' objections to the lex loci (contained in paragraph (c) of para. 3.23) correctly refers to the fact that accepting the lex loci would inevitably result in limping marriages, but it is not clear that to do so would necessarily result, as they state, in more limping marriages. It should be noted that many Continental European countries refer to the nationality, rather than the domicile, of the parties. In some cases under existing English law, therefore, limping marriages will exist, where the domicile and nationality differ. To substitute the lex loci would of course, create newly limping marriages (for most common law countries, which also apply domicile as the personal law); it would also create newly limping marriages, so far as many Continental European countries are concerned, in cases where the nationality and domicile coincide but the nationaltiy and lex loci do not; but conversely in cases where the nationality and lex loci coincide, but the nationality and domicile do not, accepting the lex loci rule would have the effect of reducing limping marriages.

As a general point with regard to the limping marriages, it is perhaps useful to repeat[54] with a sense of regret matched by a sense of realism, that as long as social norms as to marriage differ from country to country, there will be limping marriages. Our private international law, of itself, cannot remove these differences; all it can seek to do is prescribe rules (in the present context relating to choice of law) which are designed so far as possible to avoid creating unnecessary differences of marital status between the laws of different countries. But even this

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[54] Cf. supra, p. 3.

more modest goal is itself subject to further constraints. First, the aim of reducing limping marriages should not be permitted to come in the way of other, more basic, aims relating to justice or social policy. Thus, for example, our law should rightly reject rules of marriage based on racial discrimination even though the effect will be to create limping marriages. Secondly, of the nature of the present state of private international law of marriage, every criterion for capacity will necessarily result in some limping marriages: simply to select a criterion will thus be to decide that certain marriages will become limping ones. When confronting this reality we should of course, attempt to examine the probable implications for limping marriages that any particular criterion may have. Weighing these implications is no easy task. To take a hypothetical, but far from entirely theoretical issue, if one particular criterion is likely to have the effect of rendering marriages in other common law countries limping, so far as our private international law is concerned, is that a reason in itself for treating it with less favour than a criterion whose likely effect would be to create limping marriages in civil law countries?

To what extent should we give priority to concerns about Irish people living abroad, or conversely to the law of countries such as China, India and Pakistan with large populations but relatively small connections with this country so far as numbers of people from these countries live or work in Ireland (and vice versa)?

Two final points may be noted about limping marriages. First, even if two countries have the same choice of law rules for capacity there is no guarantee that the factual determination of marital status in each country will be the same. Secondly, it would perhaps be unwise to regard the fate of being a limping marriage as of equal practical significance in every case. In many instances in the context of the lives of the parties concerned, the fact that their marriage is limping (let us assume, between two countries) will not impinge at all into the reality of their lives, simply because they have no practical connection with the application of the private international law of one of these countries.

Returning to the objections against the lex loci made by the English and Scottish Law Commissions, we agree with the thrust of the argument set out in sub-paragraph (d) of para. 3.23. Introducing a provision to deal with intended evasion of the law would certainly go some way towards depriving the lex loci rule of its advantages of certainty

and predictability. But this falls well short of being a very serious criticism for a number of reasons. First, domicile may require the most intensive scrutiny of the most intimate and inaccessible details of a person's life, yet this has not proved a sufficiently strong reason so far for rejecting domicile as a test for capacity in many countries. On way of preserving a high degree of certainty and predictability would be to require a minimum period of residence before and/or after the marriage. This would go some way towards reducing the risk of evasion but it would not root it out entirely.

Having examined the strengths and weaknesses of the lex loci celebrationis, we have come to the conclusion that, whether on its own or qualified by certain exceptions, it would not, on balance, offer a satisfactory test by which the capacity to marry should be determined.

(c) The Test of the "Most Real and Substantial Connection"

We must now consider whether capacity to marry should be determined by the law of the country with which the marriage has the "most real and substantial connection". This test has received some support in English nullity cases[55] although it no longer commends itself to British legislators[56] or law reform agencies[57] as a test for matrimonial causes in general.

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55 Cf. Vervaeke v Smith, [1983] 1 A.C. 145, at 166 (H.L. (Eng.) per Lord Simon of Glaisdale), and Lawrence v Lawrence, [1985] 1 All E.R. 506 (Lincoln, J.) (though not on appeal to the Court of Appeal: [1985] 2 All E.R. 733).

56 Cf. the Recognition of Divorces and Legal Separations Act 1971, section 6, abolishing the rule in Indyka v Indyka, [1969] 1 A.C. 33: see Dicey & Morris, 346-347.

57 Cf. the English and Scottish Law Commissions' Report on the Recognition of Foreign Nullity Decrees and Related Matters (Law Com. No. 137, Scot. Law Com. No. 88 (1984)) and the English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 320 (1985).

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It is useful to examine why the English and Scottish Law Commissions reject this test in relation to capacity to marry:

> "It is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e., a yardstick for future planning."[58]

We appreciate the force of this criticism, although we consider that the merits of the most "real and substantial" test are significant and should not be ignored. In some cases the test, far from being inherently vague and unpredictable, would be applied easily and appropriately, far more appropriately perhaps then in some cases where other connecting factors such as nationality or domicile[59] were applied. it may be argued that the great advantage about the most real and substantial" connection test is that it will yield a mroe consistently appropriate test than will the application of any other single specific test. All the specific tests have an "outer circle" of inappropriate, unconvincing and arguably unjust applications: that is the price of their certainty. On the other hand, the most "real and substantial" connection test offers a consistently appropriate solution, at a price of possible uncertainty.

Furthermore, it would be wrong to overstate the deficiencies of the most "real and substantial" connection test as a

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58 Op. cit., para. 3.20. The Commissions note that the "real and substantial" connection test for the recognition of foreign divorces was abolished by the Recognition of Divorces and Legal Separations Act 1971. Moreover, in their Report on the Recognition of Foreign Nullity Decrees and Related Matters (Law Com. No. 137, Scot. Law Com. No. 88 (1984)), they recommended that this test should also be abolished for foreign nullity recognition purposes.

59 E.g., in cases of a very technical application of the rules of domicile, as for example where there is a revival of a person's domicile of origin where the person had absolutely no connection with the country of the domicile of origin.

prospective yardstick for future planning. In some cases it will offer no difficulty; such difficulties as might arise in other cases have their counterparts with the tests of domicile and (to a lesser extent) habitual residence.

On balance, we consider that the test of the most real and substantial connection should not be adopted. We take this view because we are satisfied that the benefits it offers are also available (with other advantages) in a different test[60] which has less disadvantages than that of the most real and substantial connection.

(d) Nationality

We must now consider whether nationality should be adopted as the test for capacity to marry.[61]

Nationality is still widely used in civil law jurisdictions as the test for determining the capacity of the parties to marry.[62] Relative to domicile it has several advantages.[63]

It is generally easier to ascertain since it is more a matter of objective fact rather than dependent (in part) on internal intention. Moreover, it is more easily understood and easier to determine by lay persons, such as social welfare officers and customs authorities.

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60 Considered infra, pp. 112.

61 Cf. the English and Scottish Law Commissions, op. cit., paras. 3.25-3.28.

62 Cf. Dyer, Actes, p. 28. See generally Rabel, vol. 1, 120ff, Anton, 157-161, Cheshire & North, 183-185, North, 9-10, L. Pålsson, Marriage and Divorce in Comparative Conflicts of Laws, 81-105 (1974), Schmidt, Nationality and Domicile in Swedish Private International Law, 4 Int. L. Q. 39 (1951), Reed, Note: Domicile and Nationality in Comparative Conflicts of Laws, 23 U. Pittsburgh L. Rev. 979 (1962).

63 We have already considered this matter in our Working Paper and Report on Domcile and Habitual Residence as Connecting Factors in the Conflict of Laws.

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But nationality also has significant drawbacks. It may constitute an inappropriate and unjust connecting factor.[64] Moreover, as the English and Scottish Law Commissions point out:

> "Nationality, as a connecting factor, does not necessarily point to a law with which a person has subsisting practical, as opposed to legal, connections.[65] For example, an immigrant may retain his nationality even though he has severed all the practical links with the state of his nationality."[66]

Finally, nationality presents difficulties (which are not insuperable) in relation to federal states, as well as in cases involving refugees, stateless persons and persons with dual nationality. On balance we consider that nationality would not form an appropriate test for determining capacity to marry.

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[64] Cf. Anton, 160:

> "The principle of nationality achieves stability, but by the sacrifice of a man's personal freedom to adopt the legal system of his own choice. The fundamental objection to the concept of nationality is that it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life."

[65] The Commissions concede, however, that domicile, in its present unreformed state, is equally open to the same sort of objection: op. cit., para. 3.26, p. 80, fn. 254.

[66] Op. cit., para. 3.26. It should be noted that the English and Scottish Law Commissions have consistently rejected nationality as a test in matrimonial matters. In their Report on Jurisdiction in Matrimonial Causes (Law Com. No. 48, 1972) and Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status (Scot. Law Com. No. 25, 1972), the Commissions rejected nationality as a basis of jurisdiction in divorce and nullity cases. And in their Consultation Paper on the Law of Domicile (W.P. No. 88, Consultative Memorandum No. 63, 1985), para. 2.8, they reached the conclusion that domicile is a more appropriate concept than nationality for determining what system should govern a persons's civil status.

(e) **Domicile**

In an earlier Working Paper[67] and Report,[68] we have already considered the general question as to whether domicile is an appropriate connecting factor in private international law. We came to the conclusion that it would on balance be preferable to replace domicile by habitual residence.

We do not wish to rehearse the arguments for and against this general change. We will address merely the specific issue of whether domicile offers an appropriate test for capacity to marry. In its favour, it may be argued that it has for long provided the test and that it has not met with significant criticism in this country.

