I. Effects of Non-Recognized Foreign Divorces

I. View of the Country of Divorce and of Third States

In the United States, it is possible that a divorce pronounced in one state may not be recognized in a sister state, because the court did not possess the jurisdiction required under the Constitution. In such cases, it is disputed whether the divorce is valid in the state where it was decreed. But if so, as is commonly agreed, both parties to the dissolved marriage are undoubtedly able to remarry in the state of divorce, although not in every other state.

Yet, in comparable situations in countries following the nationality principle, other solutions have been reached. In France and Switzerland, an Italian (or a Spaniard, a Chilean, a Colombian), whose national law forbids the dissolution of his marriage, is not permitted to remarry, despite his divorce in a French or Swiss court. Such a divorce may have been granted either by inadvertence or on a theory like that of the Ferrari case, whereby one party of French nationality is entitled to divorce irrespective of the national law of his spouse.

In Germany, the question whether an Italian divorced in a German court for some exceptional reason—for instance be-

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1 For invalidity, Restatement §§ 111, 113 comment g. Supra p. 466, n. 22.
2 Trib. civ. Seine (May 5, 1919) S. 1921.2.9, Revue 1919, 543; cf. NiBOyET, S.1921.2.9; DEgAND, 5 Répert. 557 no. 92. It is notable, however, that the reporting judge at the Cassation Court in the Ferrari case considered remarriage in France quite possible for the Italian husband; see Bull. Soc. d'Études Leg. 1930, 104. LEREBOURS—Pigeonnière 400 no. 338 is of the same opinion, although he thinks the husband would be unable to sue for divorce.
3 Swiss Circular Letter (June 29, 1929) Clunet 1930, 539 advises civil officials to refuse remarriage to an Italian whose marriage has been dissolved in Switzerland.
4 Supra pp. 442–445.
cause the wife was of German nationality—could be permitted to marry in Germany, has been difficult. In such case, which should prevail: the authority of \textit{res judicata} owing to a domestic judgment, and in consequence the man be considered unmarried, or compliance with the Italian family law ordained by private international law, and the capacity of the man to remarry be denied (EG. art. 13)? While the older decisions followed the first, procedural, line of thought,\(^5\) numerous writers have insisted on the requirement—allegedly posited by the principle of conflicts law\(^6\) and by this construction have impressed several courts.\(^7\) Opposition to this view exists\(^8\) and is justified. It is well-nigh absurd to regard a person divorced at the forum as married. Should he succeed in having the new marriage celebrated, not even those who recognize the foreign impediment presume to regard it invalid.\(^9\)

Dutch and Belgian courts have realized that divorce should never mean dissolution of the marriage for one party and continuance of marriage for the other. A Spaniard of Catholic faith, mistakenly divorced in a Netherlands court, was permitted to remarry in the jurisdiction in view of the formally binding force of the Dutch decision and of the record in the register of civil status.\(^10\) In Belgium, as we have seen, courts for the same reason either deny divorce to a couple of mixed

\(^{5}\) KG. (March 13, 1911) 23 Z.int.R. (1913) 331, aff'd RG. (March 21, 1912) JW. 1912, 642.

\(^{6}\) LEWALD 118 no. 163; STEIN-Jonas, 1 ZPO. § 328 F n. 134, 2 ZPO. § 606 n. 22; RAAPe 404; M. WOLFF, IPR. 133; 4 Rechtsvergl. Handwörterb. 401; and particularly 3 FRANKENSTEIN 101 n. 159; \textit{ibid.} 102. MELCHIOR 251 reaches the same result on his theory of the preliminary question.

\(^{7}\) OLG. Hamburg (Jan. 3, 1923) 43 ROLG. 347; AG. Hannover (1928) IPRspr. 1929, no. 71 and especially KG. (July 11, 1924) StAZ. 1924, 306; KG. (Oct. 17, 1930) IPRspr. 1931, no. 62; KG. (March 7, 1938) JW. 1938, 1258 no. 27.


\(^{9}\) KG. (March 13, 1911) 24 ROLG. 19, approved on this point by RAAPe 404; KG. (March 7, 1938) JW. 1938, 1258 no. 27.

