DIVERGENCES concerning recognition of foreign divorces are too great to allow any systematic comparison. A few texts, representing the three systems described in the preceding chapter, illustrate the situation:

Restatement of the Law of Conflict of Laws, § 113. A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state (i) has consented that the other spouse acquire a separate home; or (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or (iii) is personally subject to the jurisdiction of the state which grants the divorce; or

(b) the state is the last state in which the spouses were domiciled together as man and wife.

Treaty of Montevideo on International Civil Law (1940), Article 15. The law of the matrimonial domicil governs: (a) conjugal separation; (b) dissolubility of marriage; but recognition of the dissolubility shall not be obligatory upon the state where the marriage was solemnized, if the ground invoked for dissolution was divorce and if the local laws do not admit of that ground as such. In no case shall the celebration of a subsequent marriage, in accordance with the laws of another state, constitute the crime of bigamy.

Article 59. Actions for annulment of marriage, divorce, or dissolution, and, in general, actions regarding all questions


2 See VREELAND, Validity of Foreign Divorces 319ff.
which affect the relations of spouses, shall be instituted before the judges of the matrimonial domicil.

*German Code of Civil Procedure*, § 328. Recognition of the judgment of a foreign court is excluded:

1. If the courts of the state to which the foreign court belongs are not competent, according to the German laws;

2. If the unsuccessful defendant is a German and has not defended the proceeding, provided that summons initiating the proceeding has been served on him neither personally within the state of the court of suit nor by means of German judicial assistance;

3. If the judgment, to the detriment of a German party, disagrees with the provisions of article 13, par. 1, 3 or articles 17, 18, 22 of the Introductory Law to the Civil Code;

4. If recognition of the judgment would violate morals or the purpose of a German law;

5. If reciprocity is not guaranteed.

**I. Individual Systems**

1. England

A foreign final decree of divorce is recognized by English courts, if (1) it is rendered by the court of any other country, which is competent according to its own *lex fori*, and (2) if (a) the husband was domiciled in the English sense in that country at the time of the commencement of the suit for divorce or (b) if the decree would be recognized by the court of the husband’s domicil.

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3 With respect to countries not considered here, see:


Illustrations: (a) An English married couple went to live in Detroit, Michigan; the wife returned to England; by agreement with her, the husband brought action for divorce and obtained a decree by default in the Wayne County Court. The High Court of England presumed that both spouses were domiciled in Detroit, as the husband certainly was. Therefore, recognizing the Michigan divorce, the High Court dismissed an action of the wife for divorce.

(b) A husband, resident in Michigan according to American conceptions but domiciled in Canada according to British law, obtained a divorce decree in Michigan. The decree was not recognized in Canada and therefore not in England either.

English courts are known, however, by courtesy to recognize the finding of domicil by trustworthy foreign courts.

The recent change of legislation (Matrimonial Causes Act of 1937) by which a deserted wife may institute suit at the last marital domicil would seem to bring about recognition of foreign jurisdiction under analogous circumstances; no authorities are yet known.

would be recognized in New York, where the husband was domiciled; hence recognized in England). Cass v. Cass (1910) 102 L. T. R. 397, Clunet 1910, 1259 (South Dakota decree not recognized in Massachusetts, where husband was domiciled; hence recognition denied in England).

Crowe v. Crowe (1937) 157 L. T. R. 557, [1937] 2 All E. R. 723, Clunet 1938, 97; similarly, Leigh v. Leigh [1937] 1 D. L. R. 773 (if nothing is proved, the court will presume that the foreign tribunal (again a Detroit court) had jurisdiction over the parties by reason of domicil and that the domicil was properly and validly established).

Cf. the reasoning of Falconbridge in [1932] 4 D. L. R. 41, supra n. 4, before the Amendment Act of 1937.


Information obtained in a Swiss divorce case; see Wyler, SJZ. (1933–34) 199.

The contrary opinion is expressed by Magdalen Schoch in 5 Giur. Comp. DIP. 300.

Before the Act of 1937, recognition in England and throughout the British Dominions of a divorce rendered in New Zealand under the provision enabling a deserted wife to sue at the last matrimonial domicil was anticipated by Mr. Justice Denniston in Poingdestre v. Poingdestre (1909) 28 N. Z. L. R. 604, 11 G. L. R. 585, but doubted in the case of a Victoria decree by Chief Justice Irvine in Chia v. Chia [1921] V. L. R. 566. See Read, Recognition and Enforcement 229, who shared the doubts.
The English rule is so exclusively influenced by jurisdictional considerations that the reasons upon which a foreign court bases its decree are immaterial. The grounds of the foreign decree need not be in accord with the grounds for divorce established in English matrimonial law, provided, of course, the decree does not violate good morals.

2. The United States

While recognition of decrees of foreign countries attracts scant attention, recognition of divorces rendered in sister states is one of the most discussed subjects of American law. The formidable complications ensuing from conflicting social policies and constitutional controversies have not been met with consistent and purposive judicial methods, in part due to the limited federal control exercised over the subject matter by the Supreme Court under the Full Faith and Credit Clause. One school of thought, indeed, has seemed to prefer cautious case construction to any rules. However, in recent decades before Williams v. North Carolina revived the conflict of opinions, it was prevailingly assumed that the recognition due under the Full Faith and Credit Clause of the Federal Constitution depended upon the following requirements:

(a) Under that Clause as construed by the Supreme Court, it was assumed that a state had the duty to recognize a divorce pronounced in a sister state X:

(i) When both parties were domiciled in X;
(ii) (Probably) when the defendant was domiciled in X;
(iii) When the plaintiff was domiciled in the state and, in addition, one of the following three conditions was fulfilled, viz., that:

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15 Selected older literature is listed by 1 BEALE 467 n. 3; GOODRICH 345 n. 29. For recent older literature see supra p. 390, n. 12.
17 Restatement § 110; Haddock v. Haddock (1906) 201 U. S. 562 at 570.
X is the state where the parties lived together for the last time before they separated\(^{18}\) or

The defendant has been personally served with process or voluntarily appeared in X\(^{19}\) or

(In a disputed opinion) the defendant has caused the parties to be separated by his or her marital misconduct.\(^{20}\)

Inversely, no state, in the prevailing opinion, was obligated to recognize a divorce pronounced by a sister state, if the plaintiff alone was domiciled in the divorce state and none of the three additional facts also appeared, particularly when the court had assumed jurisdiction only on the ground of constructive service of process on the defendant.\(^{21}\) According to the Restatement,\(^{22}\) such a divorce would be void even in the state where it was rendered; this view, however, has been generally disapproved.\(^{23}\)

Without the obligation of the Full Faith and Credit Clause, the majority of the states also recognize a divorce granted a resident plaintiff as valid when the defendant has been served by publication only.\(^{24}\) A small minority, however, have refused recognition either generally or when, at the time of the decree, the defendant was domiciled within the forum of recognition or in a third state which did not recognize the divorce.\(^{25}\)


\(^{19}\) Cheever v. Wilson (1870) 9 Wall. 108, 19 L. Ed. 604; for state cases, see BEALE 506 n. 7.

\(^{20}\) Ditson v. Ditson (1856) 4 R. I. 87; "generally accepted as law in the United States," JACOBS, Cases and Other Materials on Domestic Relations (ed. 2, 1939) 354 n. 2.

\(^{21}\) Haddock v. Haddock (1906) 201 U. S. 562.

\(^{22}\) Restatement § 113 comment g.

\(^{23}\) BINGHAM, "The American Law Institute vs. the Supreme Court," 21 CORNELL L. Q. (1936) 393. At present, however, Mr. Justice Frankfurter, in his concurring vote in the Williams case postulates equal treatment of divorce decrees in all jurisdictions.

\(^{24}\) Miller v. Miller (1925) 200 Iowa 1193, 206 N. W. 262.

\(^{25}\) New York, Massachusetts, North Carolina, Pennsylvania, and others which
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In principle, a divorce rendered in a state in which neither of the parties was domiciled is not recognized, irrespective of whether the defendant was personally served or put in an appearance.\(^26\) This is fundamental.

(b) This set of rules has been modified by the Williams case to an extent still discussed. To an unbiased mind, however, the impression made upon most practical lawyers\(^27\) appears right; the decision eliminates the alternative requirements described under (iii) above altogether, so as to hold it unqualifiedly sufficient that the decree be rendered at the domicil of the plaintiff. This construction of the case is supported by the facts of the twin cases decided, as the Nevada court had taken jurisdiction in the one case on service by publication and in the other by personal service beyond the jurisdiction of the court. The express declaration of the Supreme Court that Haddock v. Haddock is overruled, therefore, should not be taken as an obiter dictum or a non-committal announcement of a future policy. Not even wrongful desertion of the wife by the husband, according to the majority of the Justices, is relevant to the jurisdictional question whether the new domicil of the husband suffices for the purpose of divorce. A divorce pronounced in the state of the plaintiff’s domicil ought to be recognized in any state including that of the defendant’s domicil or that of the former matrimonial domicil. Whatever criticism may be aroused, it may be justifiably claimed that the decision frees courts and lawyers from “hopeless refinements”,\(^28\) as well as from many extremely difficult fact find-

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\(^27\) See in particular the Annotation in 143 A. L. R. 1294ff., as against the subtle polemics by Bingham, “Song of Sixpence,” 29 Cornell L. Q. (1943) 1.

\(^28\) Mr. Justice Frankfurter’s concurring opinion in the Williams case, supra n. 16, at 307.
ings, and narrows considerably the number of cases where the validity of the divorce and of a remarriage is subject to contrary holding in different states.

An unfortunate feature of the case is due to the fact that the majority of the Supreme Court, for certain technical reasons which are approved by learned critics, failed to enter into a discussion of the question whether the two plaintiffs, Mr. Williams and Mrs. Hendrix, actually were domiciled in Reno. The court in Reno established its jurisdiction on their residence, during the six weeks prescribed, in the “Alamo Auto Court” of Reno. The very fact that awakened the indignation of the courts in North Carolina, to which the victorious parties brazenly returned immediately as newly married husband and wife, remained outside of the decision. Yet the doctrine that divorce judgments must be supported at least by bona fide domicil of one of the parties within the state of judgment should not be regarded as weakened, and it is also to be hoped that re-examination by the court of recognition of the facts evidencing such domicil will not be further impeded.

(c) Either under the doctrine of equitable estoppel or under the doctrine regarding the invoking of jurisdiction, several courts, particularly those of New York, have developed a bar to the impeachment of an invalid divorce. A person who has been an active party to a divorce suit or a person who has in some way profited from a divorce, for instance by remarrying, is not allowed to allege the invalidity of the divorce. This doctrine results in consequences which approach recognition of decrees that would otherwise have been

29 Note, 143 A. L. R. 1296ff.
30 BINGHAM, 29 Cornell L. Q. (1943), supra n. 23, at 3: “few lawyers will disagree.” But see the dissenting vote in the Williams case, supra n. 16, by Mr. Justice Jackson, at p. 320 under “III, Lack of domicile.”
held void or voidable. But the application of the doctrine is confused and uncertain.\textsuperscript{32}

(d) Another limitation on the right to impeach a foreign divorce decree involves the review of jurisdictional facts. On general principles, the court where recognition is sought would be free to reopen the question whether the plaintiff was domiciled within the state of judgment or whether the defendant unjustifiedly deserted the plaintiff, as facts upon which the jurisdiction for granting divorce was based. A recent decision of the United States Supreme Court, however, seems to indicate that the forum is bound to give full faith and credit to the finding of the divorce court when the defendant put in a special appearance and litigated the question of domicile or desertion.\textsuperscript{33}

Most influential is the tendency of courts, disturbed by the inconsistent treatment of divorces in the different states, to cover up defects in the jurisdictional justification of divorce decrees or, in the apt description by Lorenzen, "to close their eyes to the actualities of the situation and to allow juries to find the existence of a bona fide domicile in the state of divorce on technical grounds."\textsuperscript{34} What palpably constitutes a temporary stay of a plaintiff ready to return to his real home immediately upon rendition of the decree, is dissembled as a domicil replacing it for good, first by the divorce forum and subsequently by that of recognition.