As against this, domicile may offer a most inappropriate test for capacity to marry, not merely in cases where application of its technical rules[69] throw up a curious result, but also in some more straightforward cases. If, however, for example, an Irishman goes to New York where he marries and lives for twenty years, intending to return to Ireland and spend the rest of his days there after his family have grown up, and if after his wife's death he decides to marry for a second time in New York, he would surely be surprised to learn that his capacity to marry should be determined by Irish law, the law of his domicile.

The very uncertainty in working out a person's domicile is another factor weighing against the adoption of domicile in determining capacity to marry, since certainty and predictability are valuable policy goals in this area of life which should not be unduly prejudiced.

We are satisfied that domicile - even if reformed in such a way as to remove or reduce the effect of some of its

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67 Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws.

68 Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983).

69 As, for example, the rule relating to the revival of the domicile of origin or the rules relating to domicile of dependency.

technical rules - would not, on balance, afford a suitable test for determining capacity to marry.

(f) The Intended Matrimonial Home Test

We must now consider whether the "intended matrimonial home" test should be adopted in relation to capacity to marry. This test has had powerful adovcates in Cook and Cheshire. Cheshire & North argue that:

> "[a] rule for the choice of law commands little respect if it is framed without regard to its impact upon the social life of the community that will be most intimately affected by its operation. It seems reasonably clear that whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reason is a question that affects the community in which the parties live together as man and wife."[70]

The intended matrimonial home test also offers the advantage of a single law governing the question of capacity to marry. More debatably it may be argued that "[t]he objective of giving effect to the reasonable expectations of the parties and the policy of upholding the validity of marriages may be better achieved by this test than by the dual domicile test".[71] This argument would not apply, of course, in cases where the marriage is valid by the dual domicile but invalid according to the law of the intended matrimonial home.[72] In truth, parties who intend to make their home in a particular country do not necessarily do so in the belief that the law of that country should determine the validity of their marriage. On the contrary, it may well be that an Irish couple who marry in Ireland before

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70 Cheshire & North, 332. See also the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.34, clause (a) (1985). Cf. Morris, 160.

71 English and Scottish Law Commissions, op. cit., para. 3.34, clause (b).

72 Cf. id., para. 3.35, clause (e).

emigrating to California would have a reasonable expectation that the validity of their marriage would be determined by Irish rather than Californian law. It is, of course, true that it is very difficult to prescribe an appropriate test as to marital capacity for cases where the parties are moving from one legal system with which they have had a major connection to another legal system with which they intend to reorientate their interests. But the argument in favour of the intended matrimonial home test based on the reasonable expecations of the parties seems to us to be far from convincing.

Of the several objections to the intended matrimonial home test, perhaps the most serious is its uncertainty:

> "In effect, it would be almost impossible to predicate at the time of the marriage whether it is valid or void. The parties may have no firm intention as to their future matrimonial home, or they may implement their intention after a considerable period of time, or they may for whatever reason not implement their intention at all; and, indeed, albeit rarely, ... no matrimonial home or cohabitation at all may be proposed."[73]

As Morris observed:

> "[v]ery serious practical difficulties are likely to arise if the validity of a marriage has to remain in suspense while we wait and see (for an unspecified period) whether or not the parties implement their (unexpressed) antenuptial intention to acquire another domicile. This is especially true if interests in property depend on the validity of a marriage, as, for instance, where a widow's pension ceases on her marriage."[74]

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[73] English and Scottish Law Commissions, op. cit., para. 3.35, clause (a). See also L. Pålsson, Marriage in Comaprative Conflict of Laws, 27 (1981), Storke, Annulment in the Conflict of Laws, 43 Minn. L. Rev. 849, at 870 (1959).

[74] Morris, 160.

Finally, the "intended matrimonial home" test may involve difficulties as to evasion and lack of bona fide intent.[75]

On balance, we consider that this test would not prove to be a satisfactory or appropriate one in respect of capacity to marry.

(g) Habitual Residence

We must now consider whether habitual residence would afford an appropriate test for determining capacity to marry. As we have mentioned, we have already recommended[76] that habitual residence should replace domicile as a connecting factor in private international law in general. In the specific area of capacity to marry it has several advantages. It is an easy concept to understand, being a question of fact in which the issue of subjective intention plays a less important role than in relation to domicile. It has increasing international acceptance and is already being used, without apparent difficulty, in the matrimonial law of a number of countries and in international conventions on private international law. Moreover, it ensures the application of a system of law of a country with which the party marrying has close and continuing connections at the time of the marriage.

It is, however, worth noting some of the criticisms of the use of habitual residence in this context. Two made recently by the English and the Scottish Law Commissions are of particular interest. The first is that habitual residence "does not represent such a strong connection between a person and a country as would always justify a person's civil status being determined according to the law of that country".[77]

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75 Sykes, 90.

76 In our Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, para. 18 (LRC 7-1983).

77 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 3.31, clause (a) (1985).

While this criticism may have some force where the concept of habitual residence has no clearly-defined meaning, it has less relevance where there is a "strong" legislative definition of habitual residence. We have already recommended that such a definition should be provided. Section 3 of the General Scheme of a Bill to Reform the Law Substituting "Habitual Residence" for "Domicile" as a Connecting Factor for the Purpose of the Conflict of Laws[78] is drafted as follows:

> "(1) Provide that the habitual residence of a person shall be determined having regard to the centre of his personal, social and economic interests.
>
> (2) Provide that, in making a determination under subsection (1), account shall be taken of the duration of the interests therein specified and of the intentions of the person relative thereto ...."

We are satisfied that this definition ensures that an habitual residence will not be attributed too lightly to a person.

The second criticism by the English and Scottish Law Commissions of habitual residence as a test for capacity to marry is as follows:

> "A habitual residence test would enable a person to evade the rules as to capacity imposed by the domestic law of his or her domicile, the law of the country with which, in the normal case, he has more permanent ties and which has a greater concern with his status than the country where he may be habitually resident for a short period."[79]

Again, in view of our proposed legislative definition of habitual residence, the problem of evasion would not seem to

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[78] The General Scheme is contained in an Appendix to our Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, pp. 22-26. Section 3 is on p. 23.

[79] Op. cit., para. 3.31, clause (d).

have any force. The courts, far from being required to ignore the intentions of the person whose habitual residence is in issue, are under the specific obligation to take account of that person's intentions relative to his "personal, social and economic interests". Thus, there is no question of the courts being obliged to find that the person was habitually resident in a particular country where his intention was merely to defeat the marriage laws of his own country. The new country may be said to be one in which that person has a habitual residence only after "having regard to the centre of his personal, social and economic interests", as well as the duration of these interests and "the intentions of the person relative thereto".

We have come to the conclusion that, on balance, habitual residence offer the most satisfactory test for capacity to marry.

We consider that a marriage should be valid as regards capacity when each of the parties has, according to the law of his or her habitual residence, the capacity to marry the other. To hold valid a marriage which did not fulfil this requirement would defeat the interests of the country of the habitual residence of one of the spouses.[80]

So far as renvoi is concerned, we consider that, as in the case of formal validity, renvoi should apply in respect of capacity to marry.[81]

We do not consider that failure to comply with the substantive requirements of the lex loci celebrationis should render invalid a marriage valid according to the law of the habitual residence of the parties. The place of celebration is not of great relevance to the parties' lives and should not intrude into the question of their capacity to marry. Of course, the place of celebration is always free to specify what requirements it may wish as regards capacity to marry, and it may insist that marriage officials be satisfied that these requirements have been fulfilled before they are authorized to marry parties to an intended

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80 Cf. the English and Scottish Law Commissions, op. cit., para. 3.38.

81 Cf. the English and Scottish Law Commissions, op. cit., para. 3.39.

marriage. In practice this will limit the scope of opportunity to marry in that country in defiance of its substantive requirements.

We consider that the same approach should, as a general rule, apply to the requirements of the lex fori. We are satisfied that public policy considerations will ensure that no untoward consequences follow from the application of the law of the parties' habitual residence in this context. Moreover this approach should be subject to the entitlement of the forum by legislation specifically to exclude or modify the application of the law of the parties' habitual residence where this conflicts with a specific basic policy or policies of the forum.

So far as minimum age requirements and parental consent requirements, we have already proposed, in our Report of the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects,[82] that the substantive requirements should apply (inter alia) to any marriage solemnised in the State, irrespective of the habitual residence of the parties or of either of them. Thus, a marriage solemnised here by two foreign 14 year-olds without the consent of the President of the High Court (or nominated Judge) would be invalid even in a case where the marriage complies with the minimum age requirements of the law of the parties' habitual residence. We reiterate these recommendations in the present context.

A basic issue of policy[83] is presented by the competing rules as to recognition of foreign divorces, on the one hand, and capacity to (re)marry, on the other. It may be that a person whose divorce is not recognised here has capacity to remarry according to the law of his habitual residence; conversely cases may arise where a person whose divorce is recognised here has not capacity to remarry according to the law of his habitual residence. In the event of such a clash of rules, which rule should prevail?

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[82] LRC 5-1983, para. 63, and sections 7(2)(a) and 8(4)(a) of the draft scheme of legislation, id., pages 38, 40.

[83] Cf. L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 198 (1981) ("The method by which such questions are to be settled is a very controversial subject, at all events in cases where foreign law governs the party's capacity to marry").

This issue has arisen in the conflicts of law systems of many countries. In a wide-ranging comparative study, Pålsson reports that it is "usually agreed or tacitly assumed"[84] that a further marriage is barred when the previous one is valid and subsisting in the eyes of the lex fori even if it is not so regarded by the law governing the capacity of the parties to the proposed second union.[85] To hold otherwise might be regarded as permitting a foreign law to take precedence over the basic policy of the forum.[86]

The issue is unquestionably a difficult one, with a case to be made against all possible options. If we recognise a marriage that complies with the law of the habitual residence but has been preceded by a divorce that is not recognised under our law, we will be involving ourselves in the problems and inconsistencies outlined by Pålsson. On the other hand, it may seem unfortunate that a marriage valid according to the parties' habitual residence should not be upheld on account of the fact that the dissolution of an earlier marriage is not recognised under our law.

