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PROXY MARRIAGE AND THE CONFLICT OF LAWS

Until comparatively recent times proxy marriages[1] have been considered a social phenomenon belonging to the past.[2] For a brief period after the enactment of the immigration laws, however, the question of their validity and recognition became of more than academic interest because certain women not otherwise entitled to admission celebrated proxy marriages in foreign countries with residents of the United States and sought to enter this country as their wives.[3] Congress, realizing that this was a method of circumventing the immigration quotas, adopted a statute denying recognition to proxy marriages for immigration purposes.[4] For many years thereafter the question of their validity lay dormant, but during World War II a large number of proxy marriages occurred, principally between resident women and members of the armed forces who could not be physically present at a marriage ceremony, and the question of validity and recognition has again arisen.

Because of the complexity of modern marriage laws, it would be obviously difficult, if not impossible, for a person seeking to be married *in absentia* to comply with the formal requirements set

[1] By a proxy marriage is meant a marriage ceremony in which one or both of the contracting parties are absent and are represented by an agent or proxy who has authority to act on behalf of his or her principal in the marriage ceremony. Hardin v. Davis, 30 Ohio Ops. 524, 528, 16 Ohio Supp. 19 (1945).

[2] Marriage by proxy was allowed under the Roman Law and was also recognized under the canon law and under the English Law until abolished by the Marriage Act of 1836, 6 & 7 WM.IV c. 85 § 20; 61 & 62 VICT., c. 58 § 6 (1898). But see Apt v. Apt, [1947] P. 127, *aff'd*, [1948] P. 83 (C.A.). It was a method popular among the reigning families of Europe for many years and it may be presumed to have been a part of the common law of England at the time of the settlement of this country. Hardin v. Davis, 30 Ohio Ops. 524, 527 (1945). See Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473 *et seq.* (1919); Howery, *Marriage by Proxy and Other Informal Marriages*, 13 U. OF KAN. CITY L. REV. 48 (1944); Stern, *Marriages by Proxy in Mexico*, 19 So. CALIF. L. REV. 109 (1945); Note, 170 A.L.R. 947 (1946).

[3] See Cosulich Societa Triestina Di Navigazione v. Elting, 66 F.2d 534 (2d Cir. 1933); Silva v. Tillinghast, 36 F.2d 801 (D. Mass. 1929); Kane v. Johnson, 13 F.2d 432 (D. Mass. 1926); U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927 (E.D. La. 1925); U.S. *ex rel.* Aznar v. Commissioner of Immigration, 298 Fed. 103 (S.D. N.Y. 1924), 24 COL. L. REV. 672; *Ex parte* Suzanna, 295 Fed. 713 (D. Mass. 1924), 10 CORNELL L. Q. 53.

[4] "The terms 'wife' and 'husband' do not include a wife or husband by reason of a proxy or picture marriage." 43 STAT. 153 (1924), 8 U.S.C. § 224(m) (1946).

forth in the statutes of many states,[5] even in the absence of a statute expressly forbidding marriage by proxy.[6] When these requirements are made mandatory by the statutes, and are not complied with, the marriage will be void,[7] but, on the other hand, if the requirements are merely directory the marriage may be sustained as a valid common law marriage in states which do not require subsequent cohabitation for the creation of a common law marriage status.[8]

The validity of a proxy marriage has never been tested in the Supreme Court of Iowa. The statutes relating to ceremonial requirements in this state are not mandatory and a marriage performed in any other manner with the consent of the parties, while subjecting them to a fine, will be valid.[9] While it is not entirely clear from the Iowa cases whether cohabitation is or is not necessary, marriages devoid of ceremony are recognized.[10] There is nothing in the statutes either expressly or by implication which would militate against proxy marriages by requiring the presence of the parties at the marriage ceremony. For these reasons we may assume that a proxy marriage would probably be valid as a ceremonial marriage when performed in this state,[11] or possibly could be sustained as a valid non-ceremonial or common law marriage. The latter would depend, of course, upon the view of the Supreme Court of this state as to whether cohabitation is necessary

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[5] The law of the state in which the ceremony is to be performed governs the validity of the marriage in regard to the formal requirements of the ceremony including (a) license; (b) type of ceremony; (c) person to perform the ceremony; (d) manner of performance; (e) capacity of the parties; and (f) physical examination. RESTATEMENT, CONFLICT OF LAWS § 121, comment *e* (1934). But see COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 443-456 (1942); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 141, 153 (1943).

