CHAPTER 9

Personal Effects of Marriage

I. Effects of Marriage in General

1. The Internal Conceptions

"EFFECTS of marriage" is a modern legal concept corresponding to the comprehensive matrimonial legislation which was developed in the course of the nineteenth century. Following the model of the German and Swiss codes, all recent European codifications of private law contain a chapter concerning the operation of marriage on the relations between the spouses themselves and between the spouses and third persons. The consequences of this arrangement are many and significant; the European doctrine attributes much importance to the fact of marriage and considers many, if not all, the pertinent provisions as a separate complex of rules within the system of law.

At present, the term "effects of marriage" refers both to the personal relations and to the property of husband and wife.1 The older codifications, compiled at the turn of the eighteenth century, acknowledged certain personal rights and duties of spouses but did not contain any extensive body of rules referring to the operation of marriage on property. They customarily treated the problem of property interests between spouses as it had been approached by the statutists, that is, by discussing the effects of marriage settlements, at that time customary among propertied classes. Characteristically, today the settlement is still called in France contrat de mariage and in German, Ehevertrag, although it is not a contract of mar-

1 "Personal" and "property" relations, of course, as used above, do not exactly correspond to their meanings in private law.
riage but only a contract respecting property relations made upon the occasion of a marriage.

Consequently, these codes and the literature of the period treated the entire question of the effects of marriage on property as a question of contract. In the French Civil Code and codes of other countries influenced by it, the subject is still retained in the sections dealing with contracts. Not until very recent times have some of these countries, particularly Italy, Greece, and Peru, included in their new codes chapters on patrimonial relations between the spouses, chapters placed along with others dealing with the law of family relations. Numerous topics pertaining to the effects of marriage, however, are still dispersed throughout the codes.

American law has not developed in this subject a body of doctrine similar to that of the German Civil Code. The nearest approach to it is a collection of scattered topics connected with marriage, brought together under the heading of “husband and wife” in the various treatises and casebooks on family relations. By analytical comparison, we find an important difference in that marriage in itself does not have so many peculiar consequences in the present private law of this country as it does in Europe. The emancipation of married women, particularly as brought about by the equal rights statutes of the common law states, has reduced the effects of marriage to a comparatively small residuum.

Gradually, married women have been granted the power to own and manage property in their own names and the capacity to make valid contracts with and conveyances to third parties; transactions between husband and wife have been rendered possible; and the peculiar rules on liability for torts committed by a married woman and on the husband’s liability for the wife’s prenuptial debts abolished. Indeed, in a few states, the old disabilities of married women have been swept away completely.
On the other hand, legislatures and courts of numerous states have deemed it unwise to empower a married woman to bind her property as surety for the debts of her husband or to become his business partner. A considerable number of states have found it necessary to protect creditors by forbidding or restricting property transfers between husband and wife. In several states, the ancient institution of tenancy by the entirety has been preserved. In several states of the Middle West, a contract of a married woman does not bind her assets, unless she expressly states her intention to do so. With respect to torts, the recent family car doctrine has resulted in a revival of the husband's liability for certain torts of his wife. In the field of property interests, statutory rights have been substituted for the ancient rights of dower and curtesy in the majority of states, in many cases with elaborated and strengthened provisions. The effects of marriage upon the property relations of husband and wife, although no longer so vital as they were at common law, are still numerous and important. The changes from the old common law have been so recent, however, so unsystematic, and so different in the various states that no general doctrine has thus far been worked out. Considering the undoctrinal or even anti-doctrinal climate of American jurisprudence, we can hardly expect the elaboration of any such doctrine in the near future.

2. Reaction on Conflicts Laws

This is only one of the many differences of structure among the municipal laws, having distinct reactions on the conflicts law. Above all, in the Continental international private laws, the national law has come to govern the whole complex of relations growing out of marriage. Under the German Introductory Law, which has been followed by many other codes, the non-patrimonial rights and duties of married persons are
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governed by the national law of the husband as of the time when a particular relation is in question; effects on property of the spouses are governed by the law of the country of which the husband was a national at the time of the marriage.

The American law of conflicts, on the contrary, contains no separate body of rules on effects of marriage. The Restatement perfectly reflects the actual law, when it expresses the “effect” of foreign marriage in one single sentence (§ 133), saying that a state will give it the same effect as “a marriage created by its own law.” Duty to pay for necessaries, for goods bought, and for alimony are treated together with all other alimentary obligations (§§ 459, 460, 463). Effects on property of the spouses are considered exclusively under the head of interests of husband and wife created in each other’s property, either immovable or movable, and are treated along with property in general (§§ 237–38, 248, 289–293). Moreover, the capacity of married persons to enter into antenuptial contracts (§ 238 comment b; § 289 comment c), separation agreements, et cetera, is part of the law of contracts (§ 333); the capacity to commit torts, the right of one spouse to sue the other in tort, or the right of the husband to sue a wrongdoer for injury to his wife, are regulated by the law governing torts (§§ 377 ff.). Finally, there are the rules on constructive trusts, living trusts, and testamentary trusts, institutions affording the main safeguards for the family interests of the wealthy.

As we must follow here the European division into two groups of effects, we encounter uncertainty about the borderline between them. Again, no substantial argument supports the theory that the lex fori, the distinctions of internal law, should decide directly the scope of a conflicts rule on personal or property effects.² The more important points will have to be discussed one by one.

² Still, this seems to be the prevailing opinion, also adopted in Latin America by authoritative writers, such as 2 Vico, nos. 52, 60.
3. Personal Effects of Marriage

The conflicts rules to be discussed here refer either to the law of the forum, the law of the temporary residence of the spouses, of their domicil, or of their nationality. In order to understand why these rules differ more than those on status in general, we must remember the nature of personal marital relations. Every legislator is conscious of the fact that such duties as those of mutual fidelity, cohabitation, and obedience of the wife, have their foundation in morality or religion. Nobody would think today of enforcing such duties through specific performance or compulsory execution. All modern laws agree that, so long as a marriage is normal, the law has no importance in these respects. Modern codifiers, however, have decided to lay down rules that give these duties a legal character; they wish to emphasize the social importance of sound marriages and to grant a spouse as much judicial help as possible, short of separation and divorce. That it is insufficient to speak of "spiritual effects of marriage," as is done sometimes in Latin America, probably for the sake of Catholic doctrines, is demonstrated by the Codex Juris Canonici, which defines the conjugal duties in terms of definite jural rules (c.1110-1113).

The more the legal nature of the mutual duties of a married couple is stressed, the more it is felt possible to resort to a personal law determined either by nationality or marital domicil. Where the personal effects of marriage are governed simply by the law of the directing court, marriage is thought to be ruled essentially by morals, which are naturally evaluated according to local written or unwritten rules. We shall see how both ideas are confused in some countries, for instance, in France.
II. Contacts

1. Law of the Residence

The United States. In the United States, it is not quite clear whether purely personal marital relations are governed by the law of the forum or by the law of the place where the spouses "live," although the equation "place where they live, that is, the law of their domicil" 3 has probably been abandoned. 4 As a matter of fact, in case both parties reside temporarily at a place, the court of that place apparently will take jurisdiction and apply the local law. 5 Probably, the Restatement (§ 133, Comment b) speaks of such a case, stating that "the incidents which result from the existence of the status are determined by the law of the place where they are sought to be exercised," and declares by way of illustration that the law of the place where they presently live determines the question whether a husband is guilty of battery when he uses force to control his wife. Other cases may be too rare to be taken into account. In British countries also, including Quebec, 6 the conception seems to be that the husband's authority over the person of his wife is of a disciplinary nature and to be decided entirely within the limits of the lex fori, jurisdiction being predicated upon residence, not domicil. This rule embraces the questions of what amount of forcible control the husband may use, as well as whether a resident foreigner may apply to the courts for restitution of conjugal rights. 7

3 MINOR § 79; DUDLEY FIELD art. 554.
4 KUHN, Comp. Com. 144. This point is settled implicitly by the Restatement §§ 54, 133.
5 Cf. 4 PHILLIMORE 359 cited with approval by 1 WHARTON 365 and KUHN, Comp. Com. 144: "If the husband deserts his wife, refuses her maintenance, or ill-treats her by violence, she has a right jure gentium to redress in the tribunals of the place where they reside." Cf. also LORENZEN, 6 Répert. 343 no. 310.
6 1 JOHNSON 327.
Argentina. In Argentina, the test of domicil adopted by the Civil Code (art. 160) and by the Treaty of Montevideo of 1889 (art. 12) was suddenly changed by the Marriage Law of November 12, 1888 (art. 3), which referred to residence; hence the courts have been stimulated to apply the law of the forum. The literature criticizes this solution as an unjustifiable infringement upon the domiciliary principle.