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[84] Id., 211.

[85] Pålsson adds (id., 211-212):

> "To that extent the lex fori method of solution (the narrow reference approach) prevails for the incidental question. This is often conceded even by writers supporting the lex causae method in the converse type of situation ...."

[86] Cf. Pålsson (id., 212):

> "The reasons why the lex fori method prevails in cases of the type described here are not difficult to understand. It is an elementary expression of the principle of monogamy that the right of remarriage must be denied when the prior union is valid and has not been effectively dissolved in the eyes of the lex fori. To hold othewise, on the strength of the foreign lex causae of capacity to marry, would imply the recognition of a kind of 'legal bigamy' by the forum; for the party bound by the prior marriage would have to be considered lawfully married to two persons at the same time."

So far as remarriage following a divorce is concerned, it would appear that the effect of Article 41.3.3° of the Constitution is that parties cannot legally remarry in the State following a foreign divorce that is not recognised here. Although the position is not certain, it may well be that this incapacity exists whether or not the parties have capacity to remarry according to the law of their ante-nuptial domicile or (as we propose) of their habitual residence. A point worth noting is that the general question whether non-recognition of a foreign divorce should prevent the establishment of a capacity to remarry is one that arises in the law of every state, regardless of whether a divorce jurisdiction exists within that state.

We have come to the conclusion that, in cases where the dissolution of a marriage would not be recognised here and that marriage continues to be a subsisting valid marriage under our law, a subsequent marriage should not be recognised under our law whether or not it complies with the law as to capacity to remarry of the parties' habitual residence.

We must now consider the converse case, where our law recognises a divorce of a marriage which, acordingly, is no longer a valid subsisting one under our law, but where the parties do not have capacity under the law of their habitual residence because that law does not recognise the divorce. It may be argued that, if we recognise the divorce, we should disregard the incapacity under the law of the parties' habitual residence because in the reverse case just considered (where we do not recognise a divorce but the law of the habitual residence does) we also gave precedence to our recognition rule over the law of the of the parties' habitual residence. As against this, it may be said that this stress on apparent consistency ignores the more fundamental point that a remarriage, to be effective, must fulfil the requirements of both our divorce recognition rules and our capacity to marry rules. If it fails either of these sets of requirements its validity should not be recognised.

Thus we consider that, where a remarriage fails to satisfy the requirements of the law of the parties' habitual residence, its validity should not be recognised whether or not a prior dissolution is recognised under our law.

Consent

We must now consider what law should be used to determine issues of consent. It seems reasonably clear that the lex loci celebrationis would not, of itself, afford a satisfactory test, for much the same reason that it would not, of itself, afford a satisfactory test for capacity in general. A passing connection with the country where a marriage is celebrated is not sufficient, in our view, to refer the issue of consent to the law of that country.[87] From the standpoint neither of that country nor of the parties themselves does it appear justified.[88]

In our view the real contest is between the lex fori and the law of the country of the parties' habitual residence.

In favour of the lex fori are the standard arguments that it is cheaper and easier to apply and that the courts are more comfortable with it. Moreover, it may be contended that the issue of reality of consent "is closely connected with the public policy of the forum".[89]

Against the lex fori, the standard objection that it encourages forum shopping[90] may be mentioned. Nor do we consider that the factors of cheapness and ease of application, in themselves, outweigh the more substantial policy issue of what law is appropriate to determine the issue, so far as the parties themselves are concerned.

This brings us to the question whether the forum has a stronger claim than the law of the country of the parties' habitual residence to determine the validity of the consent

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87 Cf. English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.14 (1985).

88 It is worth noting that in the cases applying the lex loci celebrationis as the test for consent no clear argument has been made in its favour: see Parojcic v Parojcic, [1958] 1 W.L.R. 1280, Di Mento v Visalli, [1973] 2 N.S.W.L.R. 119.

89 Op. cit., para. 5.16.

of the parties, so far as policy issues are concerned. In our view, the balance lies against the forum. Of course the forum has an interest in (for example) preventing marriages by persons suffering from a serious mental illness. It seems to us, however, that rules regulating consent are primarily designed to protect the interests of the parties themselves rather than broader social interests.[91] It is, of course, possible to envisage aspects of the law relating to consent in which the public policy element is more prominent. In the more significant of these cases, it would be possible to invoke the principle of public policy.

We are satisfied that the best approach would be for the issue of consent to be determined by the law of the country of the parties' habitual residence. Where the parties have their habitual residences in different countries at the time of the marriage and application of this test leads to reference of two laws, the question arises as to whether the marriage should be invalid for lack of consent where, according (a) to both laws, or (b) to either law, a party did not provide the requisite consent, or whether it should be invalfid (c) only where, according to the law applying to the party in question, that party did not provide the requisite consent.

We do not favour option (a). If, according to the law of party X's habitual residence, X has not given an appropriate consent, it does not seem to be appropriate that the marriage should not be capable of being annulled by reason of the fact that, according to the law of party Y's habitual residence, X had no ground for annulment.

So far as option (b) is concerned, it can be argued that, by way of analogy with the ground of impotence, which we shall consider below,[92] a marriage vitiated by lack of consent involves what might be termed a "defective matrimonial relationship". If stress is laid on the relationship rather than on the physical or psychological condition of either party, then it may be argued that the real question should be whether the marriage is invalid according to the

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[90] Id., para. 5.16.

[91] Cf. id., para. 5.17.

[92] Infra, pp. 123ff.

law of either party, rather than the law of the party whose consent is alleged to be defective. Moreover, there are some instances where the lack of consent is more easily understood in terms of mutual mistake rather than some unilateral condition attaching to one party only.

It can also be argued that the grounds of nullity based on lack of consent reflect a view of certain minimum conditions for marriage, so that if these conditions are not fulfilled according to the law of either party, either party should be permitted to petition for a decree of nullity of marriage, even where the failure to fulfil these conditions is one prescribed by the law of the respondent's, rather than the petitioner's, habitual residence.

Nevertheless, we prefer option (c). It has a number of advantages. First, in the great majority of cases it is possible to say that a particular party lacks consent to marry. This may be because that party was mentally ill, for example, or was the victim of duress, or of fraud or mistake. There may of course be cases where, for example, both the parties were the victims of duress,[93] but even in these cases, the question whether one spouse was affected by duress is a separate issue from whether the other spouse was similarly affected.

Secondly, option (c) would ensure that where the law of his own habitual residence upholds the validity of his consent, a party would not be able to avail himself of an entitlement to petition on the basis of his lack of consent under the law of a country (of the other spouse's habitual residence) whose connection with him depends on a contingency over which he has no control.

Thirdly, option (c) would harmonise effectively with our earlier recommendation[94] with respect to capacity to marry. We agree with the English and Scottish Law Commissions' view that "[t]o apply different tests to these two issues would produce unnecessary complexity in the structure of the choice of law rules".[95]

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93 Cf. McK. (otherwise M. McC.) v F. McC., [1982] I.L.R.M. 277 (High Ct., O'Hanlon, J.).

94 Supra, p. 114.

95 Op. cit., para. 5.23.

Fourthly, option (c) would be in line with the main thrust of international thinking on the issue. In a detailed comparative study on private international law aspects of marriage, Pålsson reports that requirements relating to consent are:

> "usually considered unilateral .... Rules of this kind exist primarily in the interest of the party whose consent is alleged to have been vitiated. It is therefore natural that such issues should be determined as to each of the parties by reference to his personal law alone."[96]

Pålsson refers[97] to cases expressly or implicitly supporting this view in Austria, Belgium, France, the Federal Republic of Germany, Italy, the Netherlands and Switzerland. He does, however, note[98] that there is a minority opinion in several countries which favours a bilateral approach making each of the parties subject to the consent requirements of both personal laws.

One possible objection to option (c) is that it is difficult to harmonise with our recommendations in relation to impotence,[99] where we prefer the bilateral approach. We consider, however, that this difference can be justified, in the light of the specific nature of impotence and failure to consummate a marriage. We appreciate that the borderline between cases falling under the heading of consent and those falling under the heading of impotence and non-consummation may at time raise difficulties, especially where the non-consummation is attributable to a secret intention not to consummate, existing at the time of the marriage, rather than to physical or psychological incapacity. The problem of distinguishing "sham marriages" from cases of mere unilateral determination not to consummate may also be a real one in some cases.

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96 L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 114 (1981).

97 Id., 114, fn. 371. See also id., 285 where the author refers also to the fact that Scandanavian countries take the same approach.

98 Id., 114.

99 Infra, pp. 123ff.

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Nevertheless, these borderline difficulties are not sufficiently great, in our view, to warrant the application to all issues of consent of a bilateral rather than unilateral approach. The disadvantages would far outweigh the benefits.

Accordingly we recommend that, where the parties have their habitual residences in different countries at the time of the marriage, the marriage should be invalid for lack of consent only where, according to the law applying to the party in question, that party did not provide the requisite consent.

We considered, but ultimately rejected, the argument that our private international law rules should subdivide the various aspects of consent into such separate categories as duress, fraud, mistake, mental incapacity, and so on, and establish different choice-of-law rules to each of these categories according to the policy issues involved.[100] We can see some merit in this approach, but the disadvantages seem to us to far outweigh the advantages. The unifying concept of a defective consent, however it may be manifested, represents a reasonably clear criterion. On the other hand, there is considerable international disagreement and divergence as to how this central concept should be subdivided. In the absence of international harmony as to this process of subdivision there would be a real risk of adding to the confusion if our private international law rules were to differ according to which of several categories of lack of consent was in question.