[6] Louisiana seems to be the only state which expressly forbids proxy marriages by statute. LA. CIVIL CODE, Art. 109 (Dart, 1945); U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927 (E.D. La. 1925). Minnesota has temporary legislation recognizing proxy marriages under certain circumstances. Minn. Laws 1951, c. 255, § 1.

[7] Furth v. Furth, 97 Ark. 272, 133 S.W. 1037 (1911); RESTATEMENT, CONFLICT OF LAWS § 122 (1934).

[8] A proxy marriage celebrated in Florida was held valid as a common law marriage. United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946), 33 CORNELL L.Q. 129 (1947), 32 IOWA L. REV. 774 (1947). *But cf.* Respole v. Respole, 34 Ohio Ops. 1, 70 N.E.2d 465, 170 A.L.R. 942 (1946) (proxy marriage celebrated in West Virginia held voidable); *cf.* Portwood v. Portwood, 109 S.W.2d 515, 521 (Texas Civ. App. 1937).

[9] IOWA CODE § 595.11 (1950).

[10] In Pegg v. Pegg, 138 Iowa 572, 575, 115 N.W. 1027, 1028 (1908), the court expressly stated that cohabitation was necessary for the creation of a common law marriage in Iowa. In Love v. Love, 185 Iowa 930, 932, 171 N.W. 257 (1919), the court rejected the earlier holding and stated that cohabitation was not necessary. In the more recent case of *In re* Clark, 228 Iowa 75, 290 N.W. 13 (1940), the court apparently considers cohabitation as an evidentiary problem but does not rule on the question specifically. In Rittgers v. United States, 154 F.2d 768, 772 (8th Cir. 1946), the court stated in dicta that cohabitation is necessary in Iowa. For a discussion of this problem see 23 IOWA L. REV. 75 (1937).

[11] Note, 16 IOWA L. REV. 534 (1931); Note, 32 IOWA L. REV. 774, 778 (1947).

to create a valid common law marriage status or whether it is merely evidentiary.

An interesting problem is presented when we consider such a marriage from the standpoint of the conflict of laws. In the recent case of *Barrons v. United States,*[12] a woman domiciled in Texas was married by proxy in Nevada to a man domiciled in California. At the time of the marriage both were subject to military orders, the woman being stationed in California and the man in North Africa.[13] Seven days after the marriage ceremony was performed the man was killed while on military duty and this action, in the nature of a bill of interpleader, was instituted by the United States to determine whether or not the marriage was valid so as to entitle Mrs. Barrons to the proceeds of the decedent's National Service Life Insurance as his "widow" under the applicable beneficiary limiting statute.[14]

Because of diversified marriage requirements in the several states and the obvious conflict where the domicle of the parties is not coincident, it is generally agreed that the validity of a marriage will be determined by the *lex loci contractus; i.e.,* if valid by the law of the place where it is entered into, with few exceptions, a contract of marriage is valid everywhere,[15] and, conversely, if void there it will be void everywhere.[16] In determining the validity of the marriage in the place of celebration it becomes immediately apparent that the validity of the agency as well as the capacity of the parties to enter into a marriage contract must be ascertained. To what body of law should the court resort for an answer to these questions? There seems to be unanimity of opinion that the law of the place of celebration should govern the validity of the agency contract.[17] Courts and treatise writers throughout the United States

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[12] 191 F.2d 92 (9th Cir. 1951).

