THE FORMAL SUFFICIENCY OF FOREIGN MARRIAGES

BY J. DAVID FINE*

It has long been a general rule of common law that a marriage is valid only if formalized in a manner recognised by the law of the place of celebration. This rule is continued in Australian law by explicit statutory provision.

In this Article Mr Fine suggests that in Australian Law the category of exceptions to the lex loci celebrationis *requirement is significantly wider than in the common law of England. He also finds that in situations outside the scope of the requirement, Australian courts should apply the parties' domiciliary law to decide formal validity—not the law of the forum, though the latter is used in English courts as the law of second resort.*

It has long been an established rule of the English and the Australian conflict of laws that any formalities or ceremony will effect a marriage between two people if and only if the law of the jurisdiction in which it occurs deems those forms sufficient to effect a marriage.[1] This general rule is continued in the Family Law Act 1975 (Cth)[2] (hereinafter referred to as the "Family Law Act").

But although this is the general rule, virtually since the birth of the modern conflict of laws in the common law system and from the time English-law courts began to accept jurisdiction in causes where the laws of England would not govern a dispute, there have existed exceptions to the rule in the reported jurisprudence.[3] In the third quarter of the twentieth century Australian courts were even more active than English courts in testing the rationale behind the general rule, so as to define in a coherent and socially purposive manner those situations in which the general rule ought not to apply. The Australian courts also have evolved a different solution to the problem of what law to apply in the place of the *lex loci celebrationis*, whenever the general rule is to be excepted.

Presumably the proviso in the Family Law Act which directs the application of foreign law to matrimonial causes in accordance with "the

* B.S.F.S. (Georgetown), LL.B., B.C.L. (McGill), Lecturer in Law at the University of Melbourne.

[1] Sykes, *A Textbook on the Australian Conflict of Laws* (1972) 75-96; North (ed.), *Cheshire's Private International Law* (9th ed. 1974) 316-349.

[2] S. 51(2): "A marriage that takes place after the commencement of this Act is void where— . . . (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages . . ."

[3] Mendes da Costa, "The Formalities of Marriage in the Conflict of Laws" (1958) 7 International and Comparative Law Quarterly 217, 227-233.

common law rules of private international law" refers to the common law of Australia.[4] For that reason it is vital to note how and why the rules of exception to the *lex loci celebrationis* principle operate presently in Australian law. Proper effect can then be given to the Parliamentary repetition of the principal rule in the Family Law Act.[5] And when they do apply, one needs to know which law is turned to as the law of second resort.

1. *When will Australian courts not submit formal validity to the lex loci celebrationis?*

Text writers assert the fundamental character of the *lex loci celebrationis* principle in the choice-of-law rules of common law countries; they do not explain why it has gained such status. One would think that a rule, "so well established"[6] as to be "one of the clearest principles of conflict of laws"[7] would exist for some evident reason. Most rules of law do. Nor does the assertion that the dearth of attempts to explain the principle is due to its very certainty[8] help to clarify the matter.

Only one author appears to have attempted to justify the basic *lex loci celebrationis* principle. Mendes da Costa explains its ready acceptance—and its appropriateness—as being due to three factors. He explains, writing in 1958, that the rule is certain,[9] "is agreeable to the law of nations which is the law applicable to every country and taken notice of as such",[10] and is a rule, "which it is fair to assume [has] been formulated with consideration for the moral and ethical well-being of society".[11]

Is this an adequate explanation? It is not thought so. As regards Mendes da Costa's first justification, any precisely defined rule of law will be certain; it need not even be a rule susceptible of reduction to one sentence. Thus, while the common law rules respecting limitations of actions are complex, they are, if nothing else, quite certain. With respect to the second justification, other writers on the topic have noted that many countries, including France, Germany, Malta, Italy, Cyprus and Greece, refer the formal adequacy of marriage to other laws than the *lex loci celebrationis* alone.[12]

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[4] S. 42(2): "Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory), the court shall apply the laws of that country or place."

[5] *Supra* n. 2. The implications of ss. 42(2) and 51(2)(c) upon the future of the rule in Australian law are considered in Division 1 of this Article.

[6] Dicey and Morris, *Conflict of Laws* (9th ed. 1973) 236.

[7] Sykes, *op. cit.* 77. See too Cheshire, *op cit.* 316.

[8] Mendes da Costa, *op. cit.* 217.

[9] *Id.* 233.

[10] *Ibid.*, quoting, uncritically, *Scrimshire* v. *Scrimshire* (1752) 2 Hag. Con. 395, 412; 161 E.R. 782, 788.

[11] Mendes da Costa, *op. cit.* 235.

[12] Cheshire, *op. cit.* 318-319; Dicey and Morris, *loc cit.*

Mendes da Costa's last-quoted justification for the general principle, which expresses an assumption made over two hundred years ago, is circular in its reasoning. At the very least, it is not self-evident just *how* judging the formal validity of all marriages by the law of the place where they are celebrated is better suited to advancing society's well-being than any other possible rule.