\textsuperscript{34} Lorenzen, "Haddock v. Haddock Overruled," 52 Yale L. J. (1943) 341, 348, 352, 353.
A divorce rendered in a foreign country is, of course, not covered by the Full Faith and Credit Clause. Nevertheless, a state will ordinarily recognize such a divorce under the same circumstances that it gives credit to a sister state's decree. Also the method followed in ascertaining the domicil of the divorced party ordinarily is that customary in American courts rather than determination according to the view of the foreign divorce court. Yet it has been decided in agreement with the foreign law whether a married woman shares the domicil of her husband. Differences from the treatment of American decrees are most likely to occur in the respect that the place of domicil is more easily to be found situated in an American state than in a foreign country. But in Gould v. Gould, the Court of Appeals of New York, although stating that the domicil of the parties had remained in New York, held their bona fide residence in France sufficient for recognition of the French decree, in deviation from the doctrine of Andrews v. Andrews; it was, however, a special case. Since both parties had appeared in the French suit and the decision was based on New York law, the court held that "under the circumstances of this case, the policy of this state is not offended by the recognition."

Judicial separation, granted at the matrimonial domicil, has been held by the United States Supreme Court

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35 For recent cases see Note, 143 A. L. R. at 1313; cf. Hackworth, 2 Digest of International Law (1941) 382 s. 168.
36 RG. (Nov. 21, 1929) 126 RGZ. 353, JW. 1930, 1309 no. 14 (the German court, in an Iowa case, respects whatever method is followed in the United States).
37 Torlonia v. Torlonia (1920) 108 Conn. 292, 142 Atl. 843.
38 See supra p. 140, n. 157.
39 188 U. S. 14.
40 (1923) 235 N. Y. 14, 29, 138 N. E. 490, 494. Stumberg 281 n. 82 thinks estoppel was the ground of the decision. In the discussion of the American Law Institute, 4 Proceedings, Appendix (1926) 348, 354 Judge Page observed that the matrimonial domicil was in Paris; Professor Beale declared himself extremely well satisfied by this statement. The court seems to have affirmed the domicil in New York for reasons lying outside of the case.
to be entitled to recognition under the Full Faith and Credit Clause.\footnote{41}

More generally, it has been concluded from the cases that whenever a decree for judicial separation is granted under circumstances such as would have supported jurisdiction for absolute divorce in the sense of the Full Faith and Credit Clause, recognition cannot be withheld.\footnote{42}

Traditionally, however, where statutes have requirements for judicial separation different from those for dissolution of marriage, separation may be granted on the basis of personal jurisdiction, residence of both parties being sufficient. This, it is understood, only "protects the spouse against certain acts of the other spouse while they are within the state,"\footnote{43} without extraterritorial effect.\footnote{44}

3. France\footnote{45}

France has no written law on the recognition of foreign divorce decrees, but the practice has developed, in addition to the rules concerning foreign judgments in general, certain peculiarities as regards foreign judgments affecting status and capacity of individuals.\footnote{46} It seems, however, that a sharp distinction is to be made between divorces in which at least

\footnote{41 Thomson v. Thompson (1913) 226 U.S. 551; cf. Goodrich 353 n. 59. Note, 33 Yale L. J. (1924) 426.}

\footnote{42 Restatement § 114 comment b; Stumberg 292; Goodrich 354 n. 61. In the cases concerning extraterritorial effect of divorce decrees, a state may refuse to give effect to a limited divorce, while it would recognize a decree of absolute divorce, Pettis v. Pettis (1917) 91 Conn. 608, 101 Atl. 13.}

\footnote{43 Restatement § 114 comment a.}

\footnote{44 There is no authority, Goodrich 352, 353.}

\footnote{45 See Degand, 5 Répert. 559 and (with reference to the almost identical Belgian law) Pouillet, nos. 500-504; Novelles Belges, 2 D. Civ. Divorce, nos. 1760, 1761. A report was issued by the French Ministry of Foreign Affairs and reproduced in the decision of the German RG. (March 19, 1936) 150 RGZ. 374, Clunet 1939, 122.}

\footnote{46 The subject matter of the practice is extended by Lerebours-Pigeonnière 360 no. 310 to all judgments which modify a legal situation (Gestaltungsurteile in the German doctrine).}
one party is of French nationality and those in which both are foreigners.

(a) If both spouses are of foreign nationality, foreign divorce decrees, like other foreign judgments creating or modifying status and capacity, are held effective without exequatur by the French courts for purposes not requiring physical execution on property or coercion of persons.\(^\text{47}\)

Neither the conditions nor the scope of this rule are settled, with respect to which the courts seem to enjoy almost absolute discretion. One condition certainly is that the decree conform to the requirements of both judicial jurisdiction and choice of law by the national law or laws of the parties, in respect to which points at least a few cases have been re-examined by French courts.\(^\text{48}\) Often, public policy may intervene, especially when a fair opportunity for defense appears to have been lacking.\(^\text{49}\)

Without being made executory by exequatur, a foreign divorce decree has the effect of forming a proper basis for remarriage before a civil official\(^\text{50}\) and has been held in a much discussed decision to mark the beginning of the three months during which a divorced wife under French law\(^\text{51}\) must claim,

\(^{47}\) The principle initiated by the Court of Cassation in 1860 (\textit{infra} n. 50) was confirmed and formulated in Cass. (civ.) (May 9, 1900) S.1901.1.185; App. Aix (July 9, 1903) D. 1905.2.73, S.1906.2.257; cf. \textit{Weiss, 6 Traité 41ff.}; and with final clarifications in Cass. (req.) (March 3, 1930) S.1930.1.377; cf. \textit{Nibojet, 5 Z.ausl.P.R. (1931) 479}. Occasionally, it is true, exequatur is asked and granted without apparent necessity; see App. Agen (July 29, 1936) Revue Crit. 1937, 721 and the Note \textit{ibid.} (annulment in Chile).

\(^{48}\) Cass. (civ.) (May 9, 1900) S.1901.1.185; Trib. civ. Seine (March 16, 1935) Revue 1936, 519 (the Supreme Council of the Armenian Church in Constantinople no longer had divorce jurisdiction).

\(^{49}\) Cass. (civ.) (May 9, 1900) S.1901.1.185; Trib. civ. Seine (June 29, 1938) Clunet 1939, 61 (rejecting a decree of Cuernavaca, Mexico). Cf. App. Aix (March 27, 1890) and Cass. (civ.) (Oct. 25, 1892) S.1893.1.505; Cour Paris (July 2, 1934) Revue Crit. 1936, 500 (recognizing a decree of the Supreme Court of Rhode Island granted by default against the husband who was notified of the decree and failed to appeal; the note finds this holding "too absolute").


\(^{51}\) C. C. art. 1463.
or otherwise lose, any participation in marital community property.\textsuperscript{52} These decisions are understood to express the idea that a final foreign divorce decree of foreigners is assimilated to a French decree. A foreign judicial separation, if recognized, may be converted into divorce.\textsuperscript{53}

Application for exequatur, however, is necessary not only if execution is sought, as for alimentary rights or rights of restitution, but also if, in litigation between the spouses, one of them denies the validity of the divorce. In a case where divorce had been granted in the United States at the instance of the husband, the wife sued for divorce again in France; the mere fact that she challenged the American decree persuaded the Court of Cassation to prevent recognition otherwise than by means of exequatur proceedings.\textsuperscript{54} Further, the regular record of divorce at the registry of civil status, essential for terminating marital liability of spouses against third persons, cannot be obtained without exequatur.\textsuperscript{55}

This system has been adopted in several countries\textsuperscript{56} but has been criticized by French\textsuperscript{57} as well as by Italian writers.\textsuperscript{58}

\textsuperscript{52} Cass. (req.) (March 3, 1930) S.1930.1.377 cited supra n. 47.
\textsuperscript{54} Cass. (req.) (Nov. 11, 1908) Revue 1909, 227, Clunet 1909, 753, S.1909.1.572.
\textsuperscript{56} See, for instance, for Belgium cases cited in Novelles Belges, 2 D. Civ. (supra n. 45).
\textsuperscript{58} BARTIN, 1 Principes § 190; NIBOYET 952ff. nos. 850-852; PERROUD, 5 Répert. 384 nos. 147, 148.
\textsuperscript{58} ANZILOTTI, 1 Rivista (1906) 227; 5 ibid. (1910) 131; see further citations in MORELLI, Dir. Proc. Civ. Int. 289 n. 1.
who have influenced their courts to the extent that, according to the opinion now prevailing in Italy, a foreign judgment never has binding effect unless it has been rendered executory by proceedings of _delibazione_. Similarly, a Brazilian tradition requires foreign judgments declaratory of personal status to be submitted to "_homologação_" (confirmation).

(b) In cases where a French national is a party, a decree of _exequatur_ seems to be indispensable for all purposes, the question whether a person is a French national being again reserved to the French courts. Such a decree must be sought in a special proceeding in the same way and under the same conditions as in all cases of foreign judgments. Just what is the subject matter of this proceeding is highly controversial, but there is no doubt that, despite all contrary theories, the courts reserve to themselves the right to unlimited re-examination of every point of procedure and substantive law and even of the facts of the case, although they may not exercise this control completely in every case. Ordinarily, they will investigate whether the divorce was based on a ground acknowledged by the French municipal law. Where, for instance, a Swiss court pronounced divorce on the ground of disruption of marriage (C.C. art. 142), the decree was not recognized, the cause not

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59 Italian C. Civ. Proc. art. 941 (as amended in 1919). In most of its recent bilateral treaties, however, Italy has required an action for executory confirmation only for the purpose of forcible execution; see _PERASSI_ in 17 Rivista (1925) 109; _UDINA_, Elementi 95. Thus, in relation to Switzerland, no _exequatur_ is required; see Note of the Italian Government to the Swiss Government, BBl. 1938, II 499 no. 8.


61 Circular letter by the State's attorney of Paris, July 25, 1887, _Clunet_ 1892, 644. _Novelles Belges, 2 D. Civ., Divorce no. 1760_. Exceptions advanced by _AUDINET_, 11 _Recueil 1926_ I 240 n. 4, have been very rare.


63 _GLASSON_ et _TISSIER_, 4 _Traité de Procédure Civile_ (ed. 3, 1932) nos. 1015, 1016 and 5 _ibid._ Suppl. no. 1015 _bis._

64 This includes at present the statutory provision of 1941 (amending C. C. art. 233) that no marriage can be divorced in its first three years; see _JACOBS_, "Problems of Divorce in France," 28 _Iowa L. Rev._ (1943) 286 at 311.
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being existent under French law. But it has rather astonished the commentators that the Court of Appeals of Paris, in an exclusively foreign case involving an Argentine husband and his American wife, refused exequatur to a divorce decree of the Court of Monaco on the ground that the husband had in fact never resided in Europe, although both parties had been fully represented in the suit and only the parents of the husband wanted to prevent recognition of the divorce in order to keep their son from concluding another marriage. French courts always feel repugnance to collusive influence on judicial acts.