[13] Ordinarily a soldier on active military duty does not acquire a new domicile at his place of station. Wilson v. Wilson, 189 S.W.2d 212 (Texas Civ. App. 1945); 1 BEALE, CONFLICT OF LAWS § 21.2 (1935).

[14] At the time this cause of action arose, beneficiaries under the National Service Life Insurance Act were limited to ". . . a widow, widower, child . . . parent, brother or sister of the insured." 54 STAT. 1009 (1940). This statute has been subsequently amended to provide that the proceeds of any policy maturing after Aug. 1, 1946, can be paid to any designated beneficiary. 60 STAT. 781, 38 U.S.C. § 802(g) (1946).

[15] U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927 (E.D. La. 1925); Boehm v. Rohlfs, 224 Iowa 226, 230, 276 N.W. 105 (1937); RESTATEMENT, CONFLICT OF LAWS § 121, comment *d* (1934); GOODRICH, CONFLICT OF LAWS § 116 (3d ed. 1949); KEEZER, LAW OF MARRIAGE AND DIVORCE 16 (3d ed., Morland, 1946); Lorenzen, *Marriage by Proxy and the Conflict of Laws,* 32 HARV. L. REV. 473, 484 (1919).

[16] Barrons v. United States, 191 F.2d 92 (9th Cir. 1951); Rhodes v. Rhodes, 96 F.2d 715 (D.C. Cir.), *cert. denied,* 305 U.S. 632 (1938); Derrell v. United States, 82 F. Supp. 18, 20 (E.D. Mo. 1949); GOODRICH, CONFLICT OF LAWS § 116 (3d ed. 1949).

[17] If the place of celebration allows proxy marriages it will determine all questions relating to the powers of attorney as well as the other formalities concerning the marriage ceremony. Hardin v. Davis, 30 Ohio Ops. 524, 526, 16 Ohio Supp. 19 (1945); see Lorenzen, *Marriage by Proxy and the Conflict of Laws,* 32 HARV. L. REV. 473, 484 (1919). *Compare* Apt v. Apt, [1947] P. 127, 139, *with* Apt v. Apt, [1948] P. 83, 88 (C.A.).

and England, however, disagree markedly upon the question of capacity. These authorities have advanced four mutually exclusive rules, each allegedly determinative, contending that capacity should be governed by the internal law of (a) the matrimonial domicile, in the sense of the place to which the parties intend to reside after the ceremony;[18] (b) the domicile of the husband;[19] (c) the domicile of either party;[20] and (d) the place of celebration.[21]

In considering the relative merit of these purportedly "determinative" rules it may be pointed out that to ascribe to either the state of the matrimonial domicile or to the state of the domicile of the husband the privilege of determining the capacity of both parties to enter into a marriage contract is to bestow upon the statutes of such state extraterritorial effect over persons who are neither domiciled nor resident within its territorial confines.

While it may be conceded that the domicile of each of the parties has a peculiar interest in the creation of a marriage relationship involving one of its domiciliaries, it should be pointed out that the marriage contract and recognition of the marriage status are two separate and distinct concepts, the latter depending upon the validity of the former.[22] Once this distinction is recognized, there would appear to be no good reason why the capacity of the parties to enter into a contract of marriage should not be determined in accordance with the laws of the state in which the ceremony is performed, conforming to the rule frequently applied to ordinary contracts,[23] since the validity of the marriage contract is only a preliminary step in the creation of the marriage status. To the general rule that a marriage valid where celebrated will be valid everywhere, there are two well-recognized exceptions: first,

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[18] Cook advances the theory that the law of the intended family domicile should govern the capacity of the parties to enter into a contract of marriage in order to protect the social policy of that state. Cook, *op. cit. supra* note 5, at 451. See Schmitthoff, *Validity of Marriage and the Conflict of Laws*, 56 L.Q. REV. 514 (1940).

[19] Apparently Cheshire feels that the "bride-to-be" adopts the domicile of the "husband-to-be" prior to the marriage and he therefore agrees that the domicile of the parties should determine capacity to marry. Schmitthoff, *supra* note 18, at 515.