The real rationale behind the *lex loci celebrationis* rule is suggested in the writings of the French scholar, Batiffol. It is recognised by Batiffol that whatever law is chosen to regulate a given transaction by any legal system reflects, above all else, that system's decision about the relative ranking of social values. Even a decision to leave the choice of an applicable law to the decision of the parties—as in many contractual matters—is itself a policy decision that in such a matter personal freedom is of greater importance to the society than any other value which might be attained by imposing a specific choice-of-law rule.[13] Thus, Batiffol can see the submission of the formal validity of marriage to the law of the place of celebration as reflective of the importance states attach, as an incidence of their sovereignty, to regulating just how and by whom marriages may be celebrated within their borders. In France, unique social and historic influences may demand that only civil marriages be permissible. Such requirements of *l'ordre public* are to the French Republic of far greater interest than the marginal gain in personal freedom to be attained by "abandoning to the will of the parties" the choice of forms within France.[14] The *lex loci celebrationis* rule then is applied to marriages celebrated abroad, simply in the hope that other states will in turn apply it to marriages celebrated in France.

If this simple, pragmatic basis underlies the principle, it ought to follow that the principle will be inapplicable whenever insistence upon conformity with the *lex loci celebrationis* does not further the application by foreign courts of domestic laws respecting forms of marriage by persons within the forum state. Alternatively, in a legal system which operates from a heritage of personal freedom of choice in selecting the forms in which to effect juridical acts,[15] the choice-of-law rule ought not to apply when inflexible insistence upon it would prove intolerably burdensome upon the people affected.

It is submitted that the *lex loci celebrationis* rule for choice-of-law was just so interpreted and applied by English courts for perhaps a century, from its first enunciation by the ecclesiastical courts, at least until the period of the 1914-1918 war. The rule continued to be stated

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[13] Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956) 73-74 (para. 32).

[14] Batiffol, *Traité élémentaire de droit international privé* (4th ed. 1967) 474 (para. 425).

[15] *E.g.* "freedom of contract". See too Marriage Act 1961-1973 (Cth) ss. 29, 43, 45 and 47.

very often in the broadest and most unequivocal of terms, but courts passing upon the "hard cases" did take an attitude such as that described above.

The apparent inflexibility of the *lex loci celebrationis* rule is epitomized by the judgment of Viscount Dunedin, for the Privy Council, in *Berthiaume* v. *Dastous*:[16]

> If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil [*sic*] of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage.[17]

His Lordship cites as authority *Dalrymple* v. *Dalrymple*,[18] *Scrimshire* v. *Scrimshire*,[19] *Ruding* v. *Smith*,[20] and a Scottish ecclesiastical decision:[21] and all four cases do indeed affirm this principle in rationes decidendi.

These leading authorities demonstrate amply that the English courts normally imposed upon English domiciliaries the obligation to abide by formal requirements of the *lex loci celebrationis*, and not the formalities insisted upon by English law.[22]

But cases also exist in the old law reports which allow of exceptions to the principle *lex loci celebrationis*. Formal requirements of the place of celebration might be inapplicable where they would affront the religious sensibilities of the couple, and of the court.[23] Nor would English courts ever consider subjecting Englishmen to the forms required by such "primitive" legal systems as that of Imperial China.[24] The judges concerned thought the matter too obvious to warrant explanation.[25]

Such exceptions as were allowed to the *lex loci celebrationis* rule in the jurisprudence prior to the 1939-1945 war—and the small number of

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[16] [1930] A.C. 79.
[17] *Id.* 83.
[18] (1811) 2 Hag. Con. 54; 161 E.R. 665.
[19] (1752) 2 Hag. Con. 395; 161 E.R. 782.
[20] (1821) 2 Hag. Con. 371; 161 E.R. 774.
[21] *Johnstone* v. *Godet* (1813) Fergusson Consistorial Law Reports 8.
[22] *Semble*: *In re Green; Noyes* v. *Pitkin* (1909) 25 T.L.R. 222 (Swinfen Eady J.) where a New York marriage *per verba de praesenti* was recognised.
[23] *Lord Cloncurry's Case* (H.L.) unreported but cited by counsel in *The Sussex Peerage Case* (1844) 6 St. Tr. (N.S.) 79, 87; (1844) 11 Cl. & Fin. 85, 92; 8 E.R. 1034, 1037.
[24] *Phillips* v. *Phillips* (1921) 38 T.L.R. 150 (Sir Henry Duke P.); *Wolfenden* v. *Wolfenden* [1946] P. 61, 62-63 (Lord Merriman P.).
[25] *Wolfenden* v. *Wolfenden* [1946] P. 61, 63.

cases reported probably indicates only the relative paucity of litigation—support the suggestion that the general choice-of-law rule never was meant to apply where it would entail a hardship to the parties disproportionate to the benefit of the forum state. And the forum state only would benefit if there was a real likelihood of the courts of the state of the place of celebration respecting in their judgments the rules of the forum state, when they in turn might pass upon juridical acts effected there. In the nineteenth and early twentieth centuries perhaps there was little expectation of third world tribunals ever reaching such a level of sophistication.