2. Law of the Domicil

Domicil, as the test chosen for questions of status in general, is decisive also in the personal relations of the spouses in Denmark, Uruguay, if not in Argentina, more recently also Peru and Brazil and under the Treaty of Montevideo. Domicil in this connection is the marital domicil.

In Switzerland, likewise, in accordance with its general rules, married persons domiciled within the country are governed by the municipal law; Swiss nationals domiciled abroad are subject to the law that is considered applicable under the law of conflicts of their domicil.

French writers are increasingly inclined to propose legislation that marital domicil be taken as the test.

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8 Even the former text, C. C. art. 160, was understood in the same sense by DAIREAUX, Clunet 1886, 293. ALCORTA, 2 Der. Int. Priv. 105 explains that in almost every case the law of the place where the conjugal rights and duties are exercised is deemed relevant.
10 Danish Law on Effects of Marriage of March 18, 1925, § 53.
11 No discussion or problem exists as declares VALLADAO 65.
12 Peru: C. C. Tit. Prel. art. V, agreeing with precedents for which see 8 APARICIO y SANCHEZ, Código Civil 70.
13 Brazil: Lei de Introdução (1942) art. 7.
14 Text of 1889, art. 12, text of 1940, art. 14.
15 NAG. arts. 2, 32, as interpreted by the Fed. Trib. (May 29, 1908) 34 BGE. I 299, 316; cf. STAUFFER, NAG. 77 Vorbem. no. 7 to arts. 19ff. The Swiss domiciliary law has been emphatically re-emphasized in BG. (April 18, 1942) 68 BGE. II 9, 13, adding that the rules concerning the protection of the marital union belong to public policy.
16 NAG. art. 28.
17 GOUÎ, "Mariage," 9 Répert. 89 no. 477.
3. Law of Nationality

The problem. In jurisdictions adopting nationality as the test of status in general, personal husband-wife relations have been controlled by the law of the state of which the husband was a citizen. The simple reason for this rule originally was that in the countries concerned the wife at marriage regularly acquired the nationality of her husband. Yet, although this effect of marriage upon the nationality of the wife has been modified in an increasing number of countries, the conflicts rule has been preserved and is the prevailing rule. This attitude may be explained partly by the force of tradition and partly by the fact that both the wife's acquisition of the husband's nationality and the application of the husband's personal law are founded on the marital power of the husband, which in some rudimentary form still exists under most modern codes.

As a matter of fact, however, the cases where spouses have different nationalities, either during the entire marriage or as a result of later changes, have become frequent and this has had to be taken into account.

In the United States, the law of nationality has been modified several times. Under the provisions in force since 1922, a foreign wife no longer acquires American citizenship by marriage, and an American woman no longer loses her citizenship by marrying a foreigner. These rules also exist in the Soviet Union and in Brazil. French enactments after World War I provided that a French bride retained her nationality unless she filed a declaration to the contrary; an analogous provision is now in force with respect to foreign women marrying Frenchmen. Other countries have followed these models. Along the same line, repatriation of wives who have lost citizenship by marriage is frequently facilitated by reduction of the normal requirements. Another source of different nationalities of husband and wife is that, subsequent to the marriage,
husband or wife may separately acquire new nationalities.

The cases of split nationality were considered by the Hague Convention on Marriage Effects of 1905.

The rule that the national law of the husband governs the personal relations between husband and wife, is expressly up­held in the case of divergent nationalities in the codes of Ger­many, Italy, the Netherlands, Spain and Iran, by the Código Bustamante, and the Treaty of Montreux concerning the jurisdictions in Egypt. In other countries, the same view still obtains by interpretation. Prominent French authorities have also enunciated the rule.

The rule is unquestionably applied when both parties ac­quire a new nationality by a common act. This mutability of the applicable law is recognized everywhere (in contrast to the immutability of the rules on marital property relations).

Where the national laws of the spouses are different, the following efforts to modify the rule have been made:

Last common nationality. If the husband alone changes his nationality, which until then has been common to both, it seems inequitable that the wife should suffer a corresponding change in her status. Therefore, the Hague Convention of 1905 (arts. 1 and 9 par. 2) provided that the law of the last nationality common to the spouses should govern. This solu-

18 EG. art. 14 par. 1, as now usually construed; LEWALD 88; RAPE 275; WIERUSZOWSKI, 4 Leske–Loewenfeld I 61 n. 352, but see infra n. 28; art. 14 par. 2 adds that German law applies also if the husband has lost his German nationality but the wife has retained hers.
20 Hof Amsterdam (June 6, 1919) W. 10444, N. J. 1032.
21 Spain: C. C. arts. 15 and 22.
22 Iran: C. C. art. 963.
23 Código Bustamante art. 43.
25 See for instance for Austria: WALKER in 1 KLANG’S Kommentar 325 n. 177 and Internationales Privatrecht 742 (doubtful); for Guatemala: MATOS, no. 230; for Portugal: VALLADAO 79.
26 AUDINET, 11 Recueil 1926 I 212, considers this rule obvious; BARTIN, 2 Principes 214 § 293, sees no room for hesitation.
tion has been followed by Sweden, Poland, Italy, and Greece and has been approved by some writers.  

Illustration: In Germany (RG. [April 15, 1935] 147 RGZ. 385) a Dutch husband acquired German nationality, his wife remaining a Dutch national. His action for restoration of conjugal rights based on German law was denied because this cause of action is unknown to Dutch law, which continued to govern the duties of the parties according to the Hague Convention.

The rule is understood as meaning that a change of nationality, in order to affect both spouses, must be voluntary on the part of both, and not one which is voluntary on the part of the husband alone and extended to the wife merely by operation of law.

But this solution is useful only in the case where there has been at least one common nationality. The Hague Convention is limited to this case; no uniform conflicts rule exists for any other case.

Cumulative application of both national laws. To provide a solution for every case of different nationality, an influential doctrine advocates the application of both national laws cumulatively. Each party, it is argued, may have only those rights and duties that are established by his or her own national law. Hence, what right the husband or wife may exercise depends on simultaneous approval by both marriage laws.


28 Finland: Law of Dec. 5, 1929 on family relations of international nature, § 14 par. 1.

Germany: OLG. Braunschweig (Jan. 19, 1913) 26 ROLG. 233; KG. (May 27, 1927) JW. 1928, 73; KG. (Feb. 24, 1936) JW. 1936, 2470; cf. OLG. Stuttgart (March 31, 1905) 11 ROLG. 287. 2 ZITELMANN 670; WALKER 742; M. WOLFF, 4 Rechtsvergl. Handwörterb. 408, but apparently no longer
It is rather generally felt, however, that such a cumulation is difficult to determine and very undesirable. In every country, the law regulating the effects of marriage is drafted to achieve a certain balance; to take out a single part because that part has not been acknowledged by another state's legislation, destroys the consistency of the marital law and reduces its efficacy. 29

Emergency solutions. On the basis of the nationality principle, relatively the best solution seems that of resorting to the last common nationality which the parties may have had, as was done by the Hague Convention of 1905. Where the parties never had any common nationality, the best approach seems that of resorting to the law of the husband as of the time of the marriage. This solution was suggested in a draft issued by the Sixth Hague Conference of 1928. Every other solution founded on nationality imposes excessive risks on all third persons who deal with a married person. 30

Yet, would it not be preferable to abandon the principle itself, at least in this particular field? A tendency toward the domiciliary law seems strong; 31 it is of considerable weight

in his IPR. 123; contra: 1 BAR § 172 and most writers, see RAAPE 275 (deminutio matrimonii). Massfeller, JW. 1936, 2472; Eckstein, 7 Giur. Comp. DIP. 7. The RG. (Feb. 15, 1906) 62 RGZ. 400, has not yet taken sides.