4. Germany

The statutory provisions laid down in section 328 of the Code of Civil Procedure concern the conditions of both recognition and enforcement of foreign judgments in general. This regulation is complete and the most elaborate of all, but questionable in form and substance; it also has a peculiar disadvantage in application to divorce, since its principles were evolved without regard to the rules of conflict of laws contained in E.G., article 17. Questions governed by both sets of rules, which are incongruous and overlap, have been difficult to settle. The final result, however, may be briefly presented as follows:

(a) Where both parties are nationals of the country of divorce, a final divorce decree is almost always granted recognition and enforcement. There is, of course, one self-evident

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66 Cour Paris (March 24, 1930) Revue 1930, 272 criticized by NIBOYET, ibid. In the decision of Cass. (req.) (Nov. 11, 1908) S.1909.1.572, supra n. 54, a divorce decree of Pensacola, Florida, was declared ineffective because the husband was found to have obtained the decree by declaring under oath false facts supporting jurisdiction.
67 STEIN-JONAS, 1 ZPO. § 328 II; RAPE 418-424; WIERUSZOWSKI in 4 Leske-Loewenfeld I 93.
68 RG. (Feb. 28, 1938) JW. 1938, 1518; see also RG. (Jan. 5, 1925) 109 RGZ. 383, JW. 1925, 765, Clunet 1926, 173 (Czechoslovakian decree); KG. (Dec. 21, 1935) JW. 1936, 2466, Nouv. Revue 1937, 98 (Hungarian decree upon a ground of alleged collusion of the parties). The same point of view was observed in Austria, see WALKER 729, 730.
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condition—the decree must not violate German public policy (C. Civ. Proc. § 328, par. 4)—but seldom can the matter be connected with German interests closely enough to affect them. 69

For a time it was doubtful whether recognition was to be extended to the case where the husband is a domiciliary of Germany. Now the prevailing opinion is in the affirmative. 70

(b) According to the system of the procedural code, the solution stated above should also govern the case where both parties are of foreign nationality but have obtained their divorce in a third country. But, under the principle of nationality adopted in the German conflicts rules, a divorce may not be recognized unless it agrees with the law of the national country of the husband. The second view prevails in the recent literature. In summary, a decree concerning two foreigners is certain to be recognized if it is rendered at the marital domicil and recognized by the husband’s national country. 71

(c) Where one party is of German nationality, the divorce decrees of many countries are not recognized because reciproc-

69 RAAPE 419. A divorce decree validly rendered by the national court of the spouses by default was recognized, although not in conformance with German divorce procedure, LG. Dresden (Oct. 16, 1935) JW. 1935, 3493. The OLG. Hamburg (Oct. 1, 1935) JW. 1935, 3488 held a Mexican decree void because obtained in a shocking manner, but this decision has been criticized, since the husband was an American citizen domiciled in New Jersey and the wife had lost her German nationality by her marriage, JONAS, JW. 1936, 283; LORENZ, 6 Giur. Comp. DIP. 326. The decree would not have been recognized in New Jersey, however, if properly attacked, and could be disregarded for this reason in Germany. Jonas thought that as the husband had remarried in New Jersey the divorce was recognized there.

70 If the husband is domiciled in Germany, either spouse may sue at his domicil, C. Civ. Proc. § 606 par. 1. Where jurisdiction is granted in Germany, there is no recognition without reciprocity, C. Civ. Proc. § 328 par. 2. Hence, even with respect to foreigners recognition seems to be excluded in most cases, M. WOLFF, IPR. 83. This, however, makes no sense; see NUSSBAUM, D. IPR. 441; RAAPE 418 and 2 Dt. IPR. 186; BERGMANN, StAZ. 1935, 104; JONAS, JW. 1934, 2555; MASSFELLER, StAZ. 1937, 226.

71 1 FRANKENSTEIN 345ff.; RAAPE 422; JONAS, JW. 1934, 2555 and ibid. 1936, 283; MASSFELLER, StAZ. 1937, 227; contra: LEWALD 128 no. 174; KIPP-WOLFF, Familienrecht (1928) 148 § 39 n. 47 and IPR. 83; WIERUSZOWSKI in 4 Leske-Loewenfeld I 38 and ibid. 76.
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Reciprocity of recognition is not guaranteed (C. Civ. Proc. § 328, par. 2, cf. § 606, par. 2 and the Law on Divorce of Jan. 24, 1935, art. 2, par. 2). The list of countries guaranteeing reciprocity, however, is not altogether confined to those countries that have concluded treaties on recognition with Germany or to those recognizing all German judgments; it suffices that German divorce decrees are regularly recognized. Therefore, the list has been believed to be rather comprehensive.72

However, relations with Great Britain and the United States in particular are in doubt. Leading authorities declare that in neither country is there any certainty of recognition because courts in common law countries are prepared to re-examine the jurisdiction of the individual German tribunal and that English courts in particular may inquire into the question of fraud.73 On the contrary, as a practical matter, one may presume that, in most courts of the United States, German divorce decrees rendered at the domicile of one party are enforced with greater probability of excluding defenses than in Germany.74

Again, even divorces rendered in one of the countries with which reciprocal recognition is assumed to exist, such as Denmark, Norway, Rumania (old territory), or the Netherlands, must comply with a number of other requirements. Recognition is denied, if the husband is domiciled in Germany;75 or if the wife is a German national and domiciled in Germany;76 or if the losing defendant is a German national and in the

72 See especially WIERUSZOWSKI, 4 Leske–Loewenfeld I 88–92; and for instance AG. Hannover (Oct. 26, 1931) IPRspr. 1932, no. 73 (Uruguay); KG. (Dec. 19, 1932) ibid., no. 74 (Yugoslavia).
73 STEIN–JONAS, 2 ZPO. § 328 (ed. 1938) nos. 110, 132; RAAPE, 2 D. IPR. 185 considers the position of England and Sweden not clear.
75 C. Civ. Proc. § 328 par. 1; cf. ibid. § 606 par. 1.
suit was not served personally through the German authorities; \(^{77}\) or if divorce was granted on a ground unknown to German law and without stating facts which constitute a sufficient ground for divorce under German law; \(^{78}\) or if divorce was denied to the disadvantage of a German party, while it should have been granted according to German law; \(^{79}\) and finally also, if the decree is at variance with German public policy. In the case of German parties, this last point includes numerous possibilities, most of which are covered by the other conditions of recognition.\(^{80}\) In fact, not often is a foreign divorce concerning a German subject recognized except by virtue of some international treaty.

5. Soviet Union

In consequence of the principle that either spouse is able to terminate the marriage at his pleasure, it is presumed in Soviet Russia that any act of an authority in other countries designed to dissolve a marriage of Soviet citizens is supported by the intention of at least one party and therefore valid as a nonregistered divorce. A decree of the People's Commissary of Justice of July 6, 1923,\(^{81}\) states that every dissolution of marriage obtained in a foreign country according to the local laws will be recognized in the U.S.S.R., irrespective of where and when the dissolved marriage was celebrated, unless the marriage of a Soviet citizen has been dissolved or annulled on formal grounds contrary to the will of both spouses.\(^{82}\) No

\(^{77}\) C. Civ. Proc. § 328 par. 1 no. 2; RG. (June 15, 1936) JW. 1936, 2456.

\(^{78}\) C. Civ. Proc. § 328 par. 1 no. 3; cf. EG. art. 17 par. 4.

\(^{79}\) Same provision as supra n. 78.

\(^{80}\) RAAPER 410.

\(^{81}\) Sec. 2 of the Decree, which in German translation was reproduced and analyzed together with the Circular letter of the People's Commissary of the Interior of June 2, 1921, no. 19 and the Decree of the Commissary of Justice of Feb. 21, 1927, by H. FREUND, Das Zivilrecht in der Sowjetunion (1927) 1, in 4 Die Zivilgesetze der Gegenwart 71; H. FREUND, Das Zivilrecht Sowjetrusslands (1924) 69; Makarov, Précis 399; see also German RG. (June 24, 1927) IPRspr. 1926-27, no. 70; Swiss BG. (June 15, 1928) 54 BGE II 225, 228, 231.

\(^{82}\) On the limitation expressed in the last sentence, see German RG. (April 4, 1928) 121 RGZ. 24, 27.
provision has been held necessary in the case where only one party is of Soviet nationality. 83

6. The Hague Convention on Divorce

By the Hague Convention on Divorce, article 7, the member states agree to recognize a divorce or separation decreed by a court competent according to the Convention, provided the dispositions of the Convention have been observed, and, in case the decision has been rendered by default against a defendant who fails to appear, he has been cited in accordance with the special provisions of his national law for the recognition of foreign judgments. 84

A divorce or separation decreed by an administrative jurisdictional authority shall likewise be recognized everywhere, if the law of each of the spouses recognizes such divorce or separation.

Since under articles 1 and 2 the national law of the parties must be observed by the divorce court, recognition depends upon a re-examination of facts and motives. 85

The Convention is understood not only to authorize but to obligate the courts to refuse recognition, if the treaty requirements are not satisfied. 86

7. Latin-American Conventions

The Montevideo Treaty provides for reciprocal recognition of divorces decreed at the matrimonial domicil, 87 or at the last matrimonial domicil, in case the parties have been judicially separated or, according to the recent draft, the wife has been deserted and has not established a new domicil of

83 MAKAROV, Précis 400 with hypothetical comment.
84 For comment see MEILLI-MAMELOK, IPR. 240 § 45.
85 LG. München I (Jan. 17, 1908) 4 Z. Rechtspflege Bayern (1908) 295.
86 App. Milano (Nov. 21, 1906) Monitore 1907, 133, 3 Rivista (1908) 390, Clunet 1908, 1267; KOSTERS 528; LEWALD in Strupp, 1 Wörterbuch des Völkerrechts und der Diplomatie 470 VII; 3 FRANKENSTEIN 571 n. 104; VREE-LAND 229.
87 Treaty on international civil law (1889) art. 13, (1940) art. 15.
her own. This simple principle was incorporated in the Código Bustamante which for once, abandoning its neutrality to the criterion of the personal law, prescribes that the law of the matrimonial domicil is to apply. Of course, the court must have observed the treaty requirements respecting the applicable law, which are not quite so simple in the Havana Convention as in the Treaty of Montevideo. The reservations for non-recognition vary in scope. The Código Bustamante reserves to "each contracting state the right to permit or recognize, or not, the divorce or new marriage of persons divorced abroad, in causes which are not admitted by their personal law." The reservation contained in the new draft of the Montevideo Treaty is much more restricted; it covers only the case where the country of celebration does not permit divorce and grants the right to refuse recognition on this ground only to this country.

8. The Scandinavian Convention on Family Law of 1931

This Convention assures reciprocal recognition, without confirmation or re-examination, of all decisions rendered in matrimonial causes according to the treaty provisions. Actions for separation or divorce between nationals of the participating states are decided, under the basic rule of these provisions, according to the law of the state where both parties are domiciled or where they had their last common domicil, if one of them is still domiciled there.

There are, thus, no defenses to a divorce decree of another Scandinavian country, except that the case does not come under the Convention or, perhaps, that the matter is pending in the forum.

88 Treaty on international civil law (1940) art. 59 par. 2 with art. 9.
89 Art. 56.
90 Art. 53, see comment by BUSTAMANTE, La commission des jurisconsultes de Río 121.
91 (1940) art. 15(b). See supra p. 427.
92 Art. 22 referring, among others, to arts. 7, 8, 10.
93 Art. 7 par. 1.
Other inter-Scandinavian conventions provide for the mutual enforcement of alimentary awards (Feb. 10, 1931) and other judgments (March 16, 1932). 94

9. Bilateral Treaties

Before the first World War, very few conventions existed for securing mutual enforcement of judgments; the most outstanding is still in force—the French-Swiss Treaty of June 15, 1869, which, according to present prevailing opinion, is applicable also to divorce decrees. 95 In the nineteen-twenties, a wave of international adjustment in Europe brought about a series of treaties for reciprocal judicial assistance, especially through negotiations of France, Germany, Italy, and the states succeeding the Austro-Hungarian monarchy. 96

Great Britain, however, while also endeavoring to establish a system of reciprocal recognition upon a treaty basis, has concluded only two treaties with foreign countries, the first of which, with France, declares itself inapplicable to matters of status and capacity 97 and the second, with Belgium, renders inoperative its most important provision with respect to these matters. 98

94 See Bloch, 8 Z. ausl. PR. (1934) 627, 636.
95 See Secretan, Revue 1926, 199; Degand, 5 Répert. 574 no. 193. The contrary view formerly frequent in Switzerland is maintained by Gautschi, 26 SJZ. 1929, 1. The treaty also covers recognition of measures ancillary to divorce, such as awarding custody of children. See Cass. (req.) (Nov. 3, 1936) Clunet 1937, 293. The French-Belgian Treaty of July 8, 1899, was facilitated by the identical codes; see on the content, Perroud, 5 Répert. 409.