The oft-cited judgment of Lord Stowell in *Ruding* v. *Smith*[26] excepted from the requirements of form of the place of celebration Englishmen in the then newly-conquered colony of the Cape of Good Hope. An English-domiciled officer in transit to the East Indies married, in Church of England rites, a woman domiciled in British India. Lord Stowell, in the Consistory Court, offered the following explanation:

> can it be maintained that the success of their arms, and the service of vigilant control in which they are employed, lays them [referring explicitly to an army of occupation] at the feet of the civil jurisdiction of the country, without any exception whatever?[27]

The husband was said to be in the Cape Colony

> not as a volunteer or a settler, by intention of his own, [n]or there to remain; but in the character of a British soldier, in the prosecution of a further voyage directed by British authority.[28]

The suggestion clearly present in *Ruding* v. *Smith* is that when testing the formal adequacy of the marriage of a member of such a "distinct and immisceable [*sic*] body",[29] the usual interest of the forum state in applying the rule has ceased to be present. The occupied territory has ceased to be a sovereignty; the tribunals of the particular place of celebration no longer have to be entreated to recognise the right of England to legislate upon what forms of marriage might be had within England, for the legal systems of such places as those under military occupation can be forced to do so. Also, it would stand to embarrass Britain, as a sovereign imperial power of the nineteenth century, if its soldiers in a recently conquered colony had to marry in accordance with the laws of another, recently vanquished, European imperial power.

The issue now confronting one is how to transpose a choice-of-law

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[26] (1821) 2 Hag. Con. 371, 387; 161 E.R. 774, 780. See too the obiter dictum of the same judge in *Burn* v. *Farrar* (1819) 2 Hag. Con. 369, 370; 161 E.R. 773, 774.

[27] (1821) 2 Hag. Con. 371, 387; 161 E.R. 774, 780.

[28] *Id.* 389; 780.

[29] *Id.* 387; 780.

rule, conceived within nineteenth century conceptions of national interest, to a twentieth century world.

It is apparent that the first basis of exception found in the early case law is not acceptable to a polity in the last quarter of the twentieth century. It no longer is possible to regard some legal systems as too primitive for their regulation to be imposed upon nationals, or domiciliaries, of the forum state who sojourn in such places. This leaves the second basis of exception to be developed and up-dated. What political situations might, henceforth, both: (a) render it intolerably burdensome for courts of the Australian forum to require—retrospectively—that persons celebrate marriage in accordance with local laws; and also (b) render it internationally acceptable (not jeopardising future comity) to ignore a state's laws in passing judgment upon the efficacy of juridical acts passed within its territory?

Only one such class of cases has been accepted in post-1950 English conflict-of-laws rules. It is a narrow class, encompassing only marriages in which one spouse is assisting in the administration of territory under belligerent occupation, usually as a soldier garrisoned there. The English Court of Appeal has passed upon the matter twice. Neither judgment is particularly distinguished. The decision in 1957 might have allowed of a broader, more general, rule of exception; the latest decision, rendered in 1963, clearly does not.

Each Court of Appeal decision involved a marriage celebrated between two Poles. Both marriages occurred in allied-occupied Western Europe, within a year of the capitulation of the Axis governments. In each case (the first in Italy and the second in Germany) the respective *lex loci celebrationis*, had it been applied, would have deemed the marriage void for failure to comply with civil formalities after Roman Catholic marriage rites.

In the first case, *Taczanowska* (*orse. Roth*) v. *Taczanowski*,[30] Parker L.J. was the only judge to explain when the general choice-of-law principle might be inapplicable. He chose to read literally passages in early nineteenth century cases which speak of one "subjecting" one's juridical acts to the law of a country when one enters it, and concluded that a soldier in belligerent occupation does not "subject" his marriage to local law, unless he chooses to use the local facilities and formalities.[31] The next year, Sachs J., a judge at first instance, was able to find scope within the *Taczanowska* decision to rule that the inmates of a displaced persons' camp similarly never intended to "subject" their juridical acts to German law, merely by being physically present in Germany in June 1945.[32]

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[30] [1957] P. 301.

[31] *Id.* 330. Ormerod L.J. agreed with Parker L.J., Hodson L.J. did not discuss the matter.

[32] *Kochanski* v. *Kochanska* [1958] P. 147, 153.