Should the lex loci celebrationis have a subsidiary role in relation to the ground of lack of consent?

We must now consider whether the lex loci celebrationis should have some role, albeit of a subsidiary nature, in relation to the ground of lack of consent. In a case where a party consented to marry according to the law of his or her habitual residence, should it nonetheless be a ground

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100 Cf. Webb, 22 Modern L. Rev. 198, at 202-204 (1959). See also the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, paras. 5.15, 5.17 (1985).

for nullity that his or her consent was not valid according to the lex loci celebrationis? On this approach, a marriage, to be valid, would have to fulfil the requirements regarding consent of two laws.

We see no merit in this requirement. The lex loci may have only the most tenuous of connections with the parties and it does not appear sensible to permit it to have such an important role. This is not to say, of course, that the authorities in the place of celebration should be obliged to marry persons who, according to their law, are not in a position to provide a valid consent. Although the reasons why a consent is not a valid one may often not manifest themselves to the authorities - duress, fraud and certain cases of mistake, for example, are not usually easy to check at the time of the marriage - in some other cases, notably those involving severely mentally ill persons, there is an opportunity for the authorities to refuse to marry the parties.

We consider that this preventative, prospective, role should be regarded separately from the retrospective question as to whether a consent was validly given. The prospective question is analysed elsewhere;[101] so far as a possible retrospective role of the lex loci is concerned, we can see no merit in permitting the law of the place of celebration to have any such function.

Impotence

We must now consider what law or laws should govern questions of impotence. A number of approaches might be favoured: they include the lex loci celebrationis, the lex fori and the law of the parties' habitual residence. Let us consider each of these possible approaches in turn.

The lex loci celebrationis

We are not impressed by the lex loci celebrationis as the law to resolve the question of impotence. The place of

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[101] In our forthcoming Report (LRC 20-1985).

celebration may have no real connection with the parties' lives: it may have been selected for a reason which has nothing to do either with the parties' background or their future plans. The question of impotence is a personal matter of concern to the parties themselves: in no way can it be compared with the formalities of a marriage, over which, for reasons of convenience and order, the place of celebration has a justifiable supervisory function.[102]

The lex fori

In favour of the lex fori it can be argued that it has the advantages of simplicity and ease of application; in view of the difficulties involved in other possible approaches, these advantages should be given particular weight.[103] We appreciate the force of this argument but we do not consider that it outweighs the countervailing difficulty of the risk of forum shopping. Considerations of practical convenience should not prevent the application of a law that is the most appropriate to determine the question, from the standpoint of the spouses.

The law of the parties' habitual residence

In favour of the law of the parties' habitual residence it may be argued that it is the most appropriate to determine the issue. Unlike the lex loci celebrationis, which may have only a contingent, passing connection with the parties, and the lex fori, which may have no connection with them whatsoever, the law of the parties' habitual residence at the time of the marriage is one that is clearly relevant to the parties.

In our view this approach offers the best solution to the subject of impotence. But we are conscious of the fact that it offers no panacea to some difficult issues relating to the subject, which we must now address.

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102 See the English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.29 (1985).

103 Cf., id., para. 5.31, clause (d).

The first of these issues concerns the question as to which party's law should govern the issue of impotence. Three approaches have been canvassed.[104]

On one view, since impotence is a condition affecting the capacity of a spouse to enter an effective matrimonial relationship, the law of that spouse's habitual residence should be the controlling law.[105] It may be argued that impotence is similar to mental incapacity to form a caring or considerate relationship with the other party[106] in its damaging potential for the marriage relationship. This type of mental incapacity, like impotence, renders a marriage voidable. We have already proposed that the law of the mentally incpacitated person's habitual residence (rather than that of the other party) should control. On this analogy, it may be argued that the same rule should apply to impotence.

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104 Cf. the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, para. 5.36ff (1985).

105 Cheshire & North, 403, tentatively support the view that wilful refusal should be governed by the lex domicilii of the spouse who refused to consummate the marriage, but they present no policy arguments in its favour.

106 Cf. R.S.J. v J.S.J., [1982] I.L.R.M. 263, at 264 (High Ct., Barrington, J.):

> "The law has always accepted impotence as a ground for avoiding a marriage. But in ways what is contended for here is a much more serious impediment to marriage. No doubt there have been happy marriages where one of the parties was impotent. But it is impossible to imagine any form of meaningful marriage where one of the parties lacks the capacity of entering into a caring, or even a considerate, relationship with the other. There is of course the distinction that in the case of impotence providing the grounds for a decree of nullity, the marriage will not have been consummated and there will be no children. In the present case the marriage was consummated and there could have been children. On the other hand there is no child and one should deal with this case as one finds it."

The disadvantage to this view is that it ignores the potential for injustice to the non-impotent party. In a case where, according to the law of the non-impotent party, there is an entitlement to have the marriage annulled, it may be argued that it is unfair that that party be denied this entitlement merely because the law of the impotent party does not have such an entitlement. As one commentator forcibly expressed the difficulty:

> "It is one thing to take a spouse from another country and quite another thereby to forfeit some important rights to redress of a grievance - to wed not only the spouse but also his (or her) nullity law on the subject of consummation."[107]

Put another way by the English and Scottish Law Commission, a person should "not be held unwillingly bound to a marriage which, according to the notions of his own community, is a defective marriage".[108]

Three notions are becoming intermingled here, however, and it is sensible to untangle them. First, there is the notion of an incapacitated person; second there is the notion of legitimate grounds for seeking a nullity decree; and third there is the notion of a defective marriage relationship.

1. The Notion of an Incapacitated Person

So far as the first notion is concerned, impotence is an incapacitating condition, affecting one of the spouses. Impotence, whether resulting from physical or psychological causes, fits easily into this notion even where the condition manifests itself in a refusal to consummate resulting from a "paralysis and distortion of will".[109]

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[107] Bishop, supra, at 517.

[108] English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.38 (1985).

[109] G. v G., [1924] A.C. 349, at 367 (H.L.(Sc.), per Lord Shaw).

But where the refusal to consummate springs from other causes,[110] this notion of impotence as a condition is difficult to justify.

2. The Notion of Legitimate Grounds for Seeking a Decree

So far as the notion of legitimate grounds for seeking a nullity decree is concerned, it is understandable that one should think first of the non-impotent party in a case where he or she could not have been aware before the marriage of the impotence of the other party. The law of most countries will permit[111] such a person to obtain a nullity decree based on the failure of his or her expectations. But it would be wrong to consider that only the non-impotent party has grounds for complaint in cases of impotence.

As was said in a Scottish decision,

> "it can hardly be questioned that the impotent spouse has an equal interest with the potent spouse in a question which vitally affects his or her status. The bond of a marriage which cannot be consummated .... can be as irksome and humiliating to the impotent as to the other spouse."[112]

This is an important point to note in relation to private international law, since it makes it clear that the question as to who may sue for nullity "crosses party lines"; the issue whether a person is the impotent or the non-impotent party is a separate one from the issue whether that person is entitled to sue. According to some laws, only the non-impotent party may sue; according to other laws, both

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110 We will discuss some particular problems in relation to wilful refusal, infra, pp. 129ff.

111 Subject to some limitations, such as the bar of approbation: see our Report on Nullity of Marriage, 67-69, 153-157 (LRC 984).

112 F. v F., 1945 S.C. 202, at 208.

parties may sue, but with differing limitations[113] depending (among other factors) on whether they are the impotent or the other party.

3. The Notion of a Defective Marriage Relationship

The third notion to which we referred is the notion of a marriage affected by impotence as a defective marriage relationship. This notion concentrates, not on the entitlements of either spouse, but on the objective condition of the marriage relationship. It stresses the fact of impotence as going to the root of this relationship, since the capacity for sexual intercourse, save in exceptional cases,[114] is generally regarded as an essential ingredient.

On this view impotence would be regarded as a "bridge" incapacity, affecting both parties (insofar as their marriage relationship is subject to a vitiating element) rather than either one of them.[115]

Against this complex combination of notions, some of which are more prominent in one legal system than in another, it is particularly difficult to specify choice of law rules. We are of the view that the best approach would be to refer to the laws of both the spouses and to entitle the petitioner to a decree of nullity if the petitioner is, in the circumstances, entitled to petition according to the law of either party. We consider that this approach would provide the best compromise to the competing policies.

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113 As to the limitations in Irish law, see our Report on Nullity of Marriage, pp. 52-63, 144-145 (LRC 1984). As to the development of English Law, see Bevan, Limitations on the Right of an Impotent Spouse to Petition for Nullity, 76 L.Q. Rev. 267 (1960).

114 Cf. Jackson, 340-343, Cretney, 64-65.

115 On occasion, the facts of certain cases have resulted effectively in such a finding of mutual, rather than individual, incapacity: see, e.g. G. v G. (falsely called K.), 25 Times L.R. 328 (C.A., 1908), discussed in our Report on Nullity of Marriage, pp. 57-58 (LRC 9-1984).

A possible criticism of this approach is that where two persons **A** and **B**, marry, the law of **A** is an entirely contingent matter so fas as **B** is concerned,[116] and **B** should not be permitted to avail himself or herself of such a contingent entitlement offered by **A**'s law to petition for nullity. We do not agree with this criticism, which is based on a view of entitlement to petition which ignores the interpersonal and objective features of impotence already mentioned. So far as **A** is concerned the result will normally be appropriate and fair since (ex hypothesi) **A**'s law entitles **B** to petition. The fact that **B**'s law does not entitle **B** to petition is a contingency which scarcely justifies **A** in challenging his or her entitlement to petition since there will be no question of detrimental reliance on such a lack of entitlement. So far as **B** is concerned, it is true that he or she will be able to avail himself or herself of an entitlement not available under his or her own law, but that is not a ground for criticism, since impotence creates an interpersonal problem in respect of which the laws of both parties merit consideration. If, under the law of one of the parties, the problem is considered sufficiently serious to warrant the petitioner seeking a decree, we consider that this entitlement should prevail even in the absence of a similar entitlement under the law of the other party.