Italy: Anzilotti, Corso (1913) 250; cf. his arguments as to the parallel problem of paternal relations, 2 Rivista (1907) 116; Cavagliieri 219; Udina, Elementi 181; Fedozzi 432; Bosco 229; contra: Cansacchi, 3 Giur. Comp. DIP. 275, with a good summary.

29 J. Strelitz, Die Schlüsselgewalt im internationalen Privatrecht, Thesis (Göttingen, 1936) 42, tries, without success, to develop a more satisfactory “cumulation.” Wengler, Book Review, 11 Zausl.PR. (1937) 973, calls attention to the rules in French Morocco, under which the status of each spouse is governed by his personal law. 3 Frankenstein 246 n. 85, suggests applying the law of the defendant.

30 Poulet 479.

31 Cassin, 34 Recueil 1930 IV 757; Lerebours–Pigeonnière 269 no. 239; Fedozzi 238; cf. Audinet, Clunet 1930, 328. The problem was fully discussed with respect to the capacity of women to contract by Audinet and others in Travaux du Comité français de droit international privé, Année 4, 1936–37, 89ff. The revised Czechoslovak draft (Revue 1931, 187) § 17 par. 2, refers, in absence of a last common nationality, to the last common domicil of the parties.
in Latin America.\textsuperscript{32} This development is closely connected with that of resorting to public policy with respect to foreigners domiciled in the forum, a trend which we shall consider in the following section.

4. Public Policy of the Forum

\textit{Law of the wife}. In a number of countries, the rule that the governing law is the national law of the parties or of the husband, is reversed, and under certain circumstances the law of the wife is applied, at least if it happens to be the law of the forum.

In Germany (\textit{EG. art. 14 par. 2}), German law is applied when the German husband acquires a foreign nationality and the wife remains a German national.

In France, the case of a French bride marrying a foreign subject but retaining her French nationality has attracted a great deal of attention. While some authors have interpreted the amendment of the nationality laws, under which the French woman’s French nationality is preserved,\textsuperscript{33} as designed to preserve her French private law rights in all cases,\textsuperscript{34} others limit the application of French law to couples living in France.\textsuperscript{35} A similar practice obtained in Brazil under the nationality principle; Brazilian law was applied when one of the parties to the marriage was a national of the country and both, or even the husband alone, were living in Brazil.\textsuperscript{36} The like seems to be true of other Latin American countries as well.\textsuperscript{37} An attempt to clarify the situation by an express statu-

\textsuperscript{32} VALLADÃO has devoted his book, \textit{Conflictio das leis nacionaes dos conjuges nas suas relações de ordam pessoal e economica e no desquite}, to the defense of this tendency. See particularly, 178ff., on earlier views favorable to the law of the domicil and conclusions, 205ff. The Brazilian Lei de Introdução of 1942 has followed his doctrine.

\textsuperscript{33} Law of Aug. 10, 1927, art. 8.

\textsuperscript{34} LEBREBOURS-PIGEONNIÈRE 390 no. 333; cf. NIBOYET, Revue 1929, 193, 194, 209.

\textsuperscript{35} NIBOYET 734 no. 625.

\textsuperscript{36} VALLADÃO 136, 200.

\textsuperscript{37} E.g., Guatemala, MATOS nos. 211, 212.
tory rule was made in France, in 1924, when the Chamber of Deputies voted upon a bill providing for the application of French law in all cases where either the husband is a Frenchman or where, the husband being a foreigner, the wife is a French national and the parties are domiciled in France.\textsuperscript{38} The requirement of French domicil was dropped in the draft of the Société d'études législatives (1930)\textsuperscript{39}: According to this, French law should govern the non-property effects of marriage as to both spouses, if one is French!

French courts. The courts in France go so far in applying domestic law that it has been alleged that they would do so every time a French party is concerned or any French interest is at stake.\textsuperscript{40} However, this does not represent the dominant opinion. For some time, the French courts have been wavering between the two poles of national law and public policy, the former having been strongly advocated by André Weiss and his school, the latter appearing as a goal of nationalistic post-war trends. At present, it seems that certain effects of marriage are regarded as dependent on the national law and others on the domestic law. The catalogue of the latter group, as drawn up by Weiss himself\textsuperscript{41} in 1912, has presumably been extended since. In 1928, the following problems were enumerated by Niboyet\textsuperscript{42} as governed by the personal law: capacity or incapacity of the wife; mutual obligations of fidelity and assistance of husband and wife; wife's duty to follow husband to his residence and the right to bear his name; special capacity of the wife to dispose of her salary; “putative marriage.”\textsuperscript{43}

\textsuperscript{38} Revue 1924, 315 n. 1.
\textsuperscript{39} Bull. Soc. d'Études Lég. 1930, 164, art. 19; cf. ibid. 76. Cf. NIBOYET, Revue 1929, 193, 211; BARTIN, 2 Principes 201 § 288.
\textsuperscript{40} Trib. civ. Seine (April 8, 1930) Revue 1930, 461. AUBRY, L'incapacité de la femme mariée en droit international privé français (Paris, 1933) 57; LEREBOURS–PIGEONNIÈRE 389 no. 332, extending public policy to all moral conceptions.
\textsuperscript{41} WEISS, 3 Traité 584ff.
\textsuperscript{42} NIBOYET 736 nos. 627, 628.
\textsuperscript{43} See infra p. 545.
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The realm where public policy prescribes the exclusive application of French law, was defined as follows: penal provisions; implied authority of one spouse to contract for the other; alimentary obligation; desertion of family.

The same general pattern exists in the other countries following the nationality principle. So many variations in detail exist, however, that we shall have to discuss every one of the various effects of marriage separately.

Procedural law. It is a traditional proposition that domestic law is exclusively applicable in matters of procedure and penal law. Exclusive domination of the lex fori in matters of procedure is recognized by the Hague Convention on Marriage Relations of 1905. After stating as a general principle that the rights and duties of the spouses in their personal relations to each other are governed by their national law, article 1 adds the following proviso:

However, these rights and duties cannot be enforced except by the means permitted under the law of the country where their enforcement is sought.

According to this provision, the forms of action, judgment, and execution are controlled by the local rules of the court, but the court of the forum does not permit any cause of action that is not also recognized by the national law. A German husband, for example, is allowed under the German civil and procedural codes to sue his wife for restoration of conjugal rights, but he cannot bring such an action in Belgium. A Belgian husband, on the other hand, may not bring an action of this kind in a German court, since he has no such right of action under his national law.

44 Cf. for Spain: TRÍAS DE BES, 31 Recueil 1930 I 677 and 6 Répert. 253 nos. 103, 104.
45 See also 1 BAR 481 § 172 par. 3; 2 FIORE 103ff. no. 598.
46 The methods of enforcement must be analogous but not identical: see Actes de la Quatrième Conférence de la Haye, 1904, 178; German Denkschrift in 18 Z.int.R. (1908) 580.
47 Cf. infra n. 50.
This rule, forbidding a country to grant a foreigner a right of action not recognized in his national law, is a strange limitation on local public policy, to which the signatories to the Convention voluntarily submitted. A national of a non-signatory country may well be permitted to avail himself of a local remedy that is not recognized by his national law, when the forum considers the granting of such remedy required by its own public policy.  