In two later English cases, single judges criticised such an extension of the rule of exception, suggesting that it is the English conflict-of-laws rules, and not one's volition, which "subjects" the formal validity of marriage to tests of the *lex loci celebrationis*.[33] One of these two cases went to the Court of Appeal. In the Court of Appeal's 1963 decision of *Preston* (*orse. Putynski*) v. *Preston* (*orse. Putynska*) (*orse. Basinska*),[34] only two of the three judges discussed the limits of the rule of exception. The facts of the case indeed did not require demarcation of the exception's penumbra, for they were on all fours with those of the Court's 1957 decision.

Ormerod L.J. ascribes the *lex loci celebrationis* to "the canons of international comity"[35] without explaining what he perceives this to mean. He recognises that, "this rule does not apply in all circumstances",[36] but abjures from "any exhaustive definition of the circumstances in which the rule does not apply".[37] In fact, he only offers the example of persons "part of the organisation necessarily or at least commonly set up when there is hostile occupation".[38]

Russell L.J. speaks in a similar vein.[39] He goes further though, in an apparent attempt to offer a rationale behind the rule of exception and thus find its parameters:

> If . . . the true ground of the general rule is the recognition, as a matter of international comity, of the right of a state to lay down the formalities requisite for marriage within its boundaries, then it may be argued that little heed need be paid to such comity in the case of a state so reduced by conquest that it has no practical means of exerting authority or discipline over, for example, a displaced persons' camp. . . . But, for my part, I consider that encroachment upon the general rule by way of exception is not to be justified except upon some point of principle, and it is not a point of principle merely to say that it would be reasonable in all the circumstances to recognise a person as entitled to ignore the lex loci of marriage formalities.[40]

Russell L.J. is seen to speak much of "principles"; nowhere does he indicate what principles he thinks found the rule *lex loci celebrationis*, and hence the exceptions to it.

What then is the state of the law of England respecting the choice-of-law rule in the conflict of laws involving a foreign marriage: that the

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[33] *Preston* (*orse. Putynski*) v. *Preston* (*orse. Putynska*) (*orse. Basinska*) [1963] P. 141 (Cairns J.); *Merker* v. *Merker* [1963] P. 283 (Sir Jocelyn Simon P.).
[34] [1963] P. 411.
[35] *Id.* 427.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Id.* 433-434.
[40] *Id.* 435.

requisite formalities of marriage are those of the place in which any particular marriage happens to be celebrated? Without exaggeration, it appears that English courts have become frightened of the potential implications if the *lex loci celebrationis* rule should cease to play a major role in most nations' conflict-of-laws rules. However they have not considered the functions it was meant to serve and demarked the limits of the rule accordingly, taking into account the nature of the modern international system. Not able totally to ignore early precedents indicating that the principle is in essence flexible, the English courts have striven to restrict those precedents to their very facts—or to facts as akin to those of the nineteenth century cases as the inexorable passage of history will allow.

It is fortunate for the future development of the Australian conflict-of-laws that Australian courts on several occasions had to judge the scope of the *lex loci celebrationis* rule well before the reports of the arbitrary decision of the English Court of Appeal in *Preston's* case reached the Antipodes.

The entire matter was dealt with as *res integra* by the South Australian Supreme Court in *Savenis* v. *Savenis and Szmeck*[41] in 1950. Mayo J. was confronted with a Roman Catholic ceremony of marriage, involving two Lithuanian inmates of a prisoner-of-war camp in Germany in November 1945. He accepted that at that particular time and place, no possibility existed of the parties procuring a German civil marriage, due to an absence of celebrants authorised by the *lex loci celebrationis*. Acknowledging the absence of real authority in point, Mayo J. gave judgment in the following terms:

> in circumstances where a marriage cannot be lawfully 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 formerly, domiciled is itself overrun, the government being taken over by an alien power, 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 given to marriages that conform to our own common law . . .[42]

Formalities imposed by the *lex loci celebrationis* will not be enforced where the state of celebration does not also provide the means for compliance with such laws.[43] Most of the Australian cases which deny the validity of marriages for failure to follow the *lex loci celebrationis* distinguish the *Savenis* decision, by finding that the respective parties

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[41] [1950] S.A.S.R. 309.

[42] *Id.* 311.

[43] In an identical vein, see *Maksymec* v. *Maksymec and Kocan* (1954) 72 W.N. (N.S.W.) 522, 524 *per* Myers J.; *Kuklycz* v. *Kuklycz* [1972] V.R. 50 (Norris A-J); *Sadek* v. *Owarowa* (unreported) Supreme Court of Tasmania, 18 July 1975, No. 32/1975 noted [1975] Australian Current Law Digest DT208 (Chambers J.).

might easily have followed requirements of local law;[44] the broad concept is not challenged.

The basic difference between the Australian and the ruling English case law is this: whereas the English law limits exceptions to the *lex loci celebrationis* rule to the very facts of the earliest precedents, Australian law views precedents as if they indicate a limit to the rule; whereas English law is ossified fiat, Australian law is susceptible of socially purposive development.