[20] Dicey, Westlake and Foote maintain that the capacity of the parties to marry should be determined according to the laws of his or her own domicile. Schmitthoff, *supra* note 18. See ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 87, 240 (1940).

[21] As a general proposition, the majority of American authorities agree that capacity to enter into a marriage contract should be governed by the laws of the place of celebration. *E.g.*, Loughran v. Loughran, 292 U.S. 216, 223 (1934); Pickard v. Pickard, 241 Iowa 1307, 45 N.W.2d 269 (1950). See 2 BEALE, CONFLICT OF LAWS § 121.6 (1935); STORY, COMMENTARIES ON THE CONFLICT OF LAWS 84-85 (1834).

[22] *Ex parte* Suzanna, 295 Fed. 713, 714 (D. Mass. 1924); Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250, 255 (1951); Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S.W. 668, 676 (1910); Hardin v. Davis, 30 Ohio Ops. 254, 16 Ohio Supp. 19 (1945).

[23] RESTATEMENT, CONFLICT OF LAWS § 333 (1934); GOODRICH, CONFLICT OF LAWS § 108 (3d ed. 1949). But see COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 433-441 (1942).

as to those marriages which are contrary to the general view of Christendom; and secondly, those which the law-making authority has declared shall not be allowed any validity or are violative of some strong policy of the state of domicile.[24]

The question of what body of law shall be allowed the privilege of governing the creation of the marriage status provokes the formulation of four possible alternatives. It might be held to depend upon (a) the matrimonial domicile, (b) the domicile of the husband, (c) the concurrent action of both domiciles, or (d) the domicile of either party.[25]

The matrimonial domicile as the determinative may be easily dismissed. The principal difficulty with this proposal is that it disregards the existing relationship between the state and its domiciliaries for a contemplated non-existent relationship which may never materialize and its logic suggests that every time the family domicile is changed a new set of laws would redetermine the validity of the marriage.[26]

Behind the suggestion that the domicile of the husband should govern is apparently the desire for a simplified and uniform rule which is based upon the practical assumption that the parties will generally establish their home there.[27] This, of course, is not necessarily true and its effect is to disregard completely the interest of the wife's domicile in the creation of the marriage status.[28] The Restatement seems to agree with this contention.[29] On the other hand it seems to follow from the interest of each state in the marriage relationship,[30] and the general policy of promoting marriage, that the domicile of either party should be permitted to create the status and that the dissent of one domicile should not preclude the other from completing the marriage in consonance with its own policy. It seems, upon careful consideration, that this reasoning is more persuasive and this result more desirable. It corresponds to the well recognized American rule that a marriage may be terminated by divorce at the domicile of one party upon certain grounds even though the granting of a decree in such a case is opposed to the policy of the domicile of the other.[31] The policy and morals of the objecting domicile are, in any event, protected from the offensive union by the ordinary principles of recognition which permit any state in which the parties reside to deny to a valid marriage status, created elsewhere, any or all of the com-

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[24] U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927, 928 (E.D. La. 1925); GOODRICH, CONFLICT OF LAWS § 115 (3d ed. 1949); Beale, Laughlin, Guthrie and Sandomire, *Marriage and the Domicile,* 44 HARV. L. REV. 501, 508 (1931).

[25] Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 523.

[26] See GOODRICH, CONFLICT OF LAWS § 117 (3d ed. 1949).

[27] Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 525.

[28] *Id.* at 524.

[29] RESTATEMENT, CONFLICT OF LAWS § 134 (1934).

[30] See Atkeson v. Sovereign Camp, 90 Okla. 154, 226 Pac. 467, 469 (1923); Kinney v. Commonwealth, 30 Gratt. 858, 869 (Va. 1878); Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 524.