Wilful Refusal to Consummate

Wilful refusal to consummate a marriage raises particular difficulties which we must now consider. No problem arises where the refusal derives from a condition of impotence existing at the time of the marriage. Here we have a simple case of impotence manifested by a refusal to consummate. Where, however, the refusal is not based on such a condition of impotence, the position becomes more complicated. Briefly, the refusal may be attributable to a mental state existing at the time of marriage, such as a secret intention not to consummate the marriage.[117] The refusal may also be based on a prior agreement not to consummate, which could in some circumstances constitute a form of sham marriage.

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116 Cf. the English Law Commission's Working Paper No. 89 and the Scottish Law Commission's Consultative Memorandum No. 64, para. 5.39 (1985).

117 Cf. Kenny, J.'s judgment in S. v S., unreported, Sup. Ct., 1 July 1976 (1-1976).

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In either of these cases, it would seem proper to characterise the ground, not as one of impotence but as one of fraud or mistake, in the case of the secret intention not to consummate, and of a sham marriage in the other case. (We are not concerned here with broader questions of how our law would determine cases involving such facts; we are concerned only with the problem of their characterisation.)

The really troublesome cases arises where a foreign law provides as a ground of nullity of marriage the fact that the respondent spouse has wilfully refused to consummate the marriage, in circumstances where the petitioner need not prove that at the time of the marriage the respondent had any particular state of mind. In other words, the ground would permit a decree of nullity to be based exclusively on post-nuptial matters.

In our Report on Nullity of Marriage, published in 1984, we rejected[118] the argument that wilful refusal to consummate a marriage should, of itself,[119] be a ground for nullity of marriage. We noted that:

> "to make wilful refusal to consummate the marriage a ground for annulment might well raise difficulties under Article 41 of the Constitution."[120]

It may be seen that refusal to consummate a marriage, when related exclusively to post-nuptial matters, also raises a problem for conflicts of law. Three views must be considered.

According to the first view, our conflicts rules should not be concerned with the content of the grounds for nullity in other countries, subject to the proviso of public policy. If some other countries choose to permit annulment based on grounds that do not, and could not, constitute grounds for

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118 LRC 9-1984, p. 146.

119 In contrast to cases where the refusal manifested a condition of impotence existing at the time of the marriage or a secret intention, existing at the time of the marriage, not to consummate it.

120 Page 146 of the Report.

nullity according to our law, we should nonetheless respect those grounds in matters of choice of law. It may be argued that public policy would not require that the ground of wilful refusal should not be treated as an effective ground for nullity. As the English Law Commission observed:

> "[f]ailure to consummate, whether it be because the respondent is unable or because he is unwilling to have sexual intercourse, deprives the marriage of what is normally regarded as one of its essential purpose. Parties would think it strange that the nature of the relief should depend on the court's decision whether non-consumation was due to the respondent's inability or whether it was due to his unwillingness. From the parties's point of view the relevant fact would be that the marriage had never become a complete one.[121] To tell them that, in the eyes of the law, failure to complete it due to one cause results in the marriage being annulled, whereas such failure due to another cause results in their marriage being dissolved, would seem to them to be a strange result."[122]

While we do not accept[123] that wilful refusal to consummate should be treated as a ground for nullity of marriage in Irish law where the refusal is based exclusively on post-nuptial facts, it may be argued that, since a case on these lines can at least be formulated, even if not convincingly, our conflicts rules on this matter could legitimately be more indulgent than those of our internal law.

According to the second view, a ground for a decree of nullity based exclusively on a post-nuptial fact is simply inconsistent with our law's concept of nullity of marriage. On this view, choice of law rules for nullity of marriage which would require the application of such a ground would be contrary to public policy.

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121 For criticism of this point, see Cretney, 70, fn. 92.

122 English Law Commission's Report on Nullity of Marriage, para. 27(b) (Law Com. No. 33, 1970).

123 See our Report on Nullity of Marriage, p. 146 (LRC 9-1984).

According to the third view, a decree of nullity based on the exclusively post-nuptial fact of wilful refusal to consummate could be characterised as a decree of divorce rather than nullity.[124] This is a radical view[125] on which much can be said for and against.

Some of the implications of such a characterisation may be mentioned briefly. First, it would be impossible for a petitioner to obtain a decree of nullity here based on the ground of the respondent's wilful refusal according to the law of the country of the parties' habitual residence.[126] Under present law this would appear to be the probable position,[127] so, there would be no change in the law on this matter. The second implication would be that the choice of law rules which we propose in respect of nullity of marriage would not apply; instead those relating to the recognition of foreign divorces would govern.[128]

The third implication concerns the effects of the decree on such matters as the legitimacy of children[129] and questions

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124 Cf. Cretney, 69.

125 Much more radical than merely that wiflful refusal should have its own specific choice of law rules, in which the law of the intended matrimonial residence or the lex fori, rather than ante-nuptial domicile, would have the determinative role: cf. North, 127-128, Falconbridge, 701, L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 318 (1981).

126 We will consider later in this Report the troublesome question of which law should apply where the respective laws of the parties differ as to whether the petitioner is entitled to petition on the ground of wilful refusal.

127 Whether on account of the fact that the ground of wilful refusal has no counterpart in Irish law, or because it would be contrary to public policy to give effect to it or, possible, because wilful refusal based exclusively on post-nuptial considerations operates in effect as a ground for dissolution rather than annulment.

128 Cf. our Report on Recognition of Foreign Divorces and Legal Separations, (LRC 10-1985).

129 Cf. our Report on Illegitimacy, paras. 100-101 (LRC 4 - 1982) and our Report on Nullity of Marriage, pp. 72-73 (LRC 9-19849.

of property and maintenance. There is an important issue of justice concerning a ground for nullity based on a condition not existing at the time of marriage where the effect of granting or recognising a nullity decree would be to transform, and in certain cases radically diminish, the rights of interested parties. Under our proposals contained in our Report on Nullity of Marriage,[130] the practical dimensions of this issue would be somewhat less significant, but the issue is still one of importance.

We consider that the best approach would be to treat the ground of wilful refusal in the manner which, as we propose later in the chapter, should apply to ground unknown to the internal law of the forum generally. In other words the ground would operate subject to the public policy proviso.

The Relevant Date for Determining Whether the Ground of Impotence Exists

Of the nature of things, impotence usually manifests itself sometime after marriage. The courts have been reluctant to grant a nullity decree too soon lest the condition should prove to be only temporary.[131] This understandable delay might suggest that it would be more appropriate for the test of impotence to be referable to the law of the parties' habitual residence at the time of the proceedings rather than at the time of marriage. We do not consider that this would be a sound policy. Although impotence may take some time to establish itself as a definite fact, it is necessary that the condition should have existed at the time of the marriage. We consider that the ground of impotence should be determined by the law of the parties' habitual residence at the time of the marriage rather than at the time of the nullity proceedings.

Should the Lex Loci Celebrationis have a Subsidiary Role in Relation to the Ground of Impotence?

It might be considered desirable that a marriage, though valid according to the law of the parties' habitual

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130 LRC 9-1984.

131 Cf. Shatter, 73.

residence, should not be considered valid under our choice of law rules if it failed to comply with the lex loci celebrationis. We are not attracted to this argument.

We are of the view that it would be quite inappropriate for the lex loci celebrationis to have role, even one of a subsidiary nature, in respect of the ground of impotence. There appears to us to be nothing to be said in favour of the argument that it should. As we have already mentioned, the place of celebration may be one with which the parties have only a fortuitous or casual connection.[132] We have already recommended that questions of capacity or consent should not be referred to the lex loci celebrationis in addition to the law of the parties' habitual residence; we see no reason why the rule for the ground of impotence should be any different.

The Absence of Impotence (and Other Basic Grounds) from a Country's Law of Nullity of Marriage

Impotence is not a ground for annulment in a number of jurisdictions including Australia, some of the United States and (in certain cases) France. We must now consider what an Irish court should do if a petition for nullity of marriage based on impotence were presented to it in respect of parties whose habitual residence at the time of the marriage was in one of these jurisdictions. Should our court dismiss the petition, leaving the issue to be resolved (if at all) in the context of divorce, or should it apply Irish nullity law relating to impotence?

The issue here is an important one, with repercussions broader than the subject of impotence alone. It is a fact of modern life that in a number of countries today, nullity of marriage has been consigned to a relatively minor role. In such circumstances it is not surprising that a number of

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[132] Cf. the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.43 (1985). In spite of the strength of this argument a desire for symmetry with their proposals (id., para. 344) regarding the role of the lex loci in relation to capacity led the Commissions to make no provisional recommendation on the issue of its role in relation to impotence.

grounds for nullity which have historically been part of the law of almost all common law and civil law jurisdictions have sometimes been removed from the codes of some of these countries. The ground of impotence is but one example.

Of course, the whole function of appropriate choice of law rules is to ensure that the lex fori is not given unthinking application and that the relevant law or laws of the parties should determine whether or not they are married. But it remains true that our law does have a basic notion of what constitutes a valid marriage: it is extremely doubtful, for example, that a homosexual marriage,[133] valid in the country of the parties' habitual residence, would be recognised here. In rejecting the validity of such a marriage, our courts would possibly hold that it is simply a union which does not even aspire to the category of a void marriage (in other words, that it is a Nichtehe or marriage inexistant),[134] or, perhaps, that public policy requires the courts to hold that the marriage was not valid.