One South Australian decision presents a real challenge though to developments of a rule of exception to further personal liberty by deeming some marriages valid despite non-compliance with injunctions of law foreign to the parties. *Fokas* (*orse. Milkalauskaite*) v. *Fokas*,[45] a judgment of Napier C.J. in the South Australian Supreme Court, was concerned with a marriage in Roman Catholic form, between Lithuanian inmates of a displaced persons' camp in Germany in December 1947. First, Napier C.J. found that the parties' failure to comply with German requirements of civil solemnization could not at all be ascribed to impossibility, within the meaning of the term in *Savenis'* case. For by the end of 1947, an "abeyance" of governmental institutions certainly no longer existed in Germany.[46]

Then His Honour added the following observation, which poses the real challenge to delimiting a future rule of exception. Speaking of the decision of another judge of his Court two years before in *Savenis'* case Napier C. J. said:

> I might feel some difficulty in going all the way with the reasoning in that case . . . . it seems to me 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.[47]

This is the problem posed by Napier C.J.: Australia, *qua* forum state, wants other states to recognise its right to dictate the forms to be taken by juridical acts within Australia. It will do so—save for good reason to the contrary—by invalidating juridical acts in other countries which do not comply with their respective formal requirements. Given this, he asks, is the liberty to marry sufficiently important to *ever* require divergence from this general course? This, ultimately, is the question asked of us by *Fokas'* case.

The intensity of the former interest cannot readily be assessed; it will

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[44] *Milder* v. *Milder* [1959] V.R. 95 (Smith J.); *Grzybowicz* v. *Grzybowicz* (*orse. Kochanczuk*) [1963] S.A.S.R. 62 (Napier C.J.); *Dukov* v. *Dukov* [1969] Q.W.N. 9. (Hoare J.)

[45] [1952] S.A.S.R. 152.

[46] *Id.* 154.

[47] *Ibid.*

though be pondered shortly. But the intensity to be imputed to the latter interest by Australian courts appears clearly from the text of the Family Law Act, section 43 of which reads, in part,

> The Family Court[48] shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to—
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> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life; [and]
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> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit [*sic*] of society, particularly while it is responsible for the care and education of dependent children;
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> . . .

Parliament thus appears to have foreclosed the alternative proposed by Napier C.J. If regard is to be had to section 43(a) and (b) by Australian courts in applying the *lex loci celebrationis* rule (and this pursuant to the direction in section 51(2)(c) of the Family Law Act), there is no way that they can arbitrarily insist upon compliance with the general rule *in all cases.*

The essential question still remains unanswered: when do "the common law rules" of Australia, spoken of in section 42 of the Family Law Act, *not* require that the law of the country in which a marriage is celebrated be applied by the new family courts to test the formal validity of foreign marriages?

The answer to this question seems to emerge by contrasting the relevant English and Australian conflict rules, as they have developed since 1950. Unlike the English common law's acceptance of a hard and fast definition of a limited class of cases in which the *lex loci celebrationis* need not be applied by the English courts (unless the parties have intended that it apply to them), and unlike the ossification of the English common law's rule to encompass only marriages involving persons serving a force of belligerent occupation, the Australian common law rule is far more fluid.

The rationale underlying *Savenis'* case[49] which seems to be accepted by the Supreme Courts of New South Wales,[50] Victoria,[51] Queensland,[52] and Tasmania,[53] appreciates that persons wishing to marry cannot expect to do so in any way their past experiences suggest to them. Just as

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[48] See Part IV of the Act.
[49] *Savenis* v. *Savenis and Szmeck* [1950] S.A.S.R. 309.
[50] *Maksymec* v. *Maksymec and Kocan* (1954) 72 W.N. (N.S.W.) 522.
[51] *Milder* v. *Milder* [1959] V.R. 95; *Kuklycz* v. *Kuklycz* [1972] V.R. 50.
[52] *Semble*: *Dukov* v. *Dukov* [1969] Q.W.N. 9.
[53] *Sadek* v. *Owarowa* cited *supra* n. 43.

Australian courts have required,[54] and will continue to require, that marriages be celebrated in Australia in accordance with mandatory local requirements of form, so too will they normally have to recognise the right of all other states to impose similar requirements. Hence the *lex loci celebrationis* cannot be excluded under rules of Australian common law merely because the *lex loci celebrationis* is that of a "primitive"—or non-Western—legal system.