III. Scope of the Rules

In this section, we shall note the matters that have been claimed either generally or in some legal system as within the scope of the conflicts rule on personal marital relations.

1. Duties of Conjugal Life

Where the personal law governs the relations between husband and wife, it has been applied to determine the spouses' mutual duties of fidelity and personal assistance, the wife's duties of obedience and rendering services in the household or in the husband's business, and similar matters.

It depends on the personal law whether the husband may forcibly control his wife's conduct, whether he may open her correspondence or rescind her contractual obligations of personal work, and whether one spouse may sue the other for restitution of conjugal rights.

48 See, for instance, for Italy: Cavaglieri 218; Udina, Elementi 182 no. 132. It has been contended, however, particularly by 3 Frankensteirn 255, that the public policy of the participant states was modified by the Hague Convention. See this contention in another connection, supra p. 279.

49 Cf. 2 Streit-Vallindas 350; Niboyet 737 no. 627 (2).

50 Applying the personal law of the parties, German courts have accorded this action (provided for in the German Code of Civ. Proc. § 606) to Czechoslovakian spouses (RG. (June 12, 1922) Leipz. Z. 1922, 518) and denied it to Belgians (LG. Giessen (Nov. 1, 1920) 20 Jahrb. DR. 221), Swedes (LG. Stuttgart (April 4, 1924) 23 Jahrb. DR. 442), and Dutchmen (OLG. Hamburg (Oct. 23, 1934) IPRspr. 1934, no. 49; RG. (April 15, 1935) 147 RGZ. 385). A peculiar exception has been made by the RG. (Feb. 17, 1936) 150 RGZ. 283 (an Italian wife domiciled in Germany was granted this action, unknown to Italian law, because she lacked the remedy she would have enjoyed in Italy).
As already mentioned, the local law is competent, however, to bar an action that does not fit in with the local system or to refuse a method of enforcement not permitted by its procedure; it seems safe to assert also that no forcible control by extrajudicial acts is granted unless permitted by the local law.

Instead of resorting to the personal law, French courts have sometimes simply applied the domestic law, especially when the court was anxious to compel a husband to support his wife. French courts have also enforced the duty of obedience to which a wife is bound under French law, irrespective of whether such duty was incumbent on her under the national law of the spouses. The Código Bustamante seems to abandon the personal law entirely, when it states that the obligation of the spouses to live together, to observe mutual fidelity, and to support each other, is subject to the local law (art. 45).

Domicil by operation of law. A problem deserving special discussion is that of determining the law by which the domicil of a married woman is fixed. The conflicts rule on marital relations determines, as a matter of course, whether a wife is obliged to follow her husband to his place of abode; but does it also determine whether her domicil necessarily coin-

51 Supra p. 307. Thus, German courts would not assume the task of Swiss judges of admonishing the parties and suspending their life in common, Swiss C. C. arts. 169, 170.

52 Only occasionally, the action for restoration of conjugal rights has been classified as of imperative public policy; thus RG. (Oct. 6, 1927) IPRspr. 1926-1927, no. 68 (Soviet Russians).

53 Trib. civ. Seine (May 3, 1879) Clunet 1879, 489; Cour Paris (April 20, 1880) Clunet 1880, 300 (action for goods received at the domicil of the husband); Cour Paris (Jan. 7, 1903) Clunet 1905, 208.

54 Trib. civ. d'Evreux (Feb. 15, 1861) D. 1862.3.39 and Trib. civ. Seine (April 8, 1930) Revue 1930, 461. Concerning the latter, see infra n. 83.

55 Germany: OLG. Braunschweig (Jan. 19, 1913) 26 ROLG. 232 (American wife held obliged to follow her husband from New Jersey to Germany, the law of New Jersey being in accord).

France: Cass. (req.) (June 25, 1923) Clunet 1924, 462 (in the application of German BGB. § 1354 par. 2, it was held that a German wife in Alsace need not follow her husband to an inconvenient dwelling place).
cides with that of her husband? The municipal laws differ widely in answering this question.\textsuperscript{56} While England and Latin America still insist upon the ancient rule that the husband’s domicil is necessarily that of his wife, other countries, for instance, Norway and the Soviet Union, do not recognize the wife’s domicil as dependent on her husband’s at all.\textsuperscript{57}

In Germany, prevailing opinion applies the personal law (i.e., the national law of the husband) also to the question whether the wife necessarily shares her husband’s domicil.\textsuperscript{58}

The United States courts, as well as the Treaty of Montevideo, resolve this question, like all other questions concerning domicil, by resorting to the forum’s own rules on domicil, unified throughout the country, instead of referring the problem to the law declared applicable by the forum’s choice of law rules. Thus the Restatement says:

"§ 27 . . . a wife has the same domicil as that of her husband."

"§ 28. If a wife lives apart from her husband without being guilty of desertion according to the law of the state which was their domicil at the time of separation, she can have a separate domicil."

Except on the question of desertion, neither the municipal law of the domicil nor that of the forum is decisive.

\textsuperscript{56} E.g., in America the older rule that a deserted wife is domiciled at the new domicil of her husband, has not yet been abolished by the present Treaty of Montevideo on international civil law, text of 1889, art. 8, but is abolished by the new draft of 1940, art. 9. The Restatement § 28, moreover, permits the wife leaving her husband to establish a new domicil if she is not guilty of desertion; statutory law permits the same even if she is guilty.

\textsuperscript{57} Norway: CHRISTIANSEN, 6 Répért. 570 no. 72. Russia: FREUND, 4 Leske-Loewenfeld I 340.

\textsuperscript{58} Cf. BGB. § 10 and see RAAPE, 2 D. IPR. 1913; cf. the recent decision of the RG. (Jan. 12, 1939) HRR. 1939, no. 376, 159 RGZ. 167, on the child’s domicil (infra p. 605, n. 261).

Contra: 3 FRANKENSTEIN 231, 503.

A case decided by the *Tribunal civil de la Seine* involved a citizen of Czarist Russia who had married an American girl from Rhode Island before a civil official in Cyprus. Some time after the marriage, the husband went to Paris, while the wife went to live in Capri, Italy, and never came to France at all. The *Tribunal*, considering the question one of "qualification" and following Bartin's theory on this subject, declared in conformance with the French law of the forum that the domicile of a wife was necessarily that of her husband.

It may be observed, however, that this decision, like many others, was concerned with domicile as a condition of the court's jurisdiction in a lawsuit brought against the wife at the domicile of the husband. In this connection, the local concept of domicile clearly has a better claim than in the choice of law.

In line with the general tendency toward the domiciliary principle, it has even been advocated that the law of the husband's domicile should decide the legal domicile of the wife.

2. Capacity of Married Persons

*Classification.* Under the system of personal law, the question has been raised whether a married woman's disabilities are part of the status of the wife, and therefore governed by her own personal law, or rather whether they are part of the specific effects of marriage, and therefore subject to the law governing these effects, which may be the law of the husband,

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60 Cf. NIBOYET, Revue Crit. 1935, 762.