The same question may arise less starkly: should our courts, for example, recognise as valid a marriage where the nullity law of the parties' habitual residence does not permit any challenge to its validity on the ground of mental incapacity or lack of age? It is in this more general context that we consider the question of a law denying impotence as a ground for nullity of marriage. Rather than for the legislation to attempt to spell out in full detail the circumstnaces in which our courts should grant a nullity decree, on the grounds of public policy, in circumstances where the law of the parties' habitual residence does not so provide, we consider it more desirable to leave this function to the courts. It is in this general context that the question of the absence of the ground of impotence in a country's nullity law should be addressed by the courts.

It would be an almost impossible task for the legislation to cover all possible instances of foreign limitations, against an international background of a rapidly changing nullity law. It seems to us far more preferable for our courts to deal with the broad issue in such cases as they may arise.

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133 We are referring here to a marriage between persons of the same sex where no question of either party having had transsexual surgery arises: cf. Report on Nullity of Marriage, pp. 5-8, 90-92 (LRC 9-1984).

134 Cf. id., p. 91.

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Characterisation of Parental Consent Requirement

We must now consider the question whether the requirement of parental consent should be characterised as a formal requirement, to be governed by the lex loci celebrationis, or as a matter of essential validity (or legal capacity) to be determined by the law of the parties' habitual residence. This is a matter which we have already addressed when formulating proposals on the minimum age for marriage.[135]

In England,[136] Scotland,[137] Canada[138] and New Zealand,[139] courts have characterised parental consent requirements as formal, even though the country where the underage party is domiciled characterises these requirements as essential.

It has been observed that "[n]o case in the English conflict of laws has been criticised more heavily than Ogden v Ogden".[140] Falconbridge has contended that the requirement of parental consent:

> "cannot be characterised in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, but that in the law of one country it may by its terms and in the light of its context in that law be a matter of capacity, and in the law of another country it may by its terms and

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135 See our Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, para. 4.57, and our Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, para. 63 (LRC 5-1983).

136 Ogden v Ogden, [1908] P. 46.

137 Bliersbach v MacEwen, 1959 S.C. 43.

138 Stewart v Stewart, 56 O.L.R. 57 (1924), Solomon v Walters, 3 D.L.R. (2d) 78 (B.C. Sup. Ct. 1956), Hunt v Hunt, 14 D.L.R. (2d) 243 (Ont. High Ct., 1969).

139 Carter v Carter, [1932] N.Z.L.R. 1104.

in the light of its context in that law be a matter of formalities."[141]

The English and Scottish Law Commissions have argued that:

> "[t]o characterise every parental consent requirement as formal simply because it would be so characterised in a domestic case is, in principle, wrong. The policy considerations governing the categories of form and substance are not necessarily the same in the two situations. The English and Scottish rule presumably means that an English (or Scottish) couple over eighteen marrying abroad would have to seek parental consent if this was required by the local law and failure to do so would (unless recourse could be had to renvoi) result in the marriage being invalid. In this, and the converse case where foreign domiciliaries marry in this country, it may be thought that the country to which the parties belong, rather than the

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140 Morris, 153.

141 Falconbridge, 76, See also L. Palsson, Marriage and Divorce in Comparative Conflict of Laws, 323 (1974):

> "Parental consents...., where provided for, essentially relate to the whether, rather than the how, of the celebration of a marriage. They constitute a condition for the performance of the ceremony, and this is equally true where that condition may be dispensed from or a violation of it is left without sanction or is sanctioned in some way which does not affect the validity of the marriage once celebrated. It would seem artificial to dissociate these requirements from those relating to the marriageable age of the parties, including questions of dispensations from the stipulated age, which are universally held to belong to the substance of marriage. By way of conclusion, therefore, the best reasons seem to militate in favour of the substantive classification of the requirements under examination."

country of celebration has a greater interest in the application of its law."[142]

It should not, however, be thought that characterising the parental consent requirement as formal has no advantages: it has at least "the merit of simplicity and certainty. It is a clear and convenient solution which is easy to apply in practice."[143] Moreover, the international trend of legislation over the past twenty years has been to reduce the minimum age for marriage without parental consent[144] as well as to weaken the force of the parental consent requirement where it continues to apply.

One possible approach would be to require the Irish court to determine how the parental consent requirement is classified under the law of the parties' habitual residence and to follow that classification.[145] This would be "the only sure way"[146] of avoiding a limping marriage. But, as the English and Scottish Law Commissions point out, this approach:

> "is open to the objections that it would impose an additional and, arguably, unreasonable burden on the court [and] increase the cost of litigation, and that it would be unworkable where there is no clear classification of the rule in the foreign country or if the law of that country does not draw a distinction between form and capacity. It is also perhaps arguable that it would be contrary to principle to allow the foreign law absolutely to control characterisation in the forum."[147]

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142 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International law: Choice of Law Rules in Marriage, para. 4.6. (1985).

143 Id.

144 See our Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, para. 4.33.

145 Op. cit., para. 4.9.

146 Id.

147 Id.

In our Working Paper[148] and Report[149] on the age of majority and the minimum age for marriage we have already recommended that the parental consent requirement should be a matter of essential validity. Moreover where a marriage is solemnised in the State, we recommended that the consent provisions relating to guardians (normally the parents) should apply, irrespective of the habitual residence of the parties or of either of them.[150] We have already reiterated these recommendations in the present Report.[151]

Grounds Unknown to the Internal Law of the Forum

There are, as we have noted, quite significant differences among the nullity laws of countries throughout the world. These differences may relate to the existence or to the scope of particular grounds for nullity. Thus, for example, impotence is a ground for nullity in Irish law but

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148 Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, para. 4.57.

149 Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, para. 63 (LRC 5-1983).

150 Cf., id., p. 40 (section 8(4) of draft Age of Majority Bill 1983). The Age of Majority Act 1985 seeks to leave unchanged the minimum age for marriage and the requirement of the consent of the guardians for the marriage of a minor. The Minister for Justice, Mr Noonan, stated that this was because it would be "undesirable to have provisions relating to such an important aspect of life contained in any legislation other than a Marriage Act: 354 Dáil Debates, col. 118. For discussion of this general question during the debates on the legislation, see 353 Dáil Debates, cols. 1566, 1570-1572, 1579-1580, 1635-1639, 1833, 1844-1847, 1853-1854, 1861-1862, 1872, 1881-1886, 1887-1889, 354 Dáil Debates, cols. 117-120, (Second Stage), 354 Dáil Debates, cols. 2571-2573 (Committee Stage) 107 Seanad Debates, cols. 11, 13, 20-21, 22, 31-33, 35-36, 45-46, 48, 53, 57-59, 62, 63, 64 (2nd Reading). 107 Seanad Debates, col. 121, 122-124 (Committee Stage).

151 Supra, p. 115.

not in Australia.[152] Where a party to a marriage suffers from a condition of epilepsy[153] or venereal disease[154] this is a ground for nullity in some other jurisdictions, but not in our law. Similarly "sham marriages" are invalid in a number of countries, but entirely valid in others (such as England).[156]

With this wide range of approaches to the nature and scope of the grounds for nullity of marriage, the question arises as to whether the forum should be capable of annulling a marriage where, according to the law of the parties' habitual residence, but not according to the internal law of the forum, there is a ground for nullity. In our discussion of this question we shall consider the starkest type of case where there is no equivalent ground in the internal law of the forum, rather than the case where there is a ground similarly titled but narrower in scope.

In favour of applying the law of the parties' habitual residence, it may be argued that the whole purpose of choice of law rules in nullity cases is to ensure that the appropriate law applies to the parties. To introduce restrictions or, indeed, complete disentitlements to take proceedings, based on the mere difference between the internal law of the forum and the appropriate personal law

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152 Cf. the Family Law Act 1975, section 51(1).

153 See L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 303-304 (1981), Mitchell, The Legal Problems of Epilepsy, 29 Temple L. Q. 364, at 366-368 (1956), Foster, Marriage: A "Basic Civil Right of Man", 37 Fordham L. Rev. 51, at 64 (1968), and our Report on Nullity of Marriage, p. 151 (LRC 9-1984). From 1937 until 1971 epilepsy rendered a marriage voidable under English law.

154 See L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 303-308 (1981).

155 See Monahan, State Legislation and Control of Marriage, 2 J. of Family L. 30, at 34-35 (1962) Cretney, 81-83, and our Report on Nullity of Marriage, p. 127 (LRC 9-1984).

156 Cf. Vervaeke v Smith (Messina & A.G. Intervening), [1983] A.C. 145 (H.L.(Eng.), 1982). See further Binchy, 23-24.

could be stigmatised as being unduly provincial and as running contrary to the basic philosophy of choice of law.[157]

Already, under present law, our courts will recognise as grounds for annulment foreign limitations on the capacity to marry that have no equivalent in our law.

The same applies to underage marriages, where there are wide variations in minimum age requirements in different countries.[158] It can be argued[159] that this principle may be extended to all the essential requirements of marriage, subject to considerations of public policy.[160] The public policy proviso would ensure that no great dangers could flow from referring to the law of the parties' habitual residence rather than the lex fori.

The case against taking this approach is that it might be disquieting to public opinion. The English and Scottish Law Commissions consider that:

> "it might be thought that it would be unacceptable to public opinion if, say, an English court annulled an English domiciliary's marriage, which may have been celebrated in England, on the ground that the foreign petitioner at the time of the marriage, mistakenly believed her to possess certain attributes. Such a

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157 Of course, the lex fori may decline to facilitate the parties to the extent of permitting them to marry within the forum according to their own law's rules on consanguinity or affinity but in breach of those of the forum. Moreover public policy has a role to play if the prohibited degrees of relationship are too lax (permitting brother-sister marriage, for example) or, presumably, too broad.