Also still in force is the Treaty between Colombia and Ecuador of June 18, 1903 on international private law, art. XVI of which deals with divorce, only to deny the right of remarriage if the divorce fails to agree with the law of the other state.


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II. PARTICULAR PROBLEMS

As the general doctrine of recognition and enforcement of judgments ought to be discussed in its proper place, topics involved in this problem, such as jurisdiction of the foreign court, finality and conclusiveness of the decision, reciprocity, opportunity for defense, and fraud, cannot be treated at length here. There are, however, a few typical situations found in the field of foreign divorces, which permit comparative survey. Courts in contemplating such groups of cases may apply different legal categories to obtain the same result; indeed, several of the numerous legal requisites for recognition may be invoked at once without entirely exact discrimination, if a court feels that the foreign divorce decree should not be accepted.

1. Scope of Recognition as Contrasted with Enforcement

Recognition, as contrasted with enforcement, has more importance in the matter of divorce decrees than in ordinary judgments, but the effects of recognition are not uniformly determined.

(a) Usually, as a minimum effect, a foreign divorce decree which agrees with the essentials for recognition can be set up as a defense against the alleged existence of the marriage in any suit for separate maintenance or restitution of conjugal rights, for separation, or for divorce, etc., without bringing an action on the judgment or, on the Continent, without an application for an executory decree.


(b) Likewise, the decree provides full evidence of the dissolution of the marriage before a civil official or other marriage officer when remarriage is attempted.\textsuperscript{101} The conditions of its fitness for recognition are to be examined by the officer or any authority or court supervising him and not through an action on the judgment.\textsuperscript{102}

(c) The effects of a divorce on the name of the wife, on her ability to be reinstated in her former nationality, or on her domicile, fall within the scope of mere recognition.\textsuperscript{103}

(d) While the decree is entered upon the records of civil status without the steps necessary for enforcement, according to the German and Swiss regulations,\textsuperscript{104} in France, on the contrary, transcription in the register of civil status is denied unless a decree of exequatur is obtained.\textsuperscript{105}

(e) Recognition nowhere covers the enforcement of pe-

\textsuperscript{101} Belgium: App. Liège (Jan. 29, 1924) Jur. Liège 1924, 76; cf. POUCKET 649 n. 4.

\textsuperscript{102} See citations in preceding note.

\textsuperscript{103} BECK, NAG. 379 no. 161.

\textsuperscript{104} Germany: RG. (May 18, 1916) 88 RGZ. 244 against former practice of lower courts.

\textsuperscript{105} Trib. civ. Seine (May 19, 1926) cited supra p. 473, n. 55.

For Italy, cf. UDINA, 1 Giur. Comp. DIP. 150.

cuniary duties arising from the decree or of rights to exercise custody over children, or other provisional orders. \(^{106}\) It has been asserted, \(^{107}\) and seems correct, that recognition of a foreign divorce repugnant to the domestic principles of the forum may be granted, while executory enforcement would be denied. In the Netherlands, foreign divorces may not be executed and enforced at all but are capable of being recognized. \(^{108}\)

2. Scope of *Res Judicata*

Is full faith and credit due to a foreign decision dismissing an action for divorce on the merits? This question has arisen on the Continent, because generally defeat in a lawsuit as well as victory may constitute *res judicata*. Nevertheless, it has been argued that a subject of the forum should not be barred from suing under his own law after having been rejected under a foreign law less favorable to him. In fact, in Switzerland foreign decrees denying divorce to a Swiss citizen are said not to be entitled to recognition. \(^{109}\) A better considered solution is given in Germany; a foreign judgment unfavorable to the application of a German national is recognized, if the decision is in conformity with German divorce law. \(^{110}\)

In the United States, the binding force of a judgment dismissing a suit for divorce on the merits seems to be virtually the same whether it is rendered by a domestic or a foreign court. It could hardly be otherwise, since the divorce court applies its own law, and the forum of recognition does not re-examine the merits.

\(^{106}\) Beck, NAG. 381 no. 168.
\(^{107}\) Julliot de la Morandièere, in República de Colombia, Comisión de Reforma del Código Civil (1930–1940) 217, 218.
\(^{108}\) See 1 Bergmann 404.
\(^{109}\) See Beck, NAG. 377 no. 157.
\(^{110}\) See Raape 410 V 1.
3. Divorce Without Judicial Litigation

Many legislators and even treaty-makers are so accustomed to contemplate contentious proceedings and a decree of a state court as the only way to obtain divorce, that they overlook the possibility of other forms of divorce being used abroad. The difficulties of interpreting the pertinent narrowly drafted texts are increased in numerous systems, for instance, in the elaborate but contradictory and incomplete German enactments, by failure to coordinate the procedural rules on recognition of foreign judgments with the choice of law rules on the extraterritorial effect of private acts and by failure to regulate clearly the recognition of foreign acts of administrative justice.

Recognition of foreign forms of divorce unknown to the forum is traditionally barred by public policy with respect to nationals or subjects of the forum, as distinguished from foreign married couples. But the general trend is in the direction of replacing the former reluctance to recognize foreign modes of divorce by a broader-minded outlook.

(a) Decisions of foreign ecclesiastical courts are probably everywhere treated as equivalent to decrees of ordinary courts. The minority opinion is, however, that religious divorces should be recognized even when they are not supported by the consent of the state in whose territory they are rendered, provided only that they are recognized by the state of which the parties are nationals—a species of renvoi. The prevailing view requires an ecclesiastical court to be authorized by

111 See supra p. 475.
113 See 3 Frankenstein 560 n. 70 and the decisions cited by him.
114 3 Arminjon §§ 34, 35; M. Wolff, IPR. 132; Nussbaum, D.IPR. 164 n. 5; this also seems to be the meaning of American cases such as In re Rubenstein's Estate (1932) 143 N. Y. Misc. 917, 257 N. Y. Supp. 637; In re Sondere
the state where it is sitting, as well as by the state of which the parties are nationals or domiciliaries, according to the principle governing status.

*Illustration:* Orthodox Russians are divorced by the Council of the Orthodox Church in Paris, Polish Jews by a rabbi in the Netherlands, divorces not recognized by the country where pronounced nor under the prevailing opinion in third countries, but recognized by the national law. Supposing that the domicil was in the home country, the answer would probably be negative also in American courts.

Recognition of a religious decree means giving full civil effect to the divorce. Where a Bulgarian national of Orthodox faith had been married in the Netherlands to a Dutch woman according to both temporal and ecclesiastical ceremonies and the Bulgarian Church decreed divorce, the Orthodox tribunal of course considered only the religious marriage and ignored the Dutch civil ceremony. But a Netherlands court recognizing this divorce should not have assumed that the Dutch civil marriage remained undissolved.\(^\text{115}\)

(b) Divorce or separation pronounced by an administrative jurisdictional authority has been expressly declared recognizable by the Hague Convention on Divorce (art. 7, par. 2), provided that the national law of either spouse recognizes such act. This leaves the national laws free to decide. But there is no reason why, under any system of nationality or domicil, a decree rendered in the name of the King of Denmark\(^\text{116}\) or by bill of Parliament (if still available) should

\[^{115}\text{Rb. Amsterdam (March 3, 1930) W. 1930, 12175 approved by 3 Frankenstein 409 n. 2.}\]

\[^{116}\text{On recognition of a Danish royal decree in Italy, see Trib. Roma (April 8, 1908) Clunet 1910, 670; Germany: KG. (Jan. 23, 1939) Dt. Recht 1939, 1015 no. 38 has pronounced the principle that the Danish Royal decree, as an administrative decree, is to be recognized but depends on the same conditions as a judicial}\]
not be recognized as readily as a court decree; the protection against arbitrary dissolution seems greater than in many courts.\(^{117}\)

It is true that administrative jurisdiction over divorce is usually given upon the basis of a mutual agreement of the parties, and this circumstance raises a doubt that we may consider separately.

(c) In fact, non-contentious proceedings, if followed by a decree of any independent authority, need not necessarily be regarded as an obstacle to recognition at a forum where mutual agreement is excluded by the municipal law. But in such cases difficulties have been experienced with respect to subjects of the forum of recognition and also with respect to foreigners when the forum reviews the grounds for divorce.\(^{118}\)

A particular problem exists with regard to the conversion of a foreign limited divorce into a domestic absolute divorce. In several countries, a judicial separation may be transformed into a divorce *a vinculo* without proving new grounds, after some time has elapsed since the separation. This institution usually presupposes contentious litigation, in which the disruption of the marriage has been examined by a court before granting separation. If so, a separation obtained abroad upon a mere mutual agreement, as is possible in Chile, Italy, the decree and fulfills all requirements of German C. Civ. Proc. § 328 by analogy. In the instant case recognition was refused, the husband being a German and domiciled in Germany, according to § 328 no. 1. For a Danish husband, Reg. Praes. Schleswig (Jan. 23, 1922), see StAZ. 1932, 197, b; for a Danish couple, the husband being domiciled in Brazil, see Brazil Sup. Trib. Fed. (Jan. 31, 1933) 21 Rev. Jur. Bras. (1933) 26. Cf. for various opinions, WIERUSZOWSKI, 4 Leske-Loewenfeld I 78 n. 485.

\(^{117}\) CHESHIRE 367, declaring inconceivable nonrecognition in such cases, goes too far in extending recognition to any local form. See also KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935) 4 at 11.

\(^{118}\) For instance, French courts refuse recognition to a judgment on "acquiescence," regarding the procedure as affected by "irregularity," *arg. C. C. art. 92* (new, art. 249); likewise Swiss App. Freiburg i. Ue., 10 SJZ. 176, no. 49. A divorce by Danish royal decree, if the husband is a German, is not recognized in Germany, Pruss. Ministry of Interior (June 15, 1928), quoted in StAZ. 1932, 197. In many countries the matter is in doubt; also under the Hague Convention, see 3 FRANKENSTEIN 567.
Netherlands, in the countries of Austrian law, and others, cannot suffice as the only ground for an absolute divorce at the forum; this has been held in Belgium, France, Hungary, etc. It is also agreed that the Hague Convention, in providing that separation ought to be recognized by the participant states (art. 7), means a separation pronounced by a court upon contested proceedings.

Although these limitations are reasonable, the German courts took an intransigent attitude in construing the dissolution of the conjugal union, which was the only separation admitted by the Civil Code, as a unique institution, indispensable for conversion under the Code, and hence irreplaceable by any foreign type of separation.

(d) The forms of divorce permitted by the laws of Soviet Russia have engendered special problems. Under the initial Soviet legislation of 1918, a divorce could be obtained either by mutual consent and official registration or by application of one party to a court, notice to the other party by summons, and a decree which the court was bound to give. The marriage law of 1926 emphasized still more sharply, by abandoning any court action, the nature of divorce as a private declaration that may be pronounced by one of the spouses without cause.


Of another character is the Argentine separation of a Chilean man and a French woman in the case of Trib. civ. Seine (Dec. 13, 1898) Clunet 1921 (sic), 215.

121 Hungarian law applied for the province of Burgenland by the Austrian Supreme Court (April 25, 1925) 37 Z.int.R. (1927) 393 in the matter of an Austrian mutual agreement of separation from bed and board.

122 Hague Convention on Divorce, art. 5.

123 See supra p. 433, n. 187.
It is said that, if the marriage has been recorded, registration of divorce is possible but not essential, except under the Ukrainian Family Law of May 31, 1926, which recognizes only registered marriages and divorces, and under the White Russian Code (art. 23), if a factual marriage has been judicially established. The Family Protection Law of June 27, 1936 (art. 27) orders the registrars to summon the parties to appear at the registrar's office but does not change the divorce law.