61 Cf. e.g., OLG. Stuttgart (May 8, 1908) 17 ROLG. 81, 18 Z.int.R. (1908) 453.


62 NIBOYET, *Traité* nos. 541, 554, 571.
that of the common nationality, or some other law. All bias aside, this problem of classification depends on the specific nature of the wife’s incapacity. The conflicts rule concerning status in general envisages legal incapacities presumed to inhere in the female sex; the rule concerning personal effects of marriage regards such disabilities as may be imposed in consequence of marriage. The principal illustration was the former article 217 of the French Civil Code: A wife, even when there is no community or in case of separation of property, cannot give, convey, mortgage, or acquire property, either with or without consideration, without her husband’s joining in the instrument or his written consent. This rule, imitated in many countries, was abolished in Italy in 1919, in France itself in 1938, and in other countries, but is still in force in some other places. The probable motivation of the draftsmen of the Code, emphasized by modern commentators, was not a belief in the “frailty of the sex” but a desire to strengthen the leadership of the husband, who was intended to enjoy his powers not only in his own interest but in the interest of the family as a whole. Hence, the provision affects not so much the status of the wife as the organization of the family, i.e., the effects of marriage. An incapacity, such as was imposed by the French Code, should be governed by the conflicts rules on personal effects of marriage rather than by those dealing with personal incapacities. All these observations

Rumania: Law of April 19, 1932.
65 COLIN et CAPITANT, 1 Cours élémentaire de droit civil français (ed. 3) 618; NIBOYET 736 no. 627, and prevailing theory.
66 Dominant doctrine, see RABEL, 5 Z. ausl. PR. (1931) 267; M. WOLFF, 4 Rechtsvergl. Handwörterb. 408; PILLET, 1 Traité 591 no. 277; FEDOZZI 454. Contra: 3 FRANKENSTEIN 232, because of his theory, and some of the Swiss decisions because of the confused Swiss legislation.
seem equally true in regard to the common law disabilities of married women. They were never designed for the protection of the wife but were based upon the idea of the merger of personalities and thus flowed from the marriage relationship. 67

A different characterization of similar incapacities by the municipal law of the forum is irrelevant. It is always possible, of course, that some statute, for instance, that of Florida, although on its face similar to the provision of the French Code, requires a different construction. 68

Suppose a woman, a citizen of the United States, is married to a Belgian, both being domiciled in England, and she procures a loan in Nice, France, without her husband’s consent. A court following the nationality principle (German, Cuban, etc.) will apply neither American law (as of her status) nor the English (as of her domicil) nor the French (as lex loci actus) but Belgian law (as governing marital relations).

Where the wife has retained a personal law of her own, the only consistent solution is to disregard this law. 69

Finally, personal effects of marriage must be distinguished from the effects of marriage on property interests. Numerous disabilities of a spouse as regards freedom of contract or conveyance result from some matrimonial regimes, for instance, from the community property system or the systems according to which the wife’s general assets are managed by her husband. Prevailing opinion does not link with personal effects of marriage the limitation of a married woman’s capacity, unless it results from the marriage itself irrespective of any matrimonial property regime. The Swiss Federal Tribunal

67 See the most recent writer, JOSEPH GINSBURG, “Contractual Liability of Married Women in Nebraska,” 20 Neb. L. Rev. (1941) 191, 192.

68 In Florida and Texas, the common law disabilities of married women have only partially been removed; cf. 3 VERNIER 36 § 152; in Florida the Circuit Court may grant the wife power “to take charge of and manage her own estate and property,” if the court is satisfied as to her capacity to do so, Fla. Statutes Ann. (1943) §§ 62.28–62.31.

69 PILLET, 1 Traité 591; LEWALD 95; doubts have been expressed by M. WOLFF, IPR. 124, and RAPE 289.
formulated this rule once by acknowledging such effects on the personal relations, if these effects take place even where the wife has no property at all.\textsuperscript{70} Thus, the capacity to contract and to acquire property \textsuperscript{71} granted to married women by the American equal rights statutes is a general capacity and ought to be respected everywhere as an incident of the marriage law involved insofar as that law is applied at all to the relations between a husband and his wife. Analogous observations apply with respect to limitations on married men.

\textit{Married woman’s capacity to contract.} (a) As a general rule, the personal law is applied everywhere in Europe. This principle has been stated expressly by a recent Finnish statute and seems unchallenged throughout the civil law countries.\textsuperscript{72} It was held in France, for instance, that, in accordance with the foreign law of the time, an English wife was capable of contracting without her husband’s consent,\textsuperscript{73} that an Italian

\begin{enumerate}
\item BG. (Nov. 21, 1908) 34 BGE. II 738, 742. For an illustration of the double task of examining first the personal capacity in general, then the possible restrictions by matrimonial property law, see the opinion by Lyon–Caen, advocate general, Cour Paris (July 7, 1928) Revue 1929, 81 (Norwegian spouses).
\item Cf. KG. (Aug. 2, 1934) IPRspr. 1934, no. 44.
\item Finland: Law of Dec. 5, 1929 on family relations of international nature, § 14 par. 3, capacity of a married woman to act determined by the law of the state whose citizen she is, except for art. 16, relating to third persons, and the provisions concerning marital property.
\item France: Cass. (civ.) (Jan. 30, 1854) S.1854.1.270; Cass. (civ.) (July 29, 1901) Clunet 1901, 971; and a great many decisions of the lower courts; see Weiss, 3 Traité 588.
\item Germany: OLG. Köln (Dec. 5, 1898) Clunet 1905, 396; RG. (Oct. 12, 1905) DJZ. 1905, 1170, Revue 1907, 800 (German wife contracting in Luxembourg, liable under German law); RG. (March 20, 1906) JW. 1907, 328, Clunet 1908, 187.
\item Italy: Cass. Roma (May 2, 1908) Giur. Ital. 1908, 1, 941, Clunet 1909, 563.
\item Switzerland: The national law of the wife, not the domiciliary law, is decisive; see BG. (Nov. 21, 1908) 34 BGE. II 741, applying Handlungsfähigkeitsgesetz (1881) art. 10 par. 2, instead of NAG. arts. 32, 34; BG. (May 23, 1912) 38 BGE. II 3; capacity to contract is governed by the national law: BG. (April 6, 1894) 20 BGE. 648ff, 31 ZBJV. (1895) 173, 4 Z.int.R. (1894) 390 and 5 Z.int.R. (1895) 310; even if she is a former Swiss citizen: BG. (Nov. 21, 1908) 34 BGE. II 738, 742.
\item Trib. civ. Seine (Feb. 10, 1893) Clunet 1893, 530, obviously protecting the French creditors, as the wife had made it clear that she contracted for herself alone, not on behalf of her husband. The same is true for other decisions.
\end{enumerate}
The capacity of married women under age to contract depends on whether, under the marital law, any powers are reserved to her father or guardian. 76

(b) The law of the forum is seldom resorted to in this matter. 77

(c) The law of the place of contracting is applied nowhere but in the United States and, perhaps as to mercantile contracts, in England. 78

Capacity to sue and be sued. A woman's capacity to be a party to a lawsuit (persona standi in judicio, capacité d'étre en justice) is generally held to depend upon the personal law, 79 except in the United States, where it is determined by the law of the forum (Restatement § 588).

The public policy of the forum has hardly ever been advanced to eliminate the personal law. 80


76 RG. (Jan. 10, 1918) 91 RGZ. 403.

77 France: PILLET, 1 Traité 588 no. 276; LEREBOURS—PIGEONNIÈRE 389 no. 332; contra: GOUÉ, "Femme mariée," 8 Répert. 388 nos. 16, 17.

78 CHESHIRE 238, advocating the proper law; cf. supra pp. 190, 191.

79 France: WEISS, 3 Traité 589 n. 1, cites six French decisions and three of Egyptian Mixed Tribunals.

Germany: never doubted.

The Netherlands: Rb. den Haag (June 24, 1919) W.10566 (Italian law); Hof Amsterdam (July 13, 1923) W.11163, N. J. 1924, 118 (Swiss law); Rb. Amsterdam (March 17, 1930) W.12151 and Rb. Arnhem (Jan. 23, 1933) W.12710, first point (German law) and others.

Spain: Trib. Supr. (Jan. 13, 1885) 57 Sent. 45; Clunet 1888, 138; cf. Clunet 1889, 771 (wife, party to a lawsuit in Cuba, on the ground of her capacity under the law of the United States).

80 One case is known: App. Gand (Dec. 24, 1902) Clunet 1903, 980, criticized by STOCQUART, ibid. 977.
Right of the wife to carry on a business or engage in a profession. (a) Whether a wife needs the consent of her husband to accept employment or to carry on an independent business of her own, is decided according to the law that governs her personal relations. For instance, an Italian wife who had engaged in a profession in French Tunisia, was held to have done so with her husband’s consent, which was presumed to exist under article 13 of the Italian Commercial Code, as worded at that time. The rule includes the conditions for a wife’s carrying on a business as a “sole trader.”