As the same time, Australia's common law conflict rules seem not to require the application of the *lex loci celebrationis* when general chaos and the suspension of facilities of celebration prescribed by the *lex loci celebrationis* have made compliance impossible. While the existing cases all arose in a wartime or post-war situation, it would seem, by parity of reasoning, that the choice-of-law rule ought to make similar exception for persons just as effectively prevented from compliance by a host of other factors. If, for example, religious or racial persecution within the jurisdiction of celebration has prevented compliance, then the policy declared in section 43 must justify the Family Court of Australia not applying the *lex loci celebrationis*, under section 42, to invalidate the marriage. It appears that prior to the American Civil War of 1861-1865, black slaves were never allowed to marry under the laws of jurisdictions such as North Carolina. The *lex loci celebrationis* there deemed invalid *any* form of marriage undertaken by such persons.[55] Similar systems of slavery exist in the world today, sometimes with formal legal sanction, at other times (and just as effectively) despite formal legal pronouncements.[56] Modern appreciation of the purpose and limitations of the general choice-of-law rule, reflected in the Australian case law of the last 25 years, stands to save marriages of all such persons from being invalidated in Australian courts. The goal of affirmation of the right to marry then ought to take precedence over the goal of seeking recognition by foreign legal systems of the interests of Australia in regulating ceremonies of marriage within Australia. The international legal order has denounced generally the institution of slavery; states are in no way obligated to assist internal policies of other states of such a sort.[57] Abstentions from the application of the *lex loci celebrationis* to invalidate such marriages would not endanger the general recognition in foreign courts of Australia's requirements of formality.

But a line is to be drawn. Section 43 of the Family Law Act cannot

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[54] *R.* v. *Fuzil Deen* (1895) 6 Queensland Law Journal Reports 302; *Tyson* v. *Logan* (1891) 12 N.S.W.L.R. (D) 29; *Rouse* v. *Rouse* [1925] V.L.R. 584.

[55] *State* v. *Samuel, a Slave* (1836) 2 Devereux & Battle 177, 181 (North Carolina Reports). See too Semonche, "Common-Law Marriage in North Carolina: A study in Legal History" (1965) 9 American Journal of Legal History 320.

[56] *E.g.*, the Sultanate of Oman, on the Persian Gulf: see Halliday, *Arabia Without Sultans* (1974) 277-278.

[57] "Slavery Convention" (1926) 60 League of Nations Treaty Series 253 (No. 1414): ratified by Australia 18 June 1927.

sanction general non-compliance with the *lex loci celebrationis* by all who would find formal requirements of that law inconvenient. Hard cases though will arise; some situations may make it more than "inconvenient" and less than "impossible" for a marriage to be had under the provisions of the *lex loci celebrationis*. What attitude might the Australian choice-of-law rule take regarding marriage between persons who claim to suffer some form of persecution by the country of celebration, which denies them *that* form of marriage required by the dictates of their conscience?

If the state of celebration denies legal validity to the ceremony required by the parties' religious or ethical beliefs, but still permits such a ceremony to be had, then a balancing of goals by the Family Court ought to result in its application of the *lex loci celebrationis*. The choice-of-law rule should not refuse to recognise, for example, the right of the French state to implement its own public policy by affording validity only to those domestic marriages celebrated by civil officers. Persons still are free to have a religious ceremony in accordance with their own beliefs, and thus be free to enter into marriage and found a family. Both the goal of preserving the institution of marriage and the nuclear family, and the goal of furthering international comity, can at once be met by the Family Court.

In a different situation, in which the formalities required by parties' consciences before they can consider themselves free to marry and found a nuclear family are not only denied legal significance by the *lex loci celebrationis*, but are outlawed altogether and cannot be had, no problem can confront the Australian Family Court. Parties then, presumably, would have abstained either from using the legally permissible formalities, or from attempting to use some non-legal formality of their own choice; there can be no marriage for the Court to adjudicate upon.

2. *What is the law of second resort?*

This gives rise to the next problem. In a situation where the *lex loci celebrationis* is deemed inapplicable under the common law choice-of-law rule of Australia, which the Court is directed to apply by section 42 of the Family Law Act, what other law is to be used to test the formal validity of a marriage?

The English courts have decided quite clearly that once the *lex loci celebrationis* has been found inapplicable under their restricted choice-of-law rule, the only other law by which an English judge can test the formal validity of a marriage is the law of England, *qua lex fori*.[58] So, should two domiciliaries and nationals of Poland—who have never had, nor even contemplated having, any contact with Britain in their whole

[58] But see Division 3 of this Article regarding what is deemed "the law of England" for this purpose!

lives—marry in a third state, and should the *lex loci celebrationis* be found inapplicable to decide the formal validity of their marriage, and should the validity of the marriage be adjudicated in England some ten or fifteen years later, the English Court of Appeal would require that the formal validity of such a marriage be decided according to the *lex fori*, the common law of England.[59]

Why ought the *lex fori* be the law of second resort, to which a court will turn after rejecting the use of the *lex loci celebrationis* to test a marriage's formal validity? Three reasons were advanced by the various members of the Court of Appeal in *Taczanowska's* case; none appears adequate.