[31] Williams v. North Carolina, 317 U.S. 287, 143 A.L.R. 1273 (1942).

monly attendant incidents of marriage.[32] This theory, while protecting the complaining state, avoids the undesirable result of bastardizing issue and cutting off the rights of inheritance in contrast to the result of declaring the marriage void.

In contesting the validity of the marriage in *Barrons v. United States*,[33] the father of the decedent contended that under the regulation promulgated by the Administrator under the National Service Life Insurance Act,[34] which then provided that the validity of the marriage was to be determined ". . . according to the law of the place where the parties resided at the time of marriage, or at the time and place where the parties resided when rights to compensation or pension accrued.",[35] the internal law of the state of residence should control in all matters without reference to the conflicts rule of the state. In rejecting this contention the court pointed out that few, if any, marriages celebrated outside the state of residence would comply with all the requirements of the laws of the state of residence relating to matters of form. While all such marriages, if valid where celebrated, would be recognized as valid in all states for all other purposes, on the father's theory they would be considered invalid for purposes of National Service Life Insurance. The court further pointed out that a marriage invalid where celebrated might be deemed to satisfy the essential requirements of the marriage laws of the state of residence. Such a marriage would be invalid for all other purposes, but on the father's contention would be valid for purposes of National Service Life Insurance.[36]

In construing the first part of the foregoing regulation, the court apparently considered the term "residence" as being synonymous with "domicile" and held, in effect, that the regulation was merely declaratory of existing law. While there is scant authority upon the construction to be applied to the latter half of the regulation,[37] it might well be construed, not as an alternative, but to give effect to judicial decisions which disregard the "incidents" theory and hold that a marriage valid by the laws of the domicile may be subsequently declared void in a third state,[38] or as a provision recognizing the validity of a marriage which, though

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[32] See Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 524; RESTATEMENT, CONFLICT OF LAWS § 134 (b) (1934); KEEZER, *op. cit. supra* note 15, at 16.

[33] 191 F.2d 92 (9th Cir. 1951).

[34] 38 U.S.C. § 381 *et seq.* (1946).

[35] 9 Fed. Reg. 13668 (1944), United States v. Snyder, 177 F.2d 44 (D.C. Cir. 1949), *cert. granted*, 339 U.S. 951 (1951). The current Code contains no such regulation.

[36] Barrons v. United States, 191 F.2d 92 (9th Cir. 1951).

[37] See United States v. Oswald, 91 F. Supp. 639 (D. Del. 1950).

[38] *E.g.*, Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S.E.2d 364, 127 A.L.R. 430 and note (1939); State v. Bell, 7 Baxt. 9, 32 Am. Rep. 549 (Tenn. 1872); *see* Pennegar v. State, 87 Tenn. 244, 10 S.W. 305 (1889).

void in its inception, has subsequently been made valid by removal of the original impediment under an applicable curative statute.[39]

In the light of the general policy to encourage marriage as the basis of organized society,[40] we must proceed to examine the various objections to particular marriages that may be interposed on behalf of some contradicting policy of the domicile which is sufficiently strong for the domicile to refuse to predicate the status on a valid contract of marriage.[41]

It has been pointed out frequently that the proxy aspect of the celebration of a proxy marriage is merely a matter of form, and that the marriage relationship created by it is in no way different from the same relationship created in the more usual manner.[42] While many states refuse to give recognition to marriages performed within their borders which do not conform to the statutory requirements of the state as to mode of celebration, they ordinarily do not refuse to recognize similar marriages performed in other states which are valid by the laws of the latter.[43] Since the courts have frequently held that a proxy marriage is neither contrary to the laws of Christendom nor violative of public policy,[44] we may assume that such a marriage, valid by the laws of the place of celebration, would be recognized in all states[45] with the exception of those cases in which the parties were domiciled in a state having a "Marriage Evasion Act"[46] which they have sought to circumvent. These statutes purport to invalidate all marriages by persons domiciled within the state which are performed elsewhere in any manner other than that authorized by the laws of the

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[39] IOWA CODE § 595.19(4) (1950), Pickard v. Pickard, 241 Iowa 1307, 45 N.W.2d 269 (1950).