The Tribunal civil de la Seine, however, consistently following its tendency to apply French law whenever possible, awarded damages of 50,000 francs to an American husband, domiciled in Chicago, Illinois, against the managers of a theater in Paris who had employed his French wife, a former music hall diva, against his prohibition. It would be intolerable, the court said, if the wife could publicly challenge in France the authority of her husband, even when he is a foreign subject. The right of a French husband to forbid his wife to engage in separate professional activity has been preserved by the reform act of 1938, which, however, subjects the exercise of this right to the approval of the courts.

(b) The law of the forum simply is applied in the United States.

Prohibition of certain transactions with third persons. In former times, a married woman was often forbidden to become a surety or to pledge or mortgage her separate property for her husband or other persons; her power to do so is still limited or denied in some states of the United States. In the Swiss

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84 Law of Feb. 18, 1938. See supra p. 312, n. 63.
85 Alabama, Georgia, Kentucky, Michigan, New Hampshire, Pennsylvania. The New Hampshire statute was construed as protecting only married women
Civil Code (art. 177 par. 3), the authorization of the court of the domicil is required for any obligation to third persons undertaken by a wife for her husband. This restriction would be applied in a German court, and it has been urged that a German court should grant such authorization if the wife has her domicil in Germany.  

Another prohibition established in Portugal and Brazil provides that a husband may not without the consent of his wife (outorga uxória) alienate immovables, sue or be sued (sic) in regard to immovables, make gifts, or (by Brazilian law) become a surety. This prohibition is expressly stated to apply irrespective of the property regime and thus comes under the heading of personal relations in all courts applying the personal law. The Brazilian courts, however, by their broad extension of public policy, have applied the prohibition also in the case of a foreigner married to a Brazilian wife and will probably continue to do so under their new law, in the case of Brazilian domicil of either party.

Protection of third persons. Restrictions of the kind described above are usually meant to apply also to relations between the spouses and third parties. If, however, foreign restrictions are to be upheld, the conflicts rule may well make an exception in the case of a third person dealing in good faith domiciled in New Hampshire; see Proctor v. Frost (1938) 89 N. H. 304, 197 Atl. 813, and Note, 51 Harv. L. Rev. (1938) 1444. On Nebraska see 3 Vernier 315 n. 9. The Roman-Dutch law imposing restrictions on a married woman binding herself or her property, was considered a rule of capacity, governed with respect to immovables by the lex situs, in Bank of Africa Ltd. v. Cohen [1909] 2 Ch. 129, cf. Cheshire 541; also Unger, "The Place of Classification in Private International Law," 19 Bell Yard (1937) 3, 14.

For France see Weiss, 3 Traité 590, 591, but he admits two decisions of 1831 and 1833 applying the lex fori, ibid. n. 5.

For Portugal see: C. C. arts. 1119, 1191, 1471. Brazil: C. C. art. 2353; cf. Bevil-Aqua, 2 Código Civil (ed. 5, 1937) 115. The husband's acting without the wife's consent is prevailingly held to be annulable rather than void; see on the controversy in Brazil Guimarães, Accordáos, 3 supplemento (1939) 476.

with one of the spouses. The German Code, although containing two clauses for the protection of domestic commerce (EG. arts. 7, par. 3 and 16, par. 2), does not cover the prohibitions discussed here, but analogous application of these clauses has been advocated. In France, Brazil, and other countries, the vague and omnipresent force of public policy is invoked whenever domestic creditors are endangered by the application of a foreign law.

3. Implied Authority: Legal Transactions Between Husband and Wife

*Power to obligate the other spouse.* By virtue of her "power of the keys," so denominated in the German doctrine as a power granted *ex lege*, the wife is authorized to bind her husband by contracting within the sphere of household activities (BGB. § 1357). The French courts have gradually been reaching similar results on the basis of an alleged implied authorization (*mandat tacite*) by the husband, the presumed contractual basis thereof becoming more and more fictitious. Most countries have rules of either the German or the French type, which are sufficiently different from each other, however, to cause problems in conflict of laws. The prevailing view holds that all these regulations are concerned with the personal relations between husband and wife, rather than their property relations.

Of the same character are the various rules concerning liability for household expenses, such as the American family expense statutes, the corresponding provisions in Switzer-

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90 See RAAPE, 2 D. IPR. 199 and citations.
91 KARL TH. KIPP, Rechtsvergleichende Studien zur Lehre von der Schlüsselgewalt in den romanischen Rechten (Berlin, 1928). Nothing was changed by the reforms of 1938; cf. Note by VIALLETON in Sirey 1938.1.176, 179.
92 See NIEBEYER, Das IPR. des BGB. 144 and the authors cited by RABEL, Z.ausl.PR. (1931) 2833 J. STRELITZ, Die Schlüsselgewalt in internationalen Privatrecht, Thesis (Göttingen, 1936). To the same effect in Switzerland, STAUFFER, NAG. 79 no. 9.
93 3 VERNIER 102 § 160.
land,\(^{94}\) Argentina, Brazil, Cuba, Scandinavia, Guatemala, and other countries,\(^{95}\) which declare both husband and wife liable for certain acts of the wife, and finally those occasional rules which impose upon the wife liability for certain deeds of her husband.

Not only in Germany is the personal law applied with respect to all these rules,\(^{96}\) but also in America the courts are in agreement on this point. In *Paquin Ltd. v. Westerfelt*,\(^{97}\) the family expense statute of Connecticut was applied by the Connecticut court to spouses domiciled in that state, while in *Mandell Brothers v. Fogg*,\(^{98}\) the Massachusetts court did not apply the statute of Illinois, making the property of both spouses jointly and severally liable for expenses of the family, as against a wife whose husband had bought goods in Chicago, both being citizens of Massachusetts. This latter case illustrates a disregard for the seller of the goods, typical of any consistent resort to the principle of personal law.

German law is less rigorous. The German code has established an exception to the rule that the law of the husband governs the relations between husband and wife; German law applies if the spouses are domiciled in Germany and the German law is "more favorable" to the third party with whom a transaction has been made (EG., art. 16 par. 2). The awkward form of this sound exception has been properly criticized.\(^{99}\)

French courts, on the contrary, have been said simply to apply the law of the forum.\(^{100}\) What they actually did in a series

94 Swiss C. C. arts. 207 par. 2, 220 par. 2, 243 par. 3; cf. *ibid.* arts. 163, 206.
95 See Kipp, *op. cit. supra* n. 91, at 17; Kaden, 6 Rechtsvergl. Handworterb. 205 b (a).
96 Unanimous opinion. The application of the Hague Convention of 1905 is controversial; cf. Wieruszowski, 4 Leske–Loewenfeld I 63 n. 365 and contra: 3 Frankenstei"-240.
97 *Paquin, Ltd. v. Westerfelt* (1919) 93 Conn. 513, 106 Atl. 766.
99 See comment by RAAPE 359.
100 PILLET, 1 Traité 588 no. 276; BARTIN, 2 Principes 242 § 300, and others with regret, as they advocated the national law; NIBOYET 739 no. 628 (2).
of cases was to allow fashionable Paris dressmakers to sue the husbands of lady customers on the theory that the debt was within the rather modest scope of those household expenses usually allowed on the ground of *mandat tacite.*\(^{101}\) In no case would the national law of the husband have been more advantageous to the plaintiff; ordinarily the spouses were found to have been domiciled in France at the time of both the order and the delivery of the goods. Since the allocation of the debt as between husband and wife was not in question, the result seems not very different from the German rule.

The failure of the American conflicts rule to accept the creditor’s claim as defined under his own law, compels him, before contracting, either to investigate where the spouses are domiciled and what law is in effect there or to ask both spouses expressly to consent. The elimination of that necessity is the precise purpose of the family expense laws.