\(^{10}\) Rb. Rotterdam (April 14, 1930) W. 12197.
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nationality, when the personal law of one party is hostile to
divorce, or grant dissolution with effect for both parties.\textsuperscript{11}

A similar problem arises in a third state when a foreign di-

dorce decree is not recognized by the personal law. Again, the

opinion classifying the question as concerning capacity to

marry rather than the effects of divorce, has found favor.\textsuperscript{12}

In fact, in this case, refusal of remarriage is not in open con-
flict with the authority of the forum, so that the primary rule

for questions of status may have free play.

2. View of the Personal Law

The country to which a party belongs will normally deny
any legal effect to a foreign divorce which it does not recog-
nize; maintenance will be granted as by virtue of a valid mar-
riage. Thus, remarriage or further marriages of either party
will be considered invalid, the issue illegitimate, \textit{et cetera}. A
maintenance order, predicated on the assumption of jurisdict-
ion \textit{in rem} by a foreign divorce court, even though issued \textit{in personam}, has been regarded as void in England, because the
foreign court was considered incompetent to grant divorce and

the order was ancillary to divorce.\textsuperscript{13}

In actual fact, of course, any divorce subjects the conjugal
union to a most severe shock.\textsuperscript{14} The facts that one party has
instituted an action for divorce, that this party has remarried
and cohabited with a new spouse, may each constitute a ground
for divorce by the other party, if divorce is allowed at all in

\textsuperscript{11} \textit{Supra} pp. 444-445.

\textsuperscript{12} See for France: \textit{Audinet}, 11 Recueil 1926 I 236; \textit{Degand}, 5 \textit{Repert.} 557

no. 91; for Brazil: Trib. Sup. Fed. (Nov. 4, 1916) Clunet 1919, 402; for

Germany the authors \textit{supra} n. 6.

\textsuperscript{13} \textit{Simons v. Simons} [1939] I K. B. 490.

\textsuperscript{14} 3 \textit{Arminjon} 44 thinks indeed that a prohibition of divorce by the law of

the forum should be directed exclusively against a second marriage, the marital

union being hopelessly destroyed by the foreign divorce. \textit{Cf.} \textit{Degand}, 5 \textit{Repert.}

556 no. 88. Refusal to restore conjugal community after a foreign divorce is

not considered desertion in Denmark; see \textit{Munch-Petersen}, 4 \textit{Leske-Loewen-
feld} I 748 n. 96.
the home country. The same result is reached through those statutory provisions in the United States whereby the procuring of a divorce outside the state by one party gives the other party a ground for divorce, although these provisions also cover other cases.

A foreign decree, however, may be partially recognized in the country of the personal law. Thus we have seen that in some cases a foreign spouse has been regarded as released from the bonds of marriage, while the spouse who is a subject of the forum remains bound. Under the Ohio statute, this particular case entitles the latter to a divorce. The outstanding example of one-sided effect ascribed to divorce is presented in this country by the special rule in New York that, in the absence of personal jurisdiction, a foreign decree of divorce obtained against a spouse domiciled in New York is good by estoppel as to the libelant but not good as to the respondent. Under the Brazilian practice mentioned above, the Brazilian party to a mixed marriage dissolved abroad remained married

15 England: Adultery, at that time the only ground for divorce, was found in Clayton v. Clayton [1932] P. 453 in Lankester v. Lankester [1925] P. 114 a similar result would have been adjudicated but for connivance of the applicant in the foreign divorce.

Germany: ObLG. Bayern (May 24, 1924) 2 Jahrb. FG. 148; OLG. Königserg (Oct. 29, 1914) Pos. Mschr. 1914, 157, cited by Nussbaum, D. IPR. 164 n. 2. LG. Berlin (Jan. 9, 1937) JW. 1937, 1307 (adultery committed by celebration of a marriage “by dispensation” in Austria). Doubts in other decisions were concerned with the requisite of fault for divorce, which is no longer indispensable under German law.

16 Florida: Stat. (1941) § 65.04, No. 8: “that the defendant has obtained a divorce from the complainant in any other state or country.”

Michigan Stat: Ann. (1937) § 25.86, No. 6: “And the circuit courts may, in their discretion, upon application, . . . divorce from the bonds of matrimony any party who is a resident of this state, and whose husband or wife shall have obtained a divorce in any other state.” Cf. supra p. 404.

Ohio: Code Ann. (1940) § 11979, No. 10: “the procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage while they remain binding upon the other party.”