[40] KEEZER, *op. cit. supra* note 15, at 740.

[41] Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 507. See also Hall v. Industrial Commissioner, 165 Wis. 364, 162 N.W. 313 (1917).

[42] See, *e.g.*, Barrons v. United States, 191 F.2d (9th Cir. 1951); Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 483 (1919).

[43] "If . . . the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the court would hold such marriages valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the court must adjudge the marriage void here, as *contra bonos mores*." Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 307 (1889). See also Pierce v. Pierce, 379 Ill. 185, 38 N.E.2d 990 (1942); RESTATEMENT, CONFLICT OF LAWS § 134, comment *b* (1934); Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 521.

[44] Barrons v. United States, 191 F.2d 92 (9th Cir. 1951); U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927 (E.D. La. 1925); Ferraro v. Ferraro, 77 N.Y.S.2d 246, 251 (1948) (against public policy to deny the validity of the proxy marriage when performed in compliance with the laws of the District of Columbia); Hardin v. Davis, 30 Ohio Ops. 524, 527, 16 Ohio Supp. (1945); Apt v. Apt, [1947] P. 127, *aff'd*, [1948] P. 83 (C.A.).

[45] Hardin v. Davis, 30 Ohio Ops. 524, 527, 16 Ohio Supp. 19 (1945); Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 487 (1919).

[46] The text of the Uniform Marriage Evasion Act and other facts concerning it may be found in 9 U.L.A. 479 *et seq.* (1942).

state of domicile.[47] Unless the marriage would be valid in the state of domicile, such a marriage performed elsewhere would not be recognized as valid there. This is not a problem unique to proxy marriages, however, and further consideration is beyond the scope of this article.

[47] Royal v. Royal, 324 Mass. 613, 87 N.E.2d 850 (1949); Atwood v. Atwood, 297 Mass. 229, 8 N.E.2d 916 (1937); *In re* Canon's Estate, 221 Wis. 322, 266 N.W. 918 (1936).

THE LIE DETECTOR

Recent newspaper reports indicate that the lie detector is being used fairly extensively in police investigation in Iowa.[1] Since there are no Iowa decisions on the question of the admissibility in evidence of the results of lie-detector tests, a brief description of the lie detector and a review of its legal status are in order.

Experimentation in the detection of deception dates back as far as 1895, but the field was largely undeveloped until 1926 when Leonarde Keeler designed a portable detector known as the polygraph.[2] This is the detector most frequently used today although the original device has undergone considerable improvement. Four methods of detection are used in the Keeler machine. A blood pressure cuff attached to the subject's upper right arm controls a pen which records changes in pulse and blood pressure. A harness is placed around the upper part of the subject's chest; this is connected with a pen which records changes in the rate of breathing. Two metal plates adjusted to the left wrist pick up electrical changes in the skin which are recorded by a third pen. The three pens make their records simultaneously on a moving roll of paper about eight inches wide.[3] The most important recent development in instrumentation came as the result of research conducted in 1945 by John E. Reid. Reid found that a subject's blood pressure could be changed by various forms of unobserved muscular activity to such an extent as to affect seriously the accuracy of the exam-

[1] Des Moines Register, Feb. 23, 1952, p. 1. During a preliminary hearing on a rape charge, the accused with the approval of his attorneys was given a lie-detector test by Professor Richard L. Holcomb, chief of the police science bureau of the State University of Iowa. Apparently the Keeler polygraph was used, and a series of six tests were run. It was the opinion of the examiner that the accused told the truth when he denied having committed the crime. The account also states that Professor Holcomb performs about 12 tests a month. For another instance of the use of the lie detector in recent years in Polk County, see Des Moines Register, Feb. 24 and 25, 1948. Leonarde Keeler, inventor of the polygraph, gave the test to several persons.

[2] For a short history of lie detector experimentation, see INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 2-5 (2d ed. 1948).

[3] *Id.* at 5-8.