Whether these various forms can be recognized has been a much discussed question, especially in Germany. The German Reichsgericht finally established the view that all Russian types of divorce may be recognized in application to non-Germans domiciled in Soviet Russia but that the forms now in use whereby the private dissolution of marriage is not declared by any sort of decree, though possibly registered, are unable to affect the marriage of a German spouse. For Russian nationals domiciled and divorced in Russia, recognition seems to be unquestioned everywhere; thus, a seemingly absolute rejection of Russian divorces in Italy, for instance, cannot be taken literally. But Russian divorces, which may be recognized in Switzerland, have been refused recog-

124 This seems to be the thesis of Maurach, 3 Z. osteurop. R. (1936) 100, 106. I do not assume any responsibility as to the statements on Soviet law.
125 See Werther, 4 Z. osteurop. R. (1938) 437: the official Sovetskaja Justicija warned that art. 18 of the Family Law remained in force.
126 RG. (April 4, 1928) 121 RGZ. 24; RG. (Feb. 28, 1938) 92 Seuff. Arch. 444; JW. 1938, 1518; and the unanimous opinion of writers; see Freund, JW. 1928, 880.
127 Leading case: RG. (April 22, 1932) 136 RGZ. 142, 146; see also the decision of Feb. 28, 1938 cited in the preceding note. A Russian divorce decree before 1926, involving Germans, was recognized in the decision of the RG. (April 4, 1928) 121 RGZ. 24, assuming that the wife's adultery which under Russian law was not to be stated in the Russian decree, was the real cause of the divorce, and this was a sufficient ground under German law, though irrelevant under the Russian; this method is no longer applicable to Russian divorces without decree.
129 Switzerland: Just. Dep., BBl. 1928, II 310 no. 17; a unilateral divorce by declaration of one spouse is excepted as offending public policy by Beck, NAG. 391 no. 197.
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mination with respect to their own nationals in Poland. Opinions in England are in conflict; the thesis of Cheshire that consistency demands recognition of any Russian divorce form with respect to a married couple in Russia, irrespective of the nationality of the parties or the place of celebration, results in a perfect parallel to the doctrine of the Reichsgericht, nationality being replaced by domicil. It is doubtful, however, whether a court in America would make use of such a doctrine. Since in this country the domicil of one party is deemed to support jurisdiction for divorce, analogy would result in recognizing a Russian divorce where one party is domiciled in Soviet Russia and the other in the United States. For the purposes of immigration, the State Department recognizes such a divorce.

Recent Soviet legislation. According to newspaper notices, the Soviet laws concerning marriage and divorce were radically modified in the summer of 1944. Unfortunately, at the time of publication, precise knowledge of this legislation was not available.

(e) The same principles that applied in Germany to Russian divorce procedures have prevailed in German courts and probably elsewhere, with respect to the arbitrary repudiation of a marriage by the husband under old patriarchal regimes, such as the Jewish, the Egyptian, or the former Turkish law. True, it would be intolerable for a foreign husband to be allowed to send his bill of divorce to his wife from a place

130 Poland: Supreme Court (Feb. 5, 1931) 6 Z. f. Ostrecht (1932) 383. With respect to Latvia see the note in 1 Z. osteurop. R. (1934–1935) 82.

131 CHESHIRE 365. For the actual British cases see infra n. 134.

Keith in Dicey, Append. 939 and in 16 Bell Yard (1935) 10–12, supra n. 117, seems to reject Russian divorce of an “English marriage” because they lack a proceeding of judicial character. Falconbridge, Annotation [1932] 4 D. L. R. 50 suggests recognition of mutual agreements in the country of common domicil but non-recognition of any decree without due notice to the defendant and a fortiori of a unilaterally registered divorce declaration. Makarov, Précis 404 recommends recognition of registered and judicial unilateral divorces but not of non-registered divorces of Soviet citizens.

132 HACKWORTH, 2 Digest of International Law (1941) 383.
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within the forum. 133 But there is nothing to affect the territory of the forum where a customary right to divorce is exercised abroad and both parties are members of the same creed and nationality which permit such dissolution. 134 A court, however, may feel interested in the wife's right, if she is or was until the marriage, a subject of the forum. 135

4. Jurisdiction 136 and Procedure of the Divorce Court

(a) Exclusive jurisdiction. No foreign divorce decree is recognized when exclusive jurisdiction is claimed at the forum where recognition is sought. This is the case in England, Argentina, etc., if the matrimonial domicil is located within the forum, in Hungary, Czechoslovakia, Poland, etc., with

134 Case of Helene Böhlau, a noted writer, who had married a Mohammedan, L.G. München (Sept. 28, 1904) 14 Z.int.R. (1904) 585; OLG. München (March 24, 1905) 16 ibid. (1906) 38; Bay. ObLG. (Sept. 29, 1905) 16 ibid. (1906) 286; OLG. München (Nov. 22, 1909) 20 ibid. (1910) 529, Clunet, 1906, 1173. See also L.G. Dresden (Dec. 22, 1931) IPRspr. 1932, no. 72 (Egyptian repudiation).


135 OLG. Dresden (Jan. 18, 1927) StAZ. 1927, 219 and AG. Dresden (Oct. 6, 1930) IPRspr. 1931, no. 150 (former German nationality of the wife) refused recognition of Egyptian or Turkish tribunals. Where one spouse is a German national, the RG. now requires a foreign "judgment" according to BGB. § 1564, RG. (April 4, 1928) 121 RGZ. 24; RG. (April 22, 1932) 136 RGZ. 142 (on Russian divorces supra n. 127). The Böhlau case, supra n. 134, and that of OLG. Dresden (Jan. 18, 1927) IPRspr. 1926-27, no. 10 would probably be decided by non-recognition nowadays.

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respect to nationals of these countries, and in many countries, if the parties are domiciled in and nationals of such countries.

(b) *International jurisdiction.* Despite the many confusing differences relating to the jurisdictional requirements of recognition in the enactments and doctrines of the world, there is one condition universally observed, viz., that the court of judgment must have had jurisdiction in the international sense, i.e., according to the conceptions of the forum where recognition is sought. A better considered formula demands only that courts of the state of judgment, not just the court of the instant case, be competent in the eyes of the law of the forum.

The most firmly established ground for defense to a foreign decree in this country is that neither party was domiciled at the divorce forum. This, in general, or even the absence of the matrimonial domicil, is a defense everywhere, with the important exception, however, that under the na-

138 On the conception see Neuner, Internationale Zuständigkeit (1929) and in Annuario Dir. Comp. (1938) part 1, 349.
139 Restatement §111. See 1 Beale §111.1. For decisions invalidating for this reason Mexican divorces see Note 143 A. L. R. 1313ff.
140 Apart from the English and Argentine materials, see, for the Brazilian practice under the former law, Sup. Trib. Fed. (Oct. 6, 1906) 2 Revista dir. civ. (1906) 373 (a Portuguese court was incompetent to render a divorce, the defendant husband being domiciled in the Federal District of Brazil). In the case Sup. Trib. Fed. (July 24, 1920) 64 Revista dir. civ. (1922) 505, the husband was both domiciled and naturalized in Brazil.

Both this rule and the American principle were egregiously ignored by OLG. Hamburg (Oct. 1, 1935) JW. 1935, 3488 and its critics, Jonas, JW. 1936, 283 and Lorenz, 6 Giur. Comp. DIP. 322 no. 253, discussing a strange "new way" believed necessary by the court to justify not recognizing a frivolous Mexican divorce granted the husband, an American domiciled in New Jersey, against his wife, who had been formerly and afterwards became a German national but was an American at the time of the decree.

Switzerland: NAG. art. 7g par. 3; a divorce of a Swiss domiciled in the United States is recognized if rendered by the judge of the domicil but not if rendered in Mexico, Just. Dept., BBl. 1938, II 499 no. 9.
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tionality principle divorce may be decreed by the national state without the fulfillment of domiciliary requirements. 142 This is the foremost consideration in the struggle against the "divorce mills," but it also has a much less desirable effect on the various cases where the wife is considered by the divorce court to have a separate domicil but is not so considered in the forum where recognition is sought. 143

(c) International treaties. A remarkable advance has been conceded to the principle of domicil in recent international treaties. The Código Bustamante (art. 52) proclaimed international jurisdiction for divorce to be at the matrimonial domicil, in contrast with the general policy of the Convention not to specify the personal law (art. 7) and despite the protest of Brazil, which then followed the nationality principle. 144 The Franco-Italian Treaty of June 3, 1930, on the enforcement of judgments (art. 11, par. 1) secured recognition for the decisions of the court of the domicil or, in their


English courts generally are not supposed to recognize such jurisdiction. They have recently been said, however, to give effect to a decree rendered by a court of competent jurisdiction dealing with its own nationals, both of whom had agreed to submit their dispute to that tribunal "as a clear, final and binding decision upon all the world." See Mezger v. Mezger [1937] P. 19 at 28 per Langton, J. This would mean that the parties can dispose of the question of jurisdiction.


Italy: App. Trieste (July 19, 1933) 25 Rivista (1933) 469 and citations (on the occasion of a Swiss annulment of marriage).


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absence, decisions at the residence of the defendant, without excepting status matters, and the same devices have been adopted in other European treaties,\(^\text{145}\) despite the fact that all the countries involved are traditional followers of the nationality principle.

(d) Opportunity for defense. Due notice of the divorce suit, whether considered an independent requirement or a requisite of jurisdiction is often qualified to exclude service by publication, as was done until 1942 in a minority of states of the United States.\(^\text{146}\) It is not a new experience that "every country claims for its own courts wider extraterritorial authority than it concedes in return to foreign tribunals."\(^\text{147}\) This position is also taken in countries which allow service by publication in their own rules of procedure.

Lack of due notice may be cured, according to many rules, by the personal appearance of the defendant. But it is the second most used ground of defense to a foreign divorce decree rendered by an ill-reputed court. Another typical case is that in which the husband in suing abroad causes the notice to be sent to a false address of the wife to impair her defense; this case has also been handled in the category of fraud or public policy.\(^\text{148}\)

\(^{145}\) League of Nations Treaty Series (1934) 135, 141. It is interesting to see how vigorously the Italian Supreme Court, leading the judicature of the country of Mancini, in interpreting the Italian Treaty of April 6, 1922 with Czechoslovakia, emphasizes the importance of the husband’s domicile for jurisdiction in matrimonial causes; Cass. (April 26, 1939) Giur. Ital. 1939, I, 1, 879, affirming App. Roma (July 19, 1938) Foro Ital. 1938, 1, 1314, Giur. Ital. 1938, I, 2, 452, Clunet 1939, 177.

\(^{146}\) Vreeland 328 enumerates with some doubts: District of Columbia, Massachusetts, Montana, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Vermont, Wyoming.


\(^{148}\) Drastic illustrations:

England: Rudd v. Rudd [1924] P. 72 rejects a decree of the state of Washington of the United States, the plaintiff husband having mailed a copy of his application to an English address where his wife had never lived, and by advertising the suit in a Seattle newspaper which she never read.
Other particulars of the proceedings of the judgment court are not re-examined as a general rule, except under the French system of unlimited control. But when the defense is believed to have been obstructed, for instance with respect to evidence, some way is usually found to protect the offended interest; modern regulations contain express clauses for this purpose. It may be quoted, incidentally, that the Federal Supreme Court of Mexico has, in repeated decisions, declared divorce statutes of such states as Yucatan and Champecha unconstitutional on the ground that they impair the right of defense.

Switzerland: BG. (May 13, 1938) 64 BGE. II 74, 79 refused recognition to a Spanish divorce because the husband, knowing that his wife lived in Switzerland, did not notify her of the proceedings; in this case not even the judgment was served on her.


France: Cass. (req.) (Nov. 11, 1908) S.1909.I.572, Revue 1909, 227 (United States decree; the husband had falsely pretended not to know the wife's residence). See also infra n. 150.


The United States: In Bethune v. Bethune (1936) 192 Ark. 811, 94 S. W. (2d) 1043 a Mexican decree was refused recognition on several grounds among which insufficient evidence is mentioned.