The best solution, so far not in force anywhere, would be to hold either spouse liable or free from liability, according to the personal law governing the non-patrimonial relations between the spouses and, further, to grant the plaintiff the possibility of availing himself of any more advantageous position that he may have under the "proper law of the contract."

*Prohibited transactions between husband and wife.* A few vestiges of the ancient notion that marriage effects a merger of the wife’s personality with that of her husband and that husband and wife represent a single unity of body and soul, have survived to the present day. In several states of the United States,\(^ {102}\) husband and wife either cannot contract with each

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\(^{101}\) Worth *c.* Rimsky-Korsakoff, Trib. civ. Seine (March 30, 1893) Clunet 1893, 868; Cour Paris (June 17, 1899) Clunet 1900, 138; Trib. civ. Seine (June 9, 1905) Clunet 1905, 1040; Beer *c.* Prince Kotschoubey, Trib. civ. Seine (April 10, 1907) conf’d Cour Paris (Nov. 5, 1907) Clunet 1908, 478; Beer *c.* Prince Yourewsky, Trib. civ. Seine (June 17, 1908) Clunet 1909, 476 (denying liability of husband); Redfern *c.* the same defendant, Trib. civ. Seine (July 13, 1911) Revue 1912, 385; Cour Paris (April 18, 1929) Revue Crit. 1935, 149 (English spouses living in France; the husband is not allowed to entrench himself behind the English system of property separation).

\(^{102}\) 3 Vernier §§ 156, 173.
PERSONAL EFFECTS OF MARRIAGE

other at all or are unable to make certain transactions with each other, for instance, to form a partnership, to transfer im­movables, or to make a sale to each other. The French courts, though they cannot carry the principle through, regard partnerships between spouses as null. In European conflict of laws, the personal law clearly seems to govern the application of such provisions.

Widely discussed, however, are the choice of law problems arising from the prohibition of gifts between husband and wife. The controversy originated in the days of the postglos­sators, when Baldus and Bartolus disagreed on whether the Roman prohibition of *donationes inter virum et uxorem* was a *statutum reale* or a *statutum personale*. Most codes have abandoned such prohibitions, but, under some legislations, gifts made during coverture are still invalid or revocable. According to prevailing opinion, these rules are within the scope of the personal effects of marriage. Hence

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103 For sales, see also France: C. C. art. 1595. The Netherlands: BW. art. 1503, and others.
104 See *Lagarde*, Revue générale de droit commercial (1938) 175 since the alleged prohibition is based on the matrimonial law, Cass. (civ.) (July 3, 1917) S.1921.1.201, it is applied to French spouses trading in Italy, App. Lyon (April 24, 1929) S.1931.2.25 (refusing in consequence enforcement to an Italian decree treating the wife as a merchant and, hence, declaring her bankrupt).
106 The Netherlands: H.R. (May 17, 1929) W.12006, N.J. 1929, 1279 (sale between German spouses of Dutch immovables, subject to German marital law rather than to Dutch BW. art. 1503). Similarly Louisiana: Rush et al. v. Landers (1902) 107 La. 549, 32 So. 95; Note, 57 L.R.A. 353 applies art. 2446 La. C. C., to an immovable, the spouses being domiciled in Indiana.
107 *Cf.* *Weiss*, 3 Traité 592 n. 1; *Audinet*, 5 Répert. 668 nos. 226ff.
108 France: C. C. (1865) art. 1054; the Netherlands: BW. art. 1715; Spain: C. C. art. 1334.
109 France: C. C. art. 1096; Portugal: C. C. arts. 1178, 1181.
110 Belgium: *Poulet* 609 no. 468 n. 2.
113 Greece: *Streit-Vallindas* 350 n. 36.
114 Spain: See *De Castro*, "La cuestión de las calificaciones en el Derecho internacional privado," 20 Revista Der. Priv. (1933) 265 at 278 n. 167, refuting the argumentation by *Raafe* 341 II 3 as to Spanish law.
the personal law applied is that of the lucrative transaction, irrespective of the time element considered determinative in marital property relations. To resolve the uncertainties in the case where the spouses have different nationalities, the Polish statute expressly invokes the national law of the husband at the time of the contract.

The French courts exclude immovables, at least immovables situated in France, from the rule and apply French law as the law of the situs.

Other classifications have been occasionally preferred. The Dutch Supreme Court, for instance, once held that the Dutch prohibition, although affecting Dutch public policy, did not apply to German spouses because the prohibition was said to be inseparably connected with the prohibition of postnuptial marriage settlements, established in the Dutch legislation and Latin Codes, but unknown to the German Code.

As respects provisions excluding lawsuits between husband and wife, the American rule that the law of the forum or, in the case of an action in tort, the law of the place of the wrong should be applied, is not shared by other countries;

KG. (March 20, 1939) Dt. Recht 1939, 938 (supposing that the husband was of Greek nationality at the time of the marriage, a certain contract made by him, in view of the Greek matrimonial system of separate property, constituted a donation; since he certainly was a Greek at the time of the contract, a donation, if any, was void under Greek law, applicable as governing personal relations. The court did not, as a Note by REU believes, characterize donation under lex fori or lex causae, but simply applied the historic conceptions common to all nations concerned).

See, besides the general discussion, supra p. 301, AUDINET, 5 Répert. 669 nos. 236, 242ff.

Poland: Law of 1926 on international private law, art. 15.

Germany: Erster Gebhardscher Entwurf (1881) § 19 par. 3.


H.R. (May 17, 1929) W. 12006.

Restatement § 133 implicitly.

Critical STUMBERG 186.
such prohibitions are regarded merely as means of regulating the marriage relation and preserving domestic harmony. Recent American writers have urged a corresponding application of the personal law. ¹¹⁷

Of the same character are laws that do not permit a husband or wife to levy execution upon the property of the other spouse. The Swiss law contains peculiar provisions of this kind, which the Swiss Federal Tribunal has repeatedly declared to be no part of public policy and therefore not applicable to the case of a husband domiciled abroad. ¹¹⁸

Finally, the personal law governing marital effects extends to the problem whether spouses during coverture may make agreements on such matters as alimony (without or until judicial separation), residence, or education of children. In modern times, more and more freedom of arrangement has been allowed, but the laws differ considerably. The French courts, vigorously insisting on their domestic restrictions of such agreements, are concerned almost exclusively with examining whether these restrictions have been observed. ¹¹⁹

Particular difficulties arise in the case of financial agreements preceding separation or divorce. ¹²⁰

¹¹⁷ STUMBERG 186; HANCOCK, Torts in the Conflict of Laws 235; cf. as to vicarious liability of the husband, ibid. 255.


¹¹⁹ Cour Paris (April 29, 1913) Revue 1913, 879; Trib. civ. Seine (June 18, 1934) Clunet 1935, 619, Revue Crit. 1935, 125, criticized by BATIFFOL, Revue Crit. 1937, 429, for not having inquired into the national (German) law of the spouses; App. Lyon (March 26, 1934) Revue 1935, 461; Cass. (civ.) (Jan. 26, 1938) D.H. 1938,197, and Cour Dijon (March 28, 1939) Clunet 1939, 634, neglect the analogous Italian marital law because the agreement was valid under French law.

¹²⁰ E.g., a Swiss author, ADRIAN, (according to the review of his book in 38 SJZ. (1942), 371) admonishes Swiss lawyers to be aware in the case of English parties, of the hostility of English law to agreements whereby a spouse promises financial advantages to the other for obtaining divorce, while Swiss C. C. art. 158 allows agreements as to the consequences of divorce or separation with allowance of the divorce court. See moreover, infra, pp. 525, 531.
4. Support

Application of the matrimonial law. The husband’s duty to support his wife or, more generally, one spouse’s duty to support the other is considered in civil law countries as one of the principal incidents of marriage, rather than a quasi-contractual obligation as conceived under an earlier doctrine.