17 See preceding note.

18 People v. Baker (1879) 76 N. Y. 78, 32 Am. Rep. 274, consistently followed; see Restatement, New York Annotations § 113 at 85.

19 Supra pp. 496–497.
in the eyes of Brazilian law, but the non-Brazilian spouse was capable of remarrying even in Brazil.\textsuperscript{20} The new Brazilian law seems to reverse the latter rule.\textsuperscript{21}

Moreover, a foreign divorce \textit{a vinculo}, though not recognized in Brazil, is given the same effect upon the property of the spouses as a Brazilian separation from bed and board; this concession has been termed the only possible compromise.\textsuperscript{22}

\section*{II. Effects of Valid Divorces}

The effects of divorce or, pursuant to another conception, the continued effects of marriage after "dissolution"\textsuperscript{23} are usually discussed in the United States with respect to (1) alimony, (2) dower, and (3) custody of children. In recent times, civil law lawyers have used broader categories for each of these subjects; they distinguish the influence of divorce upon (1) personal relations between husband and wife, (2) marital property, and (3) parental rights.

For the purpose of conflict of laws, further division of the subject is necessary. On the one hand, we must distinguish the inquiries: (a) whether the divorce court has power under its own law to decide upon those effects or some of them; (b) if it has power so to decide, which law it must apply; and (c) whether its decision is recognized and enforced in other jurisdictions. On the other hand, there are analogous problems in case a divorce decree has been rendered in one jurisdiction and a related suit, as for alimony or custody, is brought in another.

\textsuperscript{20} BEVILAQUA, 6 Répert. 167 no. 41.
\textsuperscript{21} Brazil: Lei de Introdução (1942) art. 7 § 6.
\textsuperscript{23} NEUMEYER, IPR. (ed. 1) 21. It need hardly be mentioned that no problem exists with respect to the fact that every divorce decree, if recognized, determines the time, the extent, and the conditions for terminating the bond of marriage. E.g., a Belgian court grants exequatur to a French divorce without requiring that the decree be recorded within two months, as is necessary for a Belgian decree, by a different interpretation of art. 264 of the Civil Code common to both countries; Trib. civ. Termonde (Oct. 17, 1936) Rechtsk. Wkbl. 1936–1937, 1634, 3 Giur. Comp. DIP. no. 183.
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Not all these diverse problems have been dealt with explicitly, although some have been vividly discussed in a few countries and others are engulfed within other topics. There is no point in subjecting all these questions to one sole conflicts rule. Earlier writers in Europe contended that all effects of divorce are governed by the national law, whereby ordinarily the law presiding over the divorce was meant. But the conflicts rules derived from the nationality principle have been differentiated; there are different rules for personal relations of the spouses, for property relations, for parental rights and duties incident to the granting of divorce, and, moreover, there exist problems peculiar to marriages of mixed nationality. The prevailing tendency, briefly reported below, favors in each topic application of the rule that is called for by the most nearly related sphere of family life.

We still find rules of broader scope in a few regulations, characterized by the preponderance of the last matrimonial or common domicil. For instance, a Danish court will recognize not only the limitations on the right of remarriage resultant from a divorce decree of the foreign matrimonial domicil, but also its legal effects on the property of the parties. By article 55 of the Código Bustamante, "the law of the court before which litigation is pending" determines the judicial consequences of the action and the terms of the judgment with respect to the spouses and their children. It seems that this court is ordinarily that of the matrimonial domicil. Particularly elaborate is a provision of the Scandinavian Convention on Family Law, in which divorce jurisdiction with certain exceptions is fixed at the last common domicil. It seems instructive to reproduce this provision:

In connection with petitions for separation or divorce, the same or another authority of the divorce state may decide also

24 See e.g., 2 Fiore no. 695; also though more careful, Weiss, 3 Traité 702.
25 Munch-Petersen, 4 Leske-Loewenfeld I 747 n. 94.
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on the provisional suspension of conjugal rights to property division, damages, alimony, and parental rights. (Art. 8, par. 1.)

Claims later instituted concerning alimony or parental rights are decided in the state in which the defendant spouse is domiciled. This applies also to modification of awards rendered in another of the participant states. If, by the law of the state in which separation or divorce has been pronounced, alimentary sums for a separated or divorced party may not be awarded or increased, no such decision can be made in the other participant states. (Art. 8, par. 2.)