Belgium: Trib. civ. Antwerp (June 19, 1931) Clunet 1932, 1104 (fraudulent statements to make the defense impossible).

France: Trib. civ. Seine (June 3, 1938) Clunet 1939, 87 and (June 29, 1938) Clunet 1939, 61 (both regarding Mexican decrees and fraudulent manoeuvres of the husband to impair the defense of the wife).

In the Argentine case, Cám. civ. 2 de la Plata (Nov. 21, 1939) 68 J. A. 577 a Mexican decree was rejected because no contact whatever with the divorce state existed.

Hague Convention on Divorce, art. 8 and all recent treaties on enforcement of judgments.

German C. Civ. Proc. § 328 par. 2, etc.

In France "freedom of defense" is always considered an essential and in some decisions indicated as flowing from natural justice, quite as in England; see Perroud, 5 Répert. 377 no. 118.

See S. Ct. (May 9, 1934) 41 Seman. Jud. part 1, 191; S. Ct. (May 12, 1936) 48 ibid. part 2, 2290; S. Ct. (July 8, 1933) 38 ibid. part 2, 1442; S. Ct. (Nov. 29, 1933) 39 ibid. part 3, 2547.

On the American reaction to Mexican divorces see HACKWORTH, 2 Digest of International Law (1941) 384.
5. Anti-Divorce Policy of the Forum

(a) Nationals of the forum. If absolute divorce is forbidden by the municipal law of a country, it is perfectly understandable under the principle of nationality that the subjects of the forum are also prohibited from divorcing abroad. This interpretation seems obvious to the Italian courts, which will not recognize a foreign absolute divorce where both, or even only one, of the parties have been of Italian nationality. The same point of view obtains in Spain and was held in France before divorce was reestablished in 1884. All the recent French divorces of Italians, like that in the Ferrari case, are naturally regarded as invalid in Italy and have been criticized in France also, precisely because they are inconsistent with former practice as well as with the fraud theory of the French courts.

But this attitude is not the only one possible. In Brazil the matter is in doubt and has formed the subject of the most diverse decisions involving the submission of foreign divorce decrees for homologação, i.e., confirmation for the purpose of enforcement. Some authorities had considered a foreign divorce as capable of full recognition in case the wife was of Brazilian nationality, the personal law of the husband being decisive for status questions. The prevailing opinion, however, held for a long time by a majority of the Federal Su-

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156 See supra p. 443.

157 See RODRIGO OCTAVIO, Le droit international privé dans la législation brésilienne no. 61; BEVILAQUA 322 n. 19 and in 6 Répert. 167 no. 41. Where the husband was of Brazilian nationality and domicil, the Sup. Trib. Fed. (July 24, 1920) 64 Revista dir. civ. (1922) 505 spoke of lack of jurisdiction of the Portuguese court.
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preme Court and adopted by Rodrigo Octavio when he joined the Court, was that the foreign husband may remarry abroad, but that *homologação* with respect to effects of divorce in Brazil is to be limited to property effects which a Brazilian judicial separation can also produce. Such partial enforcement was also granted when both parties were of Brazilian nationality. The new law of 1942, despite its principle of domicil, provides that a foreign divorce of two Brazilian parties is not recognized; if one of them is a Brazilian, the divorce is recognized with respect to the other who, however, may not remarry in Brazil. This provision seems to place husband and wife on an equal footing; it probably does not interfere with the enforcement of property effects.

Still another solution was given by a surprisingly liberal construction of the Austrian prohibition of absolute divorce for Roman Catholics. In its last thirty years, the Austrian Supreme Court admitted that, if one spouse was a foreigner at the time of the marriage or even only at the time of suit, a foreign divorce not only had full effect for him but also freed the other party, although the latter was of Austrian nationality and Catholic religion.

Courts of third countries facing such contrasts between the law of the divorce court and the personal law have sometimes felt themselves to be in a dilemma; some have recognized a

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160 Lei de Introdução art. 7 § 6; Espinola, 8-B Tratado 1067.
161 Espinola, 8-B Tratado 1067 no. 3, however, declares that in the case of two Brazilian spouses foreign divorce will not be recognized for any effect.
162 Divorce of two Catholic Austrian spouses, of course, was not recognized, OGH. (Nov. 6, 1934) Oest. Anwalts Zeitung 1935, 15, 8 Jahrb. H. E. (1936) No. 619.
163 *infra* notes 224, 225.
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divorce irrespective of the public order of the national law, where their own public policy was not offended.\footnote{164} But actually courts generally follow their own principle on status questions. An Italian national who has obtained a divorce in the United States is not allowed to remarry in France, Germany, Cuba, or any other country following the nationality rule.\footnote{165} Under the Swedish statute, however, the exception obtains that, if a party’s marriage has been dissolved in one country and he is prohibited from remarrying under another foreign law, i.e., his personal law, his second marriage should not be annulled on this ground.\footnote{166}

(b) \textit{Marriage celebrated within the forum.} The Argentine Civil Marriage Law\footnote{167} declares that a party to an Argentine marriage cannot remarry after a foreign absolute divorce. The prevailing, though contested, interpretation considers the foreign dissolution of a marriage celebrated in Argentina invalid\footnote{168} and the foreign dissolution of a foreign marriage valid, even to the extent that the parties may remarry in Argentina. Consistently with the principle of domicil, no distinction is drawn according to the nationality of the parties.

The situation is still more striking with respect to the Treaty of Montevideo on civil international law, which expressly forbids the dissolution of a marriage celebrated in a country not permitting divorce (i.e., a participant state).\footnote{169} The courts of Uruguay feel authorized, by the clause of the Final Protocol reserving public policy, to pronounce divorces of Argentine nationals domiciled in Uruguay without any regard to

\footnote{164}{See, for instance, Trib. Seine (Nov. 18, 1901) Clunet 1902, 103.}
\footnote{165}{\textit{Cf.}} RAPE 424; differently 3 FRANKENSTEIN 100, 563.
\footnote{166}{Swedish Marriage Law of 1904, c. 2 \S 2.}
\footnote{167}{Art. 7.}
\footnote{168}{See \textit{supra} p. 432, n. 178.}
\footnote{169}{The courts are decided on this point; see ROMERO DEL PRADO, \textit{Der. Int. Priv.} 319; 2 VICO 87, and recently Cám. civ. 2 de la Cap. (Dec. 30, 1940) 21 La Ley 440 (marriage celebrated in Delaware, U. S., dissolved in Montevideo) with dicta for the case of marriages celebrated in a country where divorce is prohibited.}
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the place of celebration of the marriage. In Argentina, while there remains some doubt about the Civil Code, there can be none concerning the express provision of the treaty (art. 13), requiring that the law of the place where the marriage was celebrated must concur with the law of the matrimonial domicil in permitting a divorce. This provision inserted in favor of Argentine law leaves the Argentine courts no choice in refusing recognition to Uruguayan divorces of parties married in Argentina. A second marriage celebrated in Uruguay is considered null, i.e., as either adultery or concubinage with appropriate effects, the children illegitimate, the wife unable to obtain maintenance or, after dissolution of the second marriage, alimony. All this construed under the sanction of an international treaty sounds strange.

Under the new draft of the Montevideo Treaty, third member states are to recognize any divorce rendered at the marital domicil; this, of course, restores the full impact of the domiciliary principle, which is otherwise considerably restricted by the present treaty.

In Chile, the matter is covered by three sections not quite consistent, from which it has been concluded that persons


171 Recent surveys on the attitude of the Argentine courts: 5 Boletín del Instituto de Enseñanza Práctica de la Facultad de Buenos Aires (1939) 199; Note in 39 Rev. Der. Juris. Adm. (1941) 82.


175 2 VICO 84. Yet the new draft, art. 15, changes nothing in this particular, except that the Argentine courts will not be explicitly compelled by the wording of the treaty to maintain the prevailing interpretation of art. 7 of their Civil Marriage Law.

176 Treaty on international civil law, draft of 1940, arts. 15 and 59.
married in Chile, whether Chileans or foreigners, if divorced abroad, may not remarry in Chile, although their foreign remarriage would be recognized.\textsuperscript{178}

(c) \textit{Foreigners}. Divorce of foreigners by a foreign decree has usually been recognized despite a municipal law hostile to divorce, although often after some hesitancy. The forum is considered not really interested in the status of foreigners.\textsuperscript{179} Moreover, a foreign divorce has been regarded as creating vested rights.\textsuperscript{180}

The French Supreme Court, at the time when divorce was forbidden in France, held that a foreign divorcée could marry a Frenchman in the country.\textsuperscript{181} Along the same line of thinking, Italian courts, after having been divided on the question for a long time, are now prepared to grant a decree of exequatur for foreign divorce decrees concerning non-Italian parties, including former Italian nationals,\textsuperscript{182} and do not object to the remarriage of such parties in Italy.\textsuperscript{183} This liberal attitude suffers an exception, if any, only in the case of a marriage celebrated in Italy in accordance with a canonical ceremony and with civil effects,\textsuperscript{184} for such a marriage is exclusively subjected to the ecclesiastical tribunals and there-

\textsuperscript{178} Chile, C. C. arts. 120, 121; Ley de Matrimonio Civil, art. 15. See VELOSO CHÁVEZ, Derecho Internacional Privado (1931) 117, 118.

\textsuperscript{179} See QUADRI, 3 Giur. Comp. DIP. no. 32.

\textsuperscript{180} Cf. e.g., NIBOYET, Revue Crit. 1936, 130; ZULETA (Colombian), Comisión de Reforma del Código Civil (1939–1940) 96; SOTO, \textit{ibid.} 233.

\textsuperscript{181} French Cass. (civ.) (Feb. 28, 1860) D.1860.1.57, S.1861.1.210; cf. Cour Orléans (April 19, 1860) D.1860.2.82 (same case); Cass. (civ.) (July 15, 1878) D.1878.1.340, Clunet 1878, 499. For justification see 3 ARMINJON 44; suggesting that the most practical and also most equitable solution is not to question what has been done in the domain of another system.

\textsuperscript{182} See \textit{infra} n. 221.


\textsuperscript{184} A pure ecclesiastical ceremony does not count here because it is of no effect under Italian law.
fore susceptible only of annulment and separation from bed and board.\textsuperscript{185}

While in Italy a canonical ceremony is always voluntary, since a secular form also exists, in Spain every marriage of Catholics pertains to the Church.\textsuperscript{186} But even an American citizen, not a Catholic, married in Spain and divorced anywhere, is considered unable under Spanish law to remarry in Spain.\textsuperscript{187} Likewise, the Polish Supreme Court held that, under the applicable Polish law, an American citizen of Catholic faith who had been married and divorced in the United States could not remarry in the former Austrian and Russian part of Poland.\textsuperscript{188}

Particular rigor obtained in Brazil, as the courts, despite their former nationality principle, generally denied recognition to foreign divorces not only of Brazilian nationals but also of foreigners domiciled in Brazil.\textsuperscript{189} This policy may find even more support under the new law.

(d) 

\textit{Bigamy.} It must be noted that nonrecognition in the


\textsuperscript{186} Spanish C. C. arts. 42, 75ff.; Trib. Supr. (March 31, 1911) Revue 1914, 635.

\textsuperscript{187} In the prevailing opinion, the law of Spain is identified with Canon Law to the extent that, on principle, no divorce \textit{a vinculo} is either granted or recognized, even to non-Catholics, despite their national law permitting it. Trib. Supr. (March 31, 1911) Revue 1914, 635; LASALLA LLANAS 139; TRÍAS DE BE, Estudios de derecho internacional privado 429 n. 2 and Der. Int. Priv. no. 143. It is no true exception that a foreign civil marriage of Catholics may be divorced abroad; the marriage itself is invalid in the eyes of Canon Law; See COVIAN, Art. Divorce in 12 Enciclopedia Jur. Esp. 446, 448. For other literature, \textit{cf.} SERIN, Les conflits de lois dans les rapports franco-espagnols en matière de mariage, de divorce et de séparation de corps (1929) 87.