German courts and writers are in almost unanimous agreement that the national law of the husband, being the law governing the marital relation, applies to all questions pertaining to the conditions and kind of support to be rendered, either within the common household or during an extrajudicial separation. The only exception to this principle, according to German decisions, is that marital property rules govern the determination of what property is liable to furnish the means of support.

French courts have often been said to follow the law of the forum, but they too start with the application of the national law. They think, however, that the French rules on alimony present a minimum standard which must be applied on the ground of public policy. This modification has been rejected

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121 On comparative law and international enforcement see International Institute for the Unification of Private Law, L'Exécution à l'étranger des obligations alimentaires (Rome, 1938); “L'abandon de famille et ses sanctions,” in Travaux de la semaine internationale de droit (Paris, 1937).

122 ROCUIN, Traité de droit civil comparé, Le Mariage (1904) 198 ff. nos. 147, 148; Swiss BG. (May 29, 1908) 34 BGE. I 299, 313; revised Czechoslovakian draft of Private International Law, § 17 par. 1, in Revue 1931, 189.

123 I BAR § 201.

124 RG. (Feb. 15, 1906) 62 RGZ. 400, 16 Z.int.R. (1906) 298, 20 Z.int.R. (1910) 404, Clunet 1911, 946; Bay. ObLG. (March 3, 1913) 30 ROLG. 165; 3 FRANKENSTEIN 260 n. 135; KG. (Feb. 9, 1929) IPRspr. 1929, no. 15; KG. 1929, no. 15; KG. (March 9, 1931) IPRspr. 1931, no. 66.


126 Cass. (req.) (July 22, 1903) Clunet 1904, 355; Cass. (req.) (March 27, 1922) S.1923.1.27, Clunet 1922, 115, Revue 1924, 401. For many other decisions see WEISS, 3 Traité 597 n. 2. Spanish Trib. Supr. (July 1, 1897) 82 Sent. 18 declares that a foreign married woman is to be protected, if in Spain.
by most German authorities, although it might well be advocated in cases where a foreign married person is left stranded in the forum and has become a public charge, because his personal law fails to grant him a right to support by his spouse under the circumstances. The English and American rules on alimony and support in particular are usually construed so as to exclude their application by a foreign court; the lex fori is, then, the only possible resort to secure support for an indigent foreigner.

Switzerland applies the general rules on marital effects according to which foreigners domiciled in Switzerland are subject to Swiss law.

According to section 459 of the Restatement, the duty imposed by the state of the domicil to pay for necessaries furnished to a husband, wife, or minor child is enforced in every state. To this extent the personal law of the parties has extraterritorial effect. The Restatement also recognizes an obligation imposed by the state where the necessaries have been furnished, but only if this state has jurisdiction over the debtor.

*Lex fori.* Simple application of the *lex fori* to the duty of support has been adopted in the United States as well as by the *Código Bustamante.*

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127 RG. (Feb. 15, 1906) 62 RGZ. 400, cited *supra* n. 124; 1 BAR § 203 n. 2: "arbitrary." LEWALD 91 no. 126; RAAPE 284; 3 FRANKENSTEIN 261, emphasizing the force of the Hague Convention on effects of marriage. *Contra:* KIPP-WOLFF, Familienrecht 144 § 39B; NUSSBAUM, D. IPR. 147, in the case where both spouses reside permanently in Germany, or one spouse with the consent of the other, in view of the administrative and criminal importance of the duty.

128 BG. (May 29, 1908) 34 BGE. I 299, 316ff; BG. (Feb. 22, 1934) 60 BGE. II 77 (leaving undecided the case where only the defendant lives in Switzerland); BG. (April 18, 1942) 68 BGE. II 9, 13.

129 Restatement § 458.

130 *Código Bustamante* art. 45. It is recognized in community property states that the obligation to pay for necessaries arises out of the marriage and not out of the wife's partnership in the community fund. See DAGGETT, Legal Essays on Family Law (1935) 116 for California, 123 for Louisiana, 134 for Texas, 144 for Washington.
Law of the debtor. A theory presented by Pillet \(^{131}\) and adopted by the Japanese statute \(^{132}\) subjects duties of support to the law of the debtor, but it is doubtful whether this rule is meant to apply to marital duties of support.

Provisional decrees. If the personal law governs, it does so until the marriage is dissolved or some special rule applies. The personal law is not supplanted even on the commencement of an action for annulment, for limited or full divorce, or for judicial separation; however, the procedural situation may give rise to particular needs.\(^{133}\)

A few German decisions have assumed that a court, taking cognizance of an action for divorce or some similar action, could by interlocutory decree grant the wife alimony *pendente lite*, irrespective of the foreign personal law governing the marital status of the parties.\(^{134}\) More recent decisions, however, no longer resort to the German law of the forum even in an interlocutory decree unless the personal law cannot be readily ascertained; \(^{135}\) sometimes it is presumed that the foreign rule is identical with that of the forum.\(^{136}\)

5. Wife's lien \(^{137}\)

Article 2121 of the French Civil Code grants any married

\(^{131}\) Pillet, 1 Traité 599 and Droit international privé, résumé du cours (Paris 1904–1905).

\(^{132}\) Japan: Law of 1898, art. 21.

\(^{133}\) See also *infra* pp. 526–529.

\(^{134}\) OLG. Hamburg (Dec. 7, 1911) Hans. G. Z. 1912 Beibl. 56 no. 28 II; OLG. Hamburg (April 28, 1921) 76 Seuff. Arch. 242 no. 149; OLG. München (Nov. 4, 1921) JW. 1921, 1465; OLG. Köln (Dec. 14, 1928) JW. 1929, 449; OLG. Hamm (Sept. 22, 1932) JW. 1932, 3824, IPRspr. 1932, no. 87. This practice was approved by Lewald 91 no. 126 (b); Nussbaum, D. IPR 147 n. 3; Jonas, JW. 1936, 3578. It does not refer to alimony between spouses in general, as an American writer understood.

\(^{135}\) The constant practice of the 11th Senate of the Kammergericht (March 9, 1931 and Oct. 22, 1931) IPRspr. 1931, nos. 66, 67; (Dec. 19, 1932) IPRspr. 1932, no. 88; (May 25, 1936) JW. 1936, 3577, 7 Giur. Comp. DIP. no. 33; Raafe 284; cf. also Wieruszowski, 4 Leske–Loewenfeld I 62 n. 359.

\(^{136}\) LG. Mainz (Sept. 2, 1925) JW. 1925, 2163; 3 Frankenstein 262.

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woman, irrespective of her property regime, a general lien on all her husband’s land for the protection of claims which she may have against her husband, particularly claims arising from his management of her property. Prevailing opinion in France categorizes provisions of this sort despite their pecuniary character among personal effects of marriage.\(^\text{138}\) In recent years, however, French courts have refused to recognize a wife’s lien on French immovables when the wife is neither a French national nor enjoys treaty rights, even though her national law imposes a lien on her husband’s immovables.\(^\text{139}\)

The theory that the wife’s lien is the counterpart of the disabilities of a married woman has been invoked to justify the first theory.\(^\text{140}\) This argument cannot be correct, as the wife’s lien was not abolished in France\(^\text{141}\) when full legal capacity was granted to married women by the law of February 18, 1938. On the other hand, the courts transplant the problem into the field of the rights of aliens where it does not belong. The personal law should govern the problem simply as an incident of the marriage relationship.

\(^{138}\) Trib. Havre (Dec. 29, 1928) Clunet 1929, 1048; Weiss, \text{3 Traité 649}; Pillet, \text{1 Traité 593ff. no. 278}; Niboyet \text{741 no. 630}; Lerebours–Pigeonnier \text{428 no. 354}; on an earlier practice see infra p. 336, n. 15.


\(^{140}\) See Pillet and Niboyet, \text{loc. cit. supra n. 138}, Caleb, \text{4 Répert. 196 no. 176} and authors cited.

\(^{141}\) C. C. art. 2135, modified by Décret of June 14, 1938, allowing the wife, however, to waive her hypothèque légale.