In rendering decision under articles 7 and 8 in each state, the law there in force is to be applied. Decisions, however, on division of property or on damages always must be based on the law applicable to the conjugal property relations according to article 3. (Art. 9, par. 1.)

For civil law countries, it should be borne in mind that jurisdiction is a matter entirely different from choice of law; the former is not here involved.

1. Effects on Personal Relations between Husband and Wife

(a) Name, capacity, gifts, et cetera. What law determines, for instance, whether a divorced wife ought to resume her maiden name, to retain that of her husband, or to have her choice as under the common law? Should a divorce court determine this question according to its own family (or other) law, or according to the same family law that was applied in granting the divorce, or according to the law that governed the personal relations of the parties during coverture? The subject matter includes, among other things, alimony, a topic presenting peculiarities.

(i) The law of the forum. The application of the domestic law seems natural within systems that make the matrimonial domicil the exclusive basis for jurisdiction and choice of law in granting and recognizing divorce. But also in Switzerland,
although divorce is not granted unless the foreigners' national law accords, Swiss law determines every divorce decree and its ancillary effects. 26

In the United States, probably the law of the divorce forum governs. Except for alimony, however, the question seems not to have been discussed.

(ii) The law of divorce. To control the effects of divorce, the decidedly prevailing opinion on the European Continent has selected, among the various possibilities offered by the nationality principle, the law under which the marriage was dissolved. 27 In Germany, this is the national law of the husband at the time when the divorce suit was instituted (EG. art. 17, par. 1); in France, the national law of the party at whose instance divorce is granted. This rule refers to problems such as:

What name the wife ought to bear; 28

26 See supra p. 429 and ibid., n. 169.
OG. Zürich (Dec. 8, 1937) 38 Bl. f. Zürich. Rspr. 1939, 105 no. 42 therefore states that even if in the national courts the effects of divorce would not be expressed in the divorce decree itself and established by rules different from the Swiss rules, a Swiss divorce decree always causes Swiss law to be applied to all problems of damages and moral compensation, support, property, etc.

27 France: for status and capacity see DEGAND, 5 Répert. 555 no. 86; NIBOYET nos. 642, 755 pars. 6 and 7.
Germany: RG. Plenary Decision (June 25, 1898) 41 RGZ. 175, 9 Z.int.R. (1899) 382, Clunet 1900, 161; KG. (May 39, 1938) JW. 1938, 2750 (explains in agreement with the dominant opinion that EG. art. 17 par. 1 also governs the effect of divorce on personal relations such as name and alimony, while the reservation in par. 4 for German law is inapplicable).
Switzerland: BG. (Oct. 11, 1911) 37 BGE. I 400 (foreign divorce of Swiss nationals); cf. BECK, NAG. 398 no. 163; ibid. 375 no. 148.
The Hague Convention on Divorce contains no rule on the effect of divorce, see LEwald in Strupp, 1 Wörterbuch des Völkerrechts und der Diplomatie 471 VIII.

28 France: Cour Paris (Dec. 15, 1936) D. H. 1937. 72 (the national law of the foreigner); Cour Paris (June 16, 1904) Revue 1905, 146 (French law applied to the name of an American ex-wife because of renvoi); Trib. civ. Seine (Dec. 22, 1923) Gaz. Trib. 1924.2.204 (Frank Jay-Gould, after his divorce [see the New York case of Gould v. Gould cited supra p. 503], sued his former wife and the Alhambra Theater in Paris to enjoin them from advertising her performances under the name of Edith Kelly-Gould; the injunction was granted under French C. C. art. 299 because the defendant had submitted to French law in the divorce suit with the collateral argument that New York
Whether restrictions on the wife's capacity to contract disappear automatically with the end of the marriage; 29 Whether gifts between the spouses may be revoked; 30 Whether confidential communications between the spouses remain privileged in testimony. 31

In addition, agreements between the spouses concerning a future divorce, since not operative during coverture, do not pertain to the law of marital relations but to that of divorce. 32 According to this law, such agreements may be licit; if so, resort to a divergent public policy of the forum seems unnecessary to German courts. 33 French judges, however, always suspicious of an intention to facilitate divorce by consent, are inclined to assume that such agreements constitute an offense to the French public order. 34

(b) Alimony following a foreign divorce. 35 In accordance with an old conception, in England divorce still ends any law permitted the same right to the plaintiff. For literature see PILLET, 1 Traité Pratique 627; TAGER, Clunet 1933, 96.