In Brazil to the same effect Ct. App. Civ. Rio de Janeiro (Oct. 2, 1919) 55 Revista dir. civ. (1920) 523, Clunet 1921, 990; but see supra n. 159.

\textsuperscript{188} Polish S. Ct. (Dec. 17, 1936) 4 Zosteueop.R. (1937) 47.

\textsuperscript{189} The principle has been stated, although breaking it by majority vote by a very cautiously framed exception, in the decision of the Sup. Trib. Fed. no. 993 (July 17, 1940) 58 Arch. Jud. 83 on the ground of jurisdictional considerations that may be questioned.
cases discussed under (a) and (c) supra does not mean that remarriage following the divorce is bigamous in the criminal sense. Even the Spanish Supreme Court, after having declared invalid a German divorce of a German national who had undergone a Catholic marriage ceremony in Spain, refused to consider his remarriage bigamous because in accordance with his national law he could well think his action justified.\textsuperscript{190} As the Treaty of Montevideo has been understood\textsuperscript{191} and as its new draft expressly states,\textsuperscript{192} entering upon a second marriage after divorce at the matrimonial domicil does not constitute bigamy under any law in the member states, including Argentina.

6. Requirement of Similar Grounds

(a) In most states of the United States, at English common law,\textsuperscript{193} and in many other countries, it is immaterial whether the ground upon which a foreign divorce is based is adequate under the law of the forum too.

(b) In a number of jurisdictions, however, domiciliaries or nationals, as the status principle may be, are protected against foreign divorce decisions, unless there is agreement with the divorce grounds established by the \textit{lex fori}.

An important example is given by the New York courts, whose traditional policy so far has been to refuse to recognize


\textsuperscript{191} Argentina: Cámara crim. de la Cap. (July 1, 1932) 38 J. A. 1237. See also 2 Vico 81 no. 109a.

\textsuperscript{192} (1940) art. 15b.

\textsuperscript{193} The doubt whether the \textit{lex domicilii} abroad could also govern the case of an English marriage was removed by Harvey v. Farnie [1882–1883] 8 App. Cas. 43; Pemberton v. Hughes [1899] 1 Ch. 781; Bater v. Bater [1906] P. 209 by Sir Gorell Barnes at 217; the principle was recently confirmed by Mezger v. Mezger [1936] 3 All E. R. 130, [1937] P. 19 (conduct short of adultery under § 1568 German C. C.).


Greece: 6 Répert. 430 no. 98.
any decree of divorce obtained "upon grounds insufficient for that purpose in this state, when the divorced defendant resides in this state and was not personally served with process and did not appear in the action." The last limitation, of course, was necessitated by the Full Faith and Credit Clause of the Constitution but also seems to be in accord with Gould v. Gould, dealing with a French decree. This practice evidently is affected by Williams v. North Carolina.

British subjects, domiciled in England or Scotland, but living in India or certain other British possessions, may obtain divorce in the local courts under the Indian and Colonial Divorce Jurisdiction Act of 1926; among other conditions, the grounds of divorce must be those recognized by English law.

An analogous restriction with respect to foreign divorces of their nationals obtains in a number of countries following the nationality principle.


(1923) 235 N. Y. 14, 138 N. E. 490.

Indian and Colonial Divorce Jurisdiction Act, 1926, 16 & 17 Geo. V, c. 40; 3 & 4 Geo. VI, c. 35: Indian and Colonial Divorce Jurisdiction Act, 1940, 301.

France: Trib. civ. Seine (May 2, 1918) Clunet 1918, 1182 (even with respect to foreigners). Trib. civ. Seine (June 10, 1936) D. H. 1936, 420 (exequatur denied one spouse being of French nationality and the ground for divorce not agreeing with French law). NIBOYET 754 bases the rule on the idea that there is no vested interest.

Greece: Trib. Athens, 47 Thémis 582, Clunet 1937, 597 (Turkish decree).


Poland: Law of 1926 on private international law, art. 17 § 3 provides that Polish law must be applied; in more recent practice, however, recognition is denied unless a treaty assures reciprocity, see supra p. 398, n. 30.

Portugal: (probably also beyond the domain of the Hague Convention) see CUNHA GONÇALVES, 1 Direito Civil 692 pars. 1 and 2.

Switzerland: BG. (Oct. 10, 1930) 56 BGE. II 335 and (May 13, 1938) 64 BGE. II 76 at 78 (if one of the spouses is a Swiss national and domiciliary,
In Germany, however, it is sufficient that the foreign decree state facts which constitute valid grounds for divorce under German law, although the decree may have been based upon other grounds or no grounds at all or upon mutual agreement. This theory of substitute ground is a concession to a more liberal conception of migratory divorce but gives meager justification for the fortuitous chances of searching in a foreign decree for facts held irrelevant by the foreign court.

(c) A corresponding regard for the legislation of third states is shown by the Swedish law, providing that a divorce decree rendered by a foreign authority may not be recognized, unless a ground for divorce existed under the law of the state whose nationals the parties were.

7. Evasion

(a) Fictitious change of personal law. The requirements of similar grounds and also in part of jurisdiction result in a bar to subjects of the forum who seek dissolution of their marriages abroad under easier conditions than they find at home. Indeed, a considerable number of the cases which have been termed evasion from or circumvention of the domestic provisions on divorce are sufficiently dealt with under the heading of exclusive jurisdiction of the forum or lack of international jurisdiction of the divorce court.

the rule of NAG, art. 7g par. 3 that Swiss jurisdiction and law give way to the foreign domicile is inapplicable).

Cuba: Divorce law (Decreto-Ley) 206 of May 10, 1934, art. 58: Foreign divorce judgments between Cubans and foreigners are recognized if the basis of the judgment was equal or analogous to any of the divorce grounds recognized in the above Decreto-Ley 206.

In Peru a similar principle seems indicated by the decision of the Lima court of Oct. 4, 1935, Revista del Foro 1935; 913, Clunet 1937, 124, recognizing dissolution of a marriage celebrated in Peru between a foreign diplomat and a formerly Peruvian woman, because the divorce was based on grounds recognized in the recent Peruvian C. C.

198 C. Civ. Proc. § 328 no. 4 in combination with EG, art. 17 par. 4, as interpreted by RG. (April 4, 1928) 121 RGZ. 24.

199 Law of 1904 with amendments, c. 3 § 5.
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(b) Fictitious change of domicil. Fictitious change of domicil occurs in the frequent cases where the parties falsely assert that a domicil exists within the divorce forum, as demanded both by the divorce court and the court of recognition. The British 200 and Swiss 201 authorities consider collusion or fraud going to the root of the jurisdiction as a defense against recognition. Similarly, all American courts seem to hold that recognition is not due to a divorce obtained under a "residence simulated for this purpose" or not established "bona fide with intention of a permanent domicil." 202 This rule has been developed, in contrast to the English doctrine, 203 under the standard of the state where the judgment is rendered and not of the forum of recognition. With respect to divorce decrees, however, the result is hardly distinguishable, and this is true also of the five state statutes and various court practices 204 that contemplate the same factual situation from the angle of the evaded domiciliary law. The Massachusetts and Maine statutes preceded and the statutes of Delaware, New Jersey, and Wisconsin followed and adopted the evasion section of the otherwise ill-fated Uniform Annulment of Marriage and Divorce Act; 205 they deny force to a foreign decree of divorce if, to use the wording of the Delaware statute: 206

"Any inhabitant of this State shall go into another State, territory or country in order to obtain a decree of divorce for a cause which occurred while the parties resided in this State,

201 BECK, NAG. 359 no. 100 with literature.
202 See cases in 27 C. J. S. (1941) Divorce § 332 n. 113; see also SCHOULER, Domestic Relations § 1983, 2101; 1 WHARTON § 228.
203 See YNTEMA, supra n. 136, 387.
204 VREELAND 329 places twelve states in this category.
205 The Uniform State Law was drafted by the Divorce Congress of Philadelphia in November, 1906, and approved by the Commissioners but finally retired by them to be replaced by the draft of a Uniform Divorce Jurisdiction Act of 1930, based on other principles.
206 Del. Rev. C. (1935) § 3525, identical with the model.
or for a cause which is not ground for divorce under the laws of this State."

This text with its twin clauses, however, is puzzling. In the second clause, "inhabitant" clearly means, as it does generally, a domiciliary who has remained domiciled in the state. This case, "or for a cause, etc.," may be fairly well defined by assuming that the parties were in fact continuously domiciled in the state of recognition and that they or the plaintiff fraudulently alleged that they were domiciled in the divorce forum and, furthermore, that the ground upon which the decree was rendered is no cause for divorce in the state. The first case, "cause which occurred, etc.," looks mysterious. "Inhabitant" must have the same meaning as in the second alternative, and this seems to be generally agreed, since the statutes, with the possible exception of New Jersey, are not applied where the parties move to another state for purposes other than to obtain a divorce. If, thus, the first case is also concerned with a fictitious foreign domicil, what is left for the second case? For, if all causes that occurred during the residence of the parties in the state are precluded from consideration by the divorce forum, what other cause can practically be in question? Perhaps the draftsmen thought that even a cause which is legally sufficient in both jurisdictions should be averred and decided exclusively by the court at the actual domicil; thus, the first clause would favor the jurisdictional and the second the substantive law of the domicil. But there is no confirmation of such an interpretation to be found anywhere; Vreeland, the sole critic, contents himself with rejecting the entire clause as indefensible on principle.

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207 See 1 WHARTON § 229 for the Massachusetts statute; Note in 7 Minn. L. Rev. (1923) 240 and especially as to and against some mysterious decisions of the New Jersey Supreme Court, Note, 21 Mich. L. Rev. (1923) 922; GOODRICH (ed. 1) § 127 n. 39; VREELAND 135, 330.

208 VREELAND 340. We may presume a connection with the obscure limitations of jurisdiction discussed supra p. 454.
It has been held that divorce void under these rules cannot be subject to estoppel.209

(c) *Fictitious change of nationality.* In a less obvious way, change of nationality has also sometimes been termed fictitious and hence regarded as incapable of supporting recognition of a divorce granted under the new national law. For a better understanding, one ought to remember the migratory divorces, typified by the pilgrimages of Americans to Paris, Reno, and Chihuahua. When divorce was forbidden in France, the *Bauffremont-Bibesco* case discussed below was a celebrated example. Austrian Catholics went over the Hungarian border for divorce. Italians, whose law still prevents absolute divorce, emigrated to Fiume to be divorced, so long as that city did not belong to Italy.

The *Bauffremont* case was the cornerstone of a French doctrine of *fraude à la loi*, which, enjoying for a time great prominence, opposed evasion of the law of the forum by agreements, adoptions, and gifts, as well as by divorces and judicial separations, the latter, however, being known as the classic domain of this doctrine.210 The princess of Bauffremont, Belgian by birth and French by marriage, changed her citizenship by naturalization in the then independent German state of Saxe-Coburg-Gotha and was there divorced under her new personal law; then she married the Rumanian prince Bibesco. The French Court of Cassation declared the naturalization of the woman, as well as her divorce and remarriage, fraudulent and void, these acts having occurred for the sole purpose of escaping from the prohibitions of the French law.211 This doctrine has been followed in other French decisions and by Bel-

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210 *Degand, 5 Répért. 554 no. 80*.
211 *Cass. (civ.) (March 18, 1878) S.1878.1.193; see also the similar case Vidal, Cour Paris (June 30, 1877) Clunet 1878, 268, where the fraud was agreed upon by both parties.*
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gian, Italian, and Latin American courts but has slowly lost its force in France itself. The writers are aware that the acquisition of a foreign citizenship is an exercise of foreign state sovereignty that cannot be denied. Moreover, the conception of fraude à la loi has made way in prevailing theory for a more general and elastic idea of public policy.