158 Cf. L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 318ff. (1981).

159 Cf. Cheshire & North, 405.

160 Cf. the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.46 (1985).

> case is likely to produce greater disquiet than a case where the English court annuls a marriage on the ground that the parties, though having capacity under English domestic law, lacked capacity by the foreign domiciliary law."[161]

We are not, however, convinced that informed public opinion could, or would, object to parties who are governed by an appropriate foreign law having the validity of their marriage determined in accordance with that law. It may be asked again why foreign "consent" grounds, more wide-ranging than those in the forum, should by reason of this fact alone raise any disquiet so far as public opinion in the forum is concerned, when (a) there is no equivalent disquiet so far as issues relating to capacity are concerned and (b) the public policy "long stop" is available.

If the suggestion is that some foreign "consent" grounds are so wide-ranging and slight as to offend the public's sense of propriety in the forum this criticism should be addressed by the public policy proviso. If on the other hand, there is an implication that "consent" grounds are more susceptible to abuse, since the evidence is more directly under the control of the parties themselves (in contrast, say, to a minimum age requirement) this scarcely amounts to a reason why all cases of consent should be referred[162] to the lex fori.

Accordingly we recommend that the fact that a particular ground for annulment is unknown to the internal law of the forum should not, of itself, be a reason for modifying the choice-of-law rules which we have already proposed. The public policy of the forum should be a sufficient safeguard to exercise control over inappropriate grounds.

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161 English Law Commission Working Paper No. 89 and Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.47 (1985).

162 Whether exclusively or otherwise. Cf. the English Law Commission's Working Paper No. 89 and the Scottish Law Commission's Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.48 (1985).

Which Law Should Determine Whether a Marriage Is Void or Voidable?

We must now consider the question of which law should determine whether a marriage is void or voidable: should it be the law of the parties' habitual residence or the lex fori?

There has been little detailed discussion of this issue by the courts,[163] commentators[164] or law reform agencies.[165] Such arguments as have been put forward in favour of the lex fori are largely based on jurisdictional considerations[166] or concern for protecting the lex fori from foreign contamination.[167]

The argument in favour of applying the parties' personal law rather than the lex fori stresses the fact that the issue before the court in nullity proceedings is whether the marriage is valid or invalid.[168] This being so:

> "[w]hether a marriage is void or voidable is merely a facet of the question whether it is valid or invalid. The law that determines its validity or invalidity must also determine what is meant by invalidity, that is, whether it means voidness or voidability."[169]

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163 Cf. the decisions cited by North, 145, fn. 214.

164 See Cheshire & North, 392, 405-406, North, 135-138, Morris, 19 Int. & Comp. L. Q. 424 (1970), Anton, 293.

165 Cf. the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Chioce of Law Rules in Marriage, para. 5.50-5.53 (1985).

166 Cf. North, 136-137.

167 Cf. North, 137.

168 See the English Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.53 (1985).

169 Cheshire & North, 392.

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A further argument in favour of looking to the parties' personal law rather than the lex fori is that to refer the quetion anywhere other than to the parties' personal law

> "could result in the virtual negation of the choice of law rule in any case where a legal incapacity for marriage makes the marriage void ab initio by the law of the [parties' personal law], is not contrary to any country's public policy, but has no effect by the internal law of any other legal system."[170]

We consider that the issue merits a more thorough analysis. The words "void" and "voidable", when applied to marriages, have not an inflexible concrete meaning throughout the different marriage laws of the world. On the contrary, there are two questions to be asked, rather than one.

Choice of law rules should be concerned, of course, to know whether, according to the law of a particular country, a particular ground for annulment renders a marriage void or voidable. But choice of law rules should also be concerned with a prior question: this concerns the nature of voidness and voidability under the laws of different countries. There is no magic in a label, and our choice of law rules would be deficient if they were content to examine the label, without examining the "parcel" containing the elements comprising a particular country's notion of voidness and voidability.

It may be that, according to the law of the forum, a voidable, but not a void, marriage is subject to a particular rule (as to the time within which proceedings may be brought, for example). It may also be that, according to the parties' personal law, that particular rule applies to void, but not voidable, marriages. In such a case it would be quite inappropriate for the forum, having established that a particular ground in the law of the habitual residence is by that law characterised as rendering the marriage (let us say) voidable, to go on to apply the rule of the forum appropriate to voidable marriages in the forum. To do so would interfere with the application of choice of law principles, not in order to protect any interest of the forum's but instead because the "label" of

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170 Clive, 158, endorsed by the English and Scottish Law Commissions, op. cit., para. 5.53.

"voidability" would be permitted (to the advantage of no one) to divert attention from the contents of the concept of voidability in the law of the parties' habitual residence.

Accordingly, we consider that it is necessary to look at the content of the notions of voidness and voidability in relation to marriage. What is immediately striking is that in common law jurisdictions the distinction between the two categories of marriage is somewhat confused.[171]

The historical development of the concepts of voidness and voidability owes more to jurisdictional struggles between the courts than to any rational analysis.[172]

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171 In Re Ames' Settlement: Dinwiddy v Ames, [1946] Ch. 217, Waisey, J. observed:

> "The question of a marriage which is not void but voidable is not the least perplexing of the legal principles and hypotheses with which this court is concerned. A marriage which holds good until it is challenged - and which can only be challenged - by one of the parties to it, and the retrospective effect of a decree of nullity declaring the marriage to have been void from the beginning, are ideas which involve some very curious considerations."

And in Adams v Adams, [1941] 1 K.B. 536, at 541 (C.A.), Scott, L.J. noted that the use of the terms "void" and "voidable" is:

> "primarily .... a metaphor from the law of contract, and is not truly appropriate to the law of status, but the use of both terms in connection with the status of marriage has received judicial sanction, and is consonant with the ordinary English meaning of the words, although it lends itself to misuse, and may cause confusion."

172 See Goda, The Historical Evolution of the Concepts of Void and Voidable Marriages, 7 J. of Family L. 297 (1967), Moore, Defenses Available in Annulment Actions, 7 J. of Family L. 239, at 241-249 (1967), Newark, The Operation of Nullity Decrees, 8 Modern L. Rev. 203 (1945), Tolstoy, Void and Voidable Marriages, 27 Modern L. Rev. 385 (1964), Anon., Comment: The Void and Voidable Marriage: A Study in Judicial Method, 7 Stanford L. Rev. 529 (1955), Davies, Annulment of Marriage, 27 Conn. Bar J. 41, at 43-47, 61-64 (1953).

It would, however, be wrong to overstress this lack of clarity. The main features of void and voidable marriages are well established in our law.[173] Briefly, these are as follows. In the case of voidable marriages a decree of nullity is required; but with void marriages no decree is necessary. A void marriage may be treated as such by any person, although in practice a court decree will remove any doubts as to the status of the marriage. While the validity of a void marriage may be contested by any person with a sufficient interest,[174] even after the death of the parties, a voidable marriage may be challenged only by one of the parties during the lifetime of both; until it is annulled it is regarded as valid. Children of a void marriage are illegitimate; children of a voidable marriage are regarded as legitimate unless and until the marriage is annulled, whereupon they are retrospectively rendered illegitimate.[175]

Marriages that are void are those invalid on the grounds of nonage, prior subsisting marriage, prohibited degrees of relationship, formal defect and lack of consent, other than at least certain instances of mental incapacity[176] which render a marriage voidable. Impotence also renders a marriage voidable.[177]

In other common law jurisdictions, the distinctions between void and voidable marriages are drawn in broadly similar terms, though with some differences on matters such as the

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173 See our Report on Nullity of Marriage, pp. 72-73 (LRC 9-1984).

174 Cf. Jackson, 100-102.

175 Particular problems regarding legitimacy attach to the status of children of second unions born before a decree of nullity has been obtained in relation to the first: cf. our Report on Nullity of Marriage, pp. 85-86 (LRC 9-1984).

176 Uncertainty surrounds the scope of voidability in this context: cf. id., p. 73, fn. 4.

177 Cf. id., 67-69. Another distinction which should be noted is that voidable marriages are subject to the bar of approbation, whereas void marriages are subject, in some instances, to the bar of ratification.

legitimacy of children,[178] for example. In Australia, the category of voidable marriages was abolished by the Family Law Act 1975.[179] In the United States, "some states now require an action for annulment or declaration of invalidity to establish the nullity of what most jurisdictions would regard as void marriages".[180] Underage marriages there may generally be ratified usually by cohabitation after the underage child reaches full age; in some states courts have held that unless the underage party actually disaffirms the marriage on reaching the required minimum age it will be binding.[181]

In many civil law jurisdictions, it is not easy to discern a distinction between void and voidable marriages which bears a very close relationship with the distinction drawn in common law jurisdictions.[182]

It is worth looking very briefly at the position in two of these countries: the Federal Republic of Germany and France. Thus, for example, one commentator, speaking of the law of the Federal Republic of Germany, notes that German law contains the concept of a Nichtehe, which he describes as:

> "a set of facts not even outwardly complying with the requirements of a valid marriage. In complete contrast to a marriage which is void a Nichtehe is ipso facto void and produces no legal consequences of any kind."[183]

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178 Cf. Davies, 40-42.

179 By section 51(1) of the Act.

180 Wadlington, 124.

181 Cf. our Report on Nullity of Marriage, p. 161, fn. 3 (LRC 9-1984).

182 See Cohn, The Nullity of Marriage: A Study on Comparative Law and Legal Reform, Part I, 64 L. Q. Rev. 324 (1948).

183 Cohn, vol. 1, para. 488. See also Müller-Freienfels, Family Law and the Law of Succession in Germany, 16 Int. & Comp. L. 409, at 431 (1967).