Switzerland: controversial; see STAUFFER, NAG. art. 8 no. 15; BECK, NAG. 373 no. 145, ibid. 466 nos. 226, 227; cf. ibid. 398 no. 16, ibid. 414 no. 67.

A Swiss divorced woman must resume her premarital name, but if a woman after a foreign divorce recovers Swiss nationality, she is entitled to the name she has according to the foreign law. See Just. Dep., BBl. 1924; II 24 no. 2; GAUTSCHI, 26 SJZ. 22; Government of Bern, 27 SJZ. 137, no. 23.

29 RAAPE 430 no. 61 M. WOLFF, IPR. 132 no. 14. In France BARTIN, who had advocated the law of the forum, now suggests with WEISS, 3 Traité 702, the personal law of the woman; see BARTIN, 2 Principes 311 § 316.

30 RAAPE, 2 D. IPR. 187.

31 This point familiar in American law is not expressly mentioned in the European literature.

32 Germany: KG. (Sept. 25, 1933) IPRspr. 1933, no. 32 (Hungarian law); OLG. Naumburg (Feb. 26, 1936) JW. 1936, 1798; cf. RAAPE, 2 D. IPR. 187; LORENZ, 7 Giur. Comp. DIP. 102.

33 Cf. also KG. (Dec. 21, 1935) JW. 1936, 2466.


35 See especially HARWOOD, "Alimony after a Decree of Divorce Rendered on Constructive Service," 24 Kentucky L. J. (1936) 241. See JACOBS, "The Enforce-
duty of support between former spouses. Therefore, no action can lie to obtain alimony after a divorce a vinculo, whether pronounced by an English or a foreign court. A recognized foreign decree of divorce even terminates a former English maintenance order.\textsuperscript{36}

In the United States, many difficulties have been encountered. Although the English conception that the duty of support does not survive the dissolution of the marriage has not been maintained in this country, only this English background seems to explain a certain opinion that has proved very strong in the past, viz., that the rendering of the divorce decree is the last moment for alimony to be recovered. Where such a doctrine is invoked against a suit for alimony, undesirable situations may arise. Thus, a divorce court in one state may refuse to order the defendant to pay alimony, because it knows that according to the prevailing opinion, it does not have the necessary jurisdiction \textit{in personam}.\textsuperscript{37} Yet, the court of another state having the required personal jurisdiction, regards a suit for support after divorce has been pronounced as impossible. The result is the same when the foreign court awarded alimony but did not have proper jurisdiction.

The diversity of jurisdiction \textit{in rem} and jurisdiction \textit{in personam} presents a second source of difficulties. Paradoxically, it follows from the historical development, that the requirements for service of process on the defendant in such ancillary actions \textit{in personam}, as enunciated by the Supreme Court, are greater than in divorce suits. It seems a neglected fact that

\footnotesize{\textsuperscript{36} Pastre \textit{v.} Pastre [1930] P. 80, 82 (French divorce); Mezger \textit{v.} Mezger (1936) 155 L. T. R. 491, [1937] P. 19, Clunet 1937, 138 (German divorce). \textsuperscript{37} This has been contested but is now treated as settled. See 2 \textit{Beale} 1435.}
the social importance of marriage and its dissolution surpasses
the significance of any alimentary orders.

A third unexpected complication arises from interference of
the estoppel idea. In cases where a wife sued for divorce in a
jurisdiction powerless to grant alimony but where the right
thereof was at issue, she has been deemed to have waived her
claim to alimony once and for all by choosing such a divorce
court. This all too technical idea, which has not been ade­
quately criticized, is so faulty that its influence should not
go far.

Finally, difficulties of another kind are encountered when
an alimentary order is sought to be enforced in another juris­
diction. In particular, orders which may be altered have been
considered to lack the finality necessary for enforcement.