In Italy, however, where the subject of forbidden divorce remains of particular importance, courts and writers insist that a change of nationality may well be simulated by the parties for divorce purposes, i.e., not seriously intended, which is different indeed from acts so intended to evade the law. If they intend in reality to remain Italians and formally to regain their Italian citizenship at the first possible moment, especially when they have not transferred their domicil to their alleged new homeland, according to an express requirement of the Italian nationality law, they may have acquired a second nationality abroad but not lost the Italian one. Since they have double nationality, they are treated, according to the rule, as nationals.

(d) Effective change of personal law. Indeed, the main doctrine of divorces in fraudem legis has been abandoned in

213 PERROUD, Clunet 1926, 19; AUDINET, 1 Recueil 1926 I 226; J. DONNEDIEU DE VABRES 481; contra: DEGAND, 5 Répert. 555 no. 83.
214 See especially the Italian writers ANZIOLotti, 6 Rivista (1912) 595; UDINA, Elementi no. 137; also FEDOZZI 277, 482, although he retains a distinct theory of fraud.
215 Act no. 555 of June 13, 1912, art. 8.
216 See supra p. 120.

In France, LEREBOURS-PIGEONNIÈRE 137 no. 114 contends that the courts are unable to set aside the acquisition of a foreign nationality by an individual but are able to restore his character as a Frenchman, if the conditions of naturalization have been proved fictitious, the naturalized person never having intended to settle outside of France.
France. By changing nationality, a party changes his personal law automatically. Divorce under the acquired statute is said to be not fraudulent against the prohibition of divorce but against the law of nationality, and consequently the former country cannot react through private lawsuits, though it may refuse the person's reinstatement to his previous nationality.

Italian courts have recognized most of the Fiume divorces and similar decrees that came before them. The highest court recently confirmed the principle, hitherto prevailing though contested, that exequatur is not denied a foreign decree, even if the parties were formerly of Italian nationality.

Italy, however, resorts to political measures against former Italians divorced abroad. Ordinarily, they are barred from regaining Italian citizenship, and an Italian intending to marry such a person is not likely to obtain the governmental authorization prescribed by Fascist discriminatory legislation.

The Austrian Supreme Court went so far as to recognize not only the divorce of a former Austrian of Catholic faith who had become a Czechoslovakian citizen, but also the un-

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219 The divorce decrees of Fiume granted to Italian nationals have finally been confirmed on the whole by Royal Decree of March 20, 1924, no. 352 art. 4; cf. App. Roma (May 31, 1927) Giur. Ital. 1927, I, 2, 400.


221 Cass. (July 13, 1939) Foro Ital. 1939, I, 1907, Rivista 1940, 478, the court recalls the plenary decision of Cass. Roma (Dec. 30, 1911) Foro Ital. 1912, I, 148 and others; cf. the note ibid.

222 Law of June 13, 1912, no. 555 on nationality, art. 9.

223 Law of November 17, 1938, no. 1728, art. 2; see Serini, "Legal Problems of Divorce in Italy," 28 Iowa L. Rev. (1943) 293.
married status of the other party who had remained an Austrian national,224 and to consider unmarried an Austrian Catholic woman who had changed to a foreign nationality, obtained a divorce, and then resumed her Austrian citizenship.225

The Tribunal of Amsterdam had recently to decide a case which could be regarded as a true prototype of a fraudulent divorce.226 A Dutchman clandestinely acquired Estonian nationality and, on the basis of a brief residence in Riga, obtained a Latvian divorce from his wife under the rather scandalous procedure of Latvia. The court acknowledged that the woman had become an Estonian citizen without knowing it and thereby was subjected to the law of that nationality. Fortunately, the judges found an older agreement of maintenance which could be taken as a basis for allocating adequate compensation to the wife. This rule also obtains in Brazil.227

An important limitation is contained in the Hague Convention on Divorce (art. 7 in conjunction with art. 4). It may be illustrated by the following example. Italian spouses acquired Hungarian nationality and obtained a divorce in a Hungarian court on the ground of desertion; the time of the desertion was calculated by including six months during which the parties still had been of Italian nationality. Recognition was refused in Italy.228

224 OGH. (June 30, 1937) Zentralblatt 1937, 814 no. 460; Clunet 1938, 354. This liberal practice was initiated by the plenary decision of Dec. 11, 1924, 6 SZ. no. 396, Judikatenbuch no. 18, and continued in numerous later decisions, for instance OGH. (May 11, 1932) 14 SZ. no. 108; (Nov. 14, 1934) 8 Jahrb. HR. 1935, no. 28; (Sept. 24, 1935) 8 Jahrb. HR. 1935, no. 2161, with the exception, however, of that of OGH. (March 27, 1935) 8 Jahrb. HR. 1935, nos. 1564, 1565, Clunet 1935, 1028. Cf. WALKER 635.


227 BEVILAQUA, 6 Répert. 167 no. 43.

8. Additional Application of Public Policy

With all the many specific obstacles to recognition of foreign divorce decrees, it seldom happens that the subsidiary intervention of public policy in its general functions is invoked. Just one case may be reported; the Tribunal de la Seine rejected the prayer of a French woman for recognition of a German decree of divorce which declared her guilty of anti-German utterances—a paradoxical treatment of the applicant.229

9. Renvoi

An interesting regard for the personal law has been introduced into the English and the New York law by a practice related to renvoi. In the English case of Armitage v. Attorney General230 a divorce decree granted in South Dakota was recognized in England, because it would have been recognized in New York where the matrimonial domicil was. It is generally concluded therefrom that any decree affecting the status of husband and wife which is held valid by the private international law of the domicil, is effectual in England.231

New York courts have established an analogous practice in connection with their well-known special rule by which they refuse to recognize as binding a foreign divorce decree against a spouse domiciled in New York, who was not personally served with process. Although the rule is said to be for the protection of New York citizens, in the case where the defendant is domiciled in another state, the courts of New York make their position dependent upon the effect given to the decree in the state of the defendant's domicil when ren-


Extension of this renvoi has been advocated as a vigorous contribution to greater uniformity.

In an analogous way, under the principle of nationality, as we have seen, consistency requires that a divorce rendered in a state other than the national state should be recognized in third countries, if recognized in the national state. Thus, indeed, some uniformity is achieved.

Illustrations: (i) (AG. Hannover (Oct. 10, 1931) IPRspr. 1932, no. 73.) Both parties were of Argentine nationality; they had married in Argentina. A divorce obtained in Uruguay was not recognized by the German court, because it was not recognizable under Argentine law.

(ii) (KG. (Feb. 11, 1938) JW. 1938, 870.) The husband of Austrian nationality and Catholic faith was domiciled in Budapest, Hungary; the wife had acquired Hungarian nationality. The divorce rendered in Hungary was sufficient to allow the woman to remarry even under Austrian practice. This Austrian practice has to be followed, said the Court of Appeals of Berlin.

A further case brings us to a combined application of the New York rule and this European rule.

(iii) (KG. (Oct. 14, 1932) IPRspr. 1932, no. 147.) Both parties were Germans who had emigrated to the United States, seemingly to New York. The wife established domicil...
in Reno and obtained a divorce there. The husband lived at the commencement of the suit in Brooklyn and later in Manhattan. The first condition for recognizing the Nevada decree in Germany was (C. Civ. Proc. § 328, no. 1) that the courts of the state to which the foreign tribunal belongs are competent according to German laws, i.e., of the domicile of the husband (C. Civ. Proc. § 13 par. 1) at the decisive moment of the divorce suit (C. Civ. Proc. § 606 par. 1). The Court of Appeals of Berlin held that the “state” to which the Reno court “belonged” was Nevada and not the United States, an obviously correct statement. 236 But the court dismissed the suit for recognition for the sole reason that the husband was not domiciled in Nevada but in New York. It should have asked the question whether a New York court would recognize the decree, although the answer might have been in the negative on the ground of the special rule of New York.

If the domicile of the defendant husband, at the time of the commencement of the action had been, for example, in Connecticut and later in New York, the Nevada decree would have been recognized in Connecticut—upon the mere personal service of the husband in Connecticut 237—and therefore also in New York, since commencement of the divorce action is regarded as the decisive moment for fixing jurisdiction. In consequence, the German court would have to recognize the divorce, whatever the German theory as to the time element may be.

III. Conclusions

The Supreme Court of the United States, in recent times, has evidently found it necessary to smooth out the complicated conditions of mutual recognition of divorce decrees among the states. Thus far, the Court has increased the import of the Full Faith and Credit Clause in two respects. The Davis case 238 has declared that a party contesting in the divorce state

236 Cf. also annotation on the case, 1 Giur. Comp. DIP. 150 no. 39.
237 Gildersleeve v. Gildersleeve (1914) 88 Conn. 689, 92 Atl. 684 (regarding a South Dakota decree).
238 Supra p. 469.
the validity of a divorce on the ground of lack of jurisdiction, for instance, by appeal, forfeits his right of collateral attack in all other states. The *Williams* case enlarges the domain of compulsory recognition by eliminating the defense based on lack of personal jurisdiction over the defendant.

This second step effectuates a far-reaching simplification of the rules on recognition. Moreover, and this is a point well to be noticed, an ancient remainder is eradicated, to the great benefit of rational procedure; the lawyers of this country customarily think of "personal jurisdiction" as based on determinate manners of service of process. But the manner in which a defendant is cited to attend the trial seems out of relation to modern circumstances. What does it practically mean in our days, whether a party receives a summons to appear in court by the hands of a sheriff or marshal, by Federal mail, or by any reliable means of communication at whatever place in the United States? A husband or wife, in particular, may very well be required to traverse any distance in the country in such a vital cause. The costs of travel may make a difference, but, at that, the matter of bearing the costs may or may not need a general reform. On the whole, the ruling that the domicil of one party supports divorce jurisdiction, according to most of the state statutes before the *Williams* case and under the Constitution according to this decision, is not so much of an innovation as a clarification and simplification of the subject.

However, this change of law will signify salutary progress, only if the domicil of at least one of the parties in the divorce state remains a basic postulate, strongly enforced by all courts involved. It is not very encouraging that this point was discarded so easily in the decision of the *Williams* case. The necessity of a serious and honest domicil has become the only remaining protection of deserted spouses and, what is more, of the divorce legislations so ambitiously advanced in individual

Supra p. 467.
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states. Without this last barrier, it would be true that the laxest divorce practice would prevail over all others.

In the light of this experience, the tendency of the Davis case or, to be specific, the application of the “boot strap doctrine” to divorce, is frankly to be regretted. If divorce jurisdiction be assumed on a fake affirmation of domicil, the mistake is not effaced by its repetition. Courts may be inclined to construe a defendant’s acquiescence to allegations of domiciliary facts or to a judgment as effective waiver of the right of collateral attack, although this clearly runs against the old established principles prohibiting parties to a matrimonial cause from disposing of their rights. But to treat a protesting party like an agreeing one, in conflict with the principle that a party specially appearing for the purpose of denying jurisdiction should not lose thereby his analogous defense in another state, is particularly bad law in a field where truth should prevail.

The most effective weapon to fight evasion would be the requirement of a “minimum residence,” if sternly observed in granting jurisdiction by the court of divorce and likewise in other courts when they re-examine the existence of a bona fide domicil in the divorce state. Quite recently, Lorenzen also has suggested that residence should extend over a reasonable period of residence, “say six months” and seriously considers that the Supreme Court or Congressional legislation should require such period as a requisite of due process. This corroborates my postulate, with the difference that Lorenzen admits mere residence as sufficient, on these conditions, as a fair basis for jurisdiction in divorce.240 In my opinion, jurisdiction in these cases has been stretched as far as it may reasonably be, if it is to be grounded in the domicil of only one party. That such domicil should be replaced altogether by

a mere temporary residence of one party is an idea that is becoming familiar through the operation of the divorce mills but which grievously encourages the evil of migratory divorce.

As to international relationships, the present chaos can be remedied only by thorough reforms of the domestic and conflicts laws. The claims of countries following the national law principle must be decisively relaxed; on the other hand, the irresponsible attitude with which *lex fori* is applied in other countries ought to be renounced.