First, Parker L.J. mentioned the difficulty in using the *lex domicilii* as the law of second resort, after rejecting the *lex loci celebrationis*. He would reject the *lex domicilii* as the law of second resort because of difficulties which would ensue if the husband and wife each had a different pre-marital domicile.[60] This reason alone appears inadequate, as the courts commonly use a *lex domicilii* to pass upon other matters relating to marriage, and have evolved rules for determining which domiciliary law to apply in such situations of dual domicile.[61]

Next, Hodson L.J., with whom Parker and Ormerod L.JJ. expressed agreement on this point, said that English common law is to be applied because "such is the law prima facie to be administered in the courts of this country".[62] Again, this assertion, though unquestionably correct, offers no reason at all for continuing to apply English law if a case can be made for the applicability to the matter of some law other than the *lex fori*.

Finally, the last reason offered by the English Court of Appeal for judging the formal validity of foreign marriages by the *lex fori*, after excluding the application to a given case of the *lex loci celebrationis*, is that the Supreme Court of South Australia said so in *Savenis'* case some seven years before.[63] In fact, as will be seen below, it said no such thing.

Given this comparative base, attention can be then turned to the controversy among Australian judges during the past quarter-century as to which law governs the formal validity of marriages when the *lex loci celebrationis* is inapplicable. Which is the law of second resort in

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[59] *Taczanowska* (*orse. Roth*) v. *Taczanowski* [1957] P. 301, 326, 331 applied in *Kochanski* v. *Kochanska* [1958] P. 147, 153-155 (Sachs J.) and *Narewski* v. *Narewski* (1966) 110 Solicitors' Journal 466 (Cumming-Bruce J.).

[60] *Taczanowska* (*orse. Roth*) v. *Taczanowski* [1957] P. 301, 331.

[61] *E.g.* Sykes, *A Textbook on the Australian Conflict of Laws* (1972) 83-94, and authorities cited therein.

[62] *Taczanowska* (*orse. Roth*) v. *Taczanowski* [1957] P. 301, 326 *per* Hodson L.J. For the concurrence of Parker and Ormerod L.JJ. see *id.* 331 and 332 (respectively).

[63] *Id.* 327 *per* Hodson L.J.: Parker and Ormerod L.JJ. again concurred; *id.* 331 and 332 (respectively).

Australia—the *lex fori* or the *lex domicilii?* Of the four Australian judges who have considered the matter, two favour the application of the *lex domicilii*, while two favour the application of the *lex fori.* But the weight of reason clearly favours the interpretation of Australia's "common law rules", referred to in section 42(2) of the Family Law Act, as requiring the application of the *lex domicilii* to determine formal validity of marriage, whenever those same rules hold inapplicable the *lex loci celebrationis* for the reasons canvassed in Division 1 of this Article.

Savenis' case was the first case to confront the issue. Mayo J. stated his reasons for applying the law of the forum as follows:

> If the matter be *res integra,* in circumstances where a marriage cannot be lawfully solemnized in accordance with the laws of some territory . . . *and if the country in which the parties are, or were formerly, domiciled is itself overrun, the government being taken over by an alien power, 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 given to marriages that conform to our own common law . . .[64]

In actual fact, *Savenis'* case does not seem to be any real authority for the use of the *lex fori* as a law of second resort. All it seems to say is that in some circumstances it may be either impossible (or merely unjust, perhaps) to apply the *lex domicilii*, and in those cases only, the *lex fori* is resorted to.

Savenis' case thus can be interpreted as applying the *lex fori* to the matter for either of two reasons. Either, the *lex loci celebrationis* being excluded, and the *lex domicilii* being found impossible of application (perhaps due to the absence of any discernible *lex domicilii*), the South Australian Supreme Court fell back upon the presumption that it is to apply its own law. In the alternative—and, in result, of no difference—Mayo J. ruled that though the *lex domicilii* is the law of second resort for passing upon the formal sufficiency of marriage when the *lex loci celebrationis* is not applicable, the *lex fori* is the law of *third* resort. This alternative approach to the matter might be justified by arguing that after the state in which a ceremony of marriage occurs, and after the state(s) of the parties' domicile, then the forum state has the greatest interest in the question.

Norris A-J (as he then was) in *Kuklycz* v. *Kuklycz*[65] is the only other Australian judge who, in passing upon the formal sufficiency of marriage, has applied the law of the forum as the law of second resort. Although he cited various cases in his judgment, His Honour offered no useful explanation for his decision.[66]

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[64] [1950] S.A.S.R. 309, 311 (italics added).
[65] [1972] V.R. 50.
[66] *Id.* 52.

The interest of the forum state in applying its own law to judge the formal sufficiency of a marriage seems relatively weak. The marriage may be between persons who then had no connection whatever with the legal system or general mores of the forum. Even if they migrated to Australia at some point after their purported marriage—and this need not always be the case for the issue to be litigated in an Australian court—general prejudices against the retrospective application of laws ought to militate against using the *lex fori* as the law of second resort. For purposes of section 42(2) of the Family Law Act there hardly appears to have emerged with any clarity any Australian "common law rule of private international law" which requires such an odd choice-of-law decision.