He explains that:

> "[w]hat is styled annulment of marriage (Aufhebung der Ehe) in German law (sections 28-39 EheG) corresponds to the conception of voidability in English law, with the proviso, however, that the grounds for annulment which are set out in sections 30-34 and 39 are more sweeping than the corresponding rules of English law, that the judgment annulling the marriage has no retrospective effect[184] and that the effects of annulment are identical with those of a divorce (see sections 29 and 37)."[185]

In France there is the concept of mariage inexistant,[186] equivalent to the German Nichtehe. There are temporal limitations on the right to petition for annulment when the conditions causing duress or mistake have been removed.[187] Where a marriage was contracted without the necessary parental consent, it may be attacked only by those whose consent was required or by the spouse in relation to whom this consent was required.[188]

Moreover, express or implied consent by the parents will bar proceedings.[189] If they fail to take steps to have the marriage annulled within a year of finding out about it, proceedings will be barred; a spouse will lose his or her right to attack the marriage when a year has passed after he or she has reached full age.[190]

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184 This difference no longer exists: cf. the Matrimonial Causes Act 1973, section 16. The change was introduced in 1971: see Cretney, 90-92.

185 Cohn, vol. 1, para. 490.

186 Cf. Marty & Raynaud, 1, vol. 1, 136-240, Cohn, supra, at 337-338.

187 Article 131 of the Civil Code.

188 Id., article 182.

189 Id., article 183.

190 Id.

Marriages contracted in breach of the minimum age requirements,[191] the rules relating to lack of consent, prior existing marriage and the prohibited degrees of relationship may be attacked by the parties themselves, those who have an interest in the matter or by the authorities.

We consider that, rather than be diverted by the issues of "voidness" and "voidability" of marriage, and of characterisation questions in relation to these concepts, the better approach would be for our choice-of-law rules to refer to the law of the parties' habitual residence questions such as entitlement to petition after the other party has died, and the bars to the granting of a nullity decree including approbation and ratification; this reference would be subject to the application of the public policy proviso. It is striking how little attention has been paid to the conflicts aspects of the bars to granting of an annulment.[192] In our view, they can best be seen as part of a larger interlocking web of rules relating to the substantive validity of marriage, which should be within the province of the law of the parties' habitual residence rather than that of the lex fori.

The Effects of a Nullity Decree

We must now address the question of which law should determine the effects of a nullity decree. These effects relate primarily to three matters: (a) ancillary orders of a financial nature; (b) questions as to the legitimacy of children; (c) the issue of retrospective operation of the decree. Let us consider each in turn.

(a) Ancillary orders of a financial nature

Irish law at present has a harshly logical approach towards

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191 Id., article 144.

192 Cf. L. Pålsson, Marriage in Comparative Conflict of Laws: Substantive Conditions, 164 (1981) (referring to the question of validation as a result of subsequent events).

nullity of marriage, so far as ancillary orders of a financial nature are concerned.[193] The law favours the approach that, if there was no valid marriage, no financial rights or obligations should attach to it. This result may be one of considerable injustice in some cases. In our Report on Nullity of Marriage[194] we have recommended that wide-ranging powers should be given to the court on granting a decree of nullity of marriage, to ensure that financial justice is done.

So far as conflicts aspects of this subject are concerned, we consider that the law of the forum is the most appropriate law to govern these ancillary financial matters.

(b) Questions as to the legitimacy of children

In our Report on Illegitimacy,[195] published in 1982, we recommended the abolition of the status of illegitimacy and the granting of equal rights to children regardless of the marital status of their parents. So far as nullity of marriage is concerned, we saw no reason for proposing more limited entitlements to legitimacy based on the "good faith" belief by one or both of the parents in the validity of the marriage.[196] In the light of our proposals to abolish illegitimacy, conflicts of law aspects of legitimacy require detailed analysis. It is in the context of this general analysis that the specific aspect of legitimacy of children of an annulled marriage can best be considered.

(c) The issue of the retrospective operation of a nullity decree

In some countries, some or all decrees of nullity operate retrospectively; in others they operate prospectively. In

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193 Cf. our Report on Nullity of Marriage, ch. 6 (LRC 9-1984).

194 Id., ch. 12.

195 (LRC 4-1982).

196 Cf. our Report on Nullity of Marriage, 167 (LRC 9-1984).

our law, decrees of nullity of a void marriage are entirely retrospective, while decrees of nullity of a voidable marriage are not entirely so: some effect ex necessitate will be given to property dispositions carried out during the course of voidable marriage. By way of contrast, in England (but not in Scotland) a decree of voidable marriage is entirely prospective.[197]

On one view, it may be argued that the lex fori should determine whether a nullity decree should be retrospective or prospective in its effect, on the basis that a decree of nullity "is a decree of the forum and .... it must be for the law of the forum as the law governing procedure to determine the effect of its own decree".[198] On the other hand, it can be said that the issue of retrospection is so closely connected with questions of legitimacy and capacity to marry that it should more appropriately be dealt with by the law of the parties' habitual residence. We are of the view that the latter argument is more convincing, and we so recommend.

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197 Cf. the English Law Commission's Working Paper No. 89 and the Scottish Law Commission's Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.54 (1985).

198 English Law Commission's Working Paper No. 89 and Scottish Law Commission's Consultative Memorandum No. 64, Private International Law: Choice of Law Rules in Marriage, para. 5.54 (1985).

CHAPTER 4: SUMMARY OF RECOMMENDATIONS

1. The lex loci celebrationis should continue to afford the test for formal validity of a marriage as a general rule.

2. It should be the function of the courts to develop the law on the question of which country is the "country of celebration", so far as the lex loci celebrationis is concerned.

3. Reference to the lex loci celebrationis should be to the whole law of the country of celebration rather than to its internal law alone.

4. A marriage should not be valid where the parties comply with the formal requirements of the internal law of the lex loci celebrationis if the lex loci celebrationis expressly excludes the internal law from application by prescribing choice of law rules.

5. Save to the extent that renvoi may come into operation, reference to the lex loci celebrationis should not also include a reference to the personal law of the parties.

6. In certain circumstances (on account of war or revolution, for example) where under present law parties might be unable to comply with the lex loci celebrationis, a marriage should be formally valid where each undertakes thereupon to become man and wife without having complied with the formal requirements of the lex loci celebrationis.

7. Special legislative provisions for consular marriages or for marriages by members of the Defence Forces should not be introduced.

8. A qualification denying recognition to marriages contracted in circumstances where the parties seek to evade the formal requirements of the personal law should not be included in the legislation.

9. A marriage should be valid as regards capacity when

each of the parties has, according to the law of his or her habitual residence, the capacity to marry the other.

10. Renvoi should apply in respect of capacity to marry.

11. The failure to comply with the substantive requirements of the lex loci celebrationis should not render invalid a marriage valid according to the law of the habitual residence of the parties.

12. The failure to comply with the substantive requirements of the lex fori should not render invalid a marriage valid according to the law of the habitual residence of the parties, subject (a) to the requirements of public policy, and (b) the entitlement of the forum, by legislation, specifically to exclude or modify the application of the law of the parties' habitual residence where this conflicts with a specific basic policy or policies of the forum.

13. (Reiterating proposals contained in our Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983)), the substantive requirements as to minimum age for marriage and as to parental consent should apply (inter alia) to any marriage solemnised in the State, irrespective of the habitual residence of the parties or of either of them.

14. In cases where the dissolution of a marriage would not be recognised here and that marriage is a subsisting valid marriage under our law, a subsequent marriage should not be recognised under our law whether or not it complies with the requirements of capacity to marry according to the law of the parties' habitual residence.

15. Where a remarriage fails to satisfy the requirements of the law of the parties' habitual residence, its validity should not be recognised whether or not a prior dissolution is recognised under our law.

16. The issue of the validity of a party's consent should be determined by the law of the country of the parties' habitual residence.

17. Where the parties have their habitual residences in different countries at the time of the marriage, the marriage should be invalid for lack of consent only where, according to the law applying to the party in question, that party did not provide the requisite consent.

18. The lex loci celebrationis should not have a subsidiary role in relation to the ground of lack of consent.

19. The ground of impotence should be determined by the law of the parties' habitual residence.

20. A petitioner should be entitled to a decree of nullity on the ground of impotence if the petitioner is, in the circumstances, entitled to petition according to the law of either party.

21. A ground of nullity based on the wilful refusal to consummate should, to the extent that it has no counterpart in Irish internal law, be treated as a ground falling within the scope of recommendation no. 25.

22. The ground of impotence should be determined by the law of the parties' habitual residence at the time of the marriage rather than at the time of the nullity proceedings.

23. The lex loci celebrationis should not have any role, even one of a subsidiary nature, in respect of the ground of impotence.

24. Rather than for the legislation to attempt to spell out in full detail the circumstances in which our courts should grant a nullity decree, on the grounds of public policy, in circumstances where the law of the parties' habitual residence does not so provide, this function should be left to the courts. In this general context, the question of the absence of the ground of impotence in a country's nullity law should be addressed by the courts.

25. The fact that a particular ground for annulment is unknown to the internal law of the forum should not, of

itself, be a reason for modifying the choice-of-law rules already proposed. The public policy of the forum should be a sufficient safeguard to exercise control over inappropriate grounds.

26. Rather than be diverted by the issues of "voidness" and "voidability" of marriage, and of characterisation questions in relation to these concepts, the better approach would be for our choice-of-law rules to refer to the law of the parties' habitual residence questions such as entitlement to petition after the other party had died, and the bars to the granting of a nullity decree, including approbation and ratification; this reference would be subject to the application of the public policy proviso.

27. The lex fori should govern ancillary financial matters.

28. The issue of retrospection as regards the operation of a nullity decree should be determined by the law of the parties' habitual residence.

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