Both of the Australian decisions which rule that the *lex domicilii* is the law of second resort adopt the same reasons. In the first case, the South Australian case of *Fokas* (*orse. Milkalauskaite*) v. *Fokas*,[67] Napier C.J. noted that *Savenis'* case only relied upon the *lex fori* because the parties in the latter case could no more conform to the law of their domicile than they could to the law of the place in which they married, in respect of requisite formalities. The Chief Justice, sitting at trial, reasoned as follows respecting situations in which parties to a marriage cannot conform to the *lex loci celebrationis*:

> In these circumstances British subjects have been conceded the right to resort to the common law of England [citations omitted]; and it seems to me that the same right, of resorting to the law of their domicile, must be accorded to others in the same situation.[68]

The New South Wales judgment of Myers J. in *Maksymec* v. *Maksymec and Kocan*[69] is in a similar vein:

> I do 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.[70]

The point is also made by Myers J. that once it is decided not to apply the law of the place of marriage, only the domiciliary law could claim any attachment to the parties' act at the time it occurred.[71]

Given the paucity of precedent, this seems by far the better rule.

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[67] [1952] S.A.S.R. 152.
[68] *Id.* 153-154.
[69] (1954) 72 W.N. (N.S.W.) 522.
[70] *Id.* 523.
[71] *Id.* 525.

3. *Concluding Remarks*

A review of the jurisprudence reveals that in passing upon the formal validity of marriages celebrated outside of Australia, the Family Court seems required by section 42(2) of the Family Law Act to apply principles like these, as being "the common law of Australia":

(1) A marriage is void where "the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages"[72] unless:

(a) the means of compliance have ceased to exist;

(b) the means of compliance are denied to the parties by the law of the place where the marriage takes place; or *(semble)*

(c) compliance with the law of the place where the marriage takes place on the part of the parties to the marriage is deemed by the Family Court to subject them to grossly intolerable indignity.

(2) A marriage which does not comply with the requirements of the law of the place where the marriage takes place with respect to the form of solemnization of marriages for one of the above reasons is void, unless it complies with the formal requirements of the domiciliary law applicable to the parties under the Australian common law rules of the conflict-of-laws.

(3) Notwithstanding paragraph (2) above, should compliance with the domiciliary law applicable to the parties under the Australian common law rules of the conflict-of-laws also be impossible for one of the reasons listed in paragraph (1) above, then the marriage is void only if it fails to satisfy the traditional rules of common law respecting marriage by exchange of words of present intent to marry.

The first two suggested principles of Australian common law follow from the case law exegesis already undertaken; the third clearly requires further explanation.

One would suppose off-hand that the application of the *lex fori* to the question of the formal validity of a marriage would entail the use of the same rules of law which appertain to marriages within Australia. But this is not so. Rather, reference must be had to those rules of common law formulated by the judges—in England, the ecclesiastical judges—before statutory changes in the field were effected in the mid-nineteenth century. The English[73] and Australian courts have said so.[74]

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[72] S. 51(2)(c) of the Family Law Act.

[73] *Catterall* v. *Catterall* (1847) 1 Rob. Ecc. 580; 163 E.R. 1142 (Dr Lushington); *Apt* v. *Apt* [1948] P. 83 (C.A.).

[74] *Quick* v. *Quick* [1953] V.L.R. 224 (F.C.); *Kuklycz* v. *Kuklycz* [1972] V.R. 50

In addition to the fact that Parliament has expressly limited the application of Australian rules respecting the requisite formalities of marriage to marriages solemnized within Australia,[75] it simply would not make good sense to apply domestic rules concerning the qualification of celebrants, for example, to overseas marriages. Australian celebrants are available only in Australia.

Policy considerations aside, the Courts consistently have refrained from imposing statutory formality requirements outside of the forum state. All that has been required is a marriage *per verba de praesenti.* Any unequivocal mutual declaration by a man and a woman of intent to cohabit monogamously and permanently will suffice to constitute a foreign ceremony of marriage under the *lex fori.*

The reason for applying this liberal rule respecting requirements (or the absence of requirements) of matrimonial form to only a limited class of situations is quite evident. Admittedly, this principle would go far to further the social policy embodied in section 43 of the Family Law Act. However, the Family Court ought to perceive that foreign governments have as great an interest in prescribing detailed requirements for use within their territory as it has in recognising foreign marriages. Likewise, the Family Court should accept that the countries of the parties' domicile have a far more intense nexus with the issue of the sufficiency of matrimonial forms than does the forum state.

Especially given the extreme liberality of the rule of the Australian law, the Family Court ought to be most willing to regard the *lex fori* as only supplying the rule of third resort by which to test the formal validity of foreign marriages.

(Norris A-J); *Hodgson* v. *Stawell* (1864) 1 Victorian Law Times 51 (F.C.); *contra*: *R.* v. *Roberts* (1850) Legge 544 (N.S.W.F.C.).

[75] Marriage Act 1961-1973 (Cth) s. 40(1).