It would not be helpful to discuss all these disturbances at
length. Recent writers assure us that the entire doctrine is in
an evolutionary stage, and that extraterritorial effect is given
to decrees for alimony "with very great completeness." 38
Courts and statutes show themselves more and more anxious
to overcome formalistic obstacles, to help deserted wives and
children. The indigent ex-husband has also found more favor
than before. Through such an evolution, the American doc­
trine approaches the views of the European laws.

In civil law countries, the nature of the duty incumbent
upon a former spouse is far from undisputed in theory; does it
follow from a breach of the marital duties? That it does was
the leading idea of older codifications, including the German
Civil Code. Or is the family relation partly conserved despite
the dissolution of the marriage tie? Modern doctrines are in­
clined in some degree, indeed, to consider the obligation
imposed by law as an effect of the former family relation and
therefore as belonging to the field of family law rather than to
the domain of ordinary obligations ex lege. In any case, the

38 Sayre, 28 Iowa L. Rev. (1943) 333, supra n. 35.
existence of such obligations is not doubted; their incidence is continuously extended. For instance, the recent German marriage law no longer maintains that only an exclusively guilty ex-spouse can be required to support the innocent other party; it declares it to be sufficient that the defendant was mainly at fault in disrupting the marriage and even allows equitable awards beyond this limit. Thus, since alimony rests on the same foundations as any family law institution, no technical impediment obstructs the application of a foreign alimentary regulation. Moreover, litigation for alimony is usually separable from the divorce suit so that nothing prevents an action for alimony being brought in another country than that where the divorce was pronounced.

Difficulties arise, however, first, because a foreign divorce is quite often refused recognition and, secondly, because of the intervention of some distinct local policy at the court where the award is sought.

In Germany, the law of divorce is applied with nicety; it signifies the law of the husband at the time when the action for divorce was instituted. 39

In France, it seems that the law governing marital relations during coverture is preferred, 40 the alimentary obligation

39 KG. (Feb. 16, 1909) 19 ROLG. 106, 20 Z.int.R. (1910) 227, Clunet 1911, 286 (without any doubt); LG. Altona (March 19, 1926) JW. 1926, 1357 (Danish law denying judicial remedy applied); KG. (Feb. 9, 1929) IPRspr. 1929, no. 153 OLG. Naumburg (Feb. 26, 1936) JW. 1936, 1798. This practice was in force before the Bürgerliche Gesetzbuch, see RG. (June 25, 1898) 41 RGZ. 175 (sупra n. 27) and RG. (July 11, 1898) JW. 1898, 545, 9 Z.int.R. (1899) 116, Clunet 1900, 635. In the case of a German husband, a technical difficulty was presented by the requirement of guilt of the defendant and innocence of the applicant when the foreign decree of divorce contained no statement on the matter. But this obstacle could be overcome; see KG. (May 3, 1935) JW. 1935, 2750, and also RAAPE 426 II 1; the question is certainly not worse under the new law.

The Italian Court of Cass. (May 3, 1934) Monitore 1934, 889 gives much weight to the statements and awards of the foreign divorce decree but seems to decide the case according to Italian law perhaps because the plaintiff wife had recovered her Italian citizenship.

40 NIBOYET 753.

In Portugal, CUNHA GONÇALVES, 1 Direito Civil 695 seems to advocate application of the husband's national law under the same viewpoint.
being traced back to the marital duty of support. Bartin, however, limits this classification to that part of the money award that the French courts base on article 301 of the Civil Code, while other grants of alimony under the heading of damages should be governed by the law of the place of wrong.41

Jurisdiction for alimony is assumed in the Netherlands at the instance of domiciled persons on the basis of foreign divorces. Here again the law applied seems to be the lex fori.42

The Swiss Federal Tribunal has taken another view in considering the problem of jurisdiction. If the divorce was rendered abroad, even if involving Swiss citizens, jurisdiction for ancillary effects is not exercised, unless the foreign courts refuse to assume jurisdiction because of the Swiss domicil of the party;43 in such event, the Swiss court is required to intervene in order to prevent a denial of justice,44 the lex fori being applied.45

2. Effects on Marital Property

If a foreign decree of judicial separation has been recognized, it must be examined, in the first place, to determine whether it is intended to terminate the property regime. With this purpose in mind, French courts have stated that an Italian separation by mutual agreement and judicial confirmation,46 as well as a Spanish separation from bed and board,47 does not have the effect of property separation (séparation de biens),

41 Bartin, 2 Principes 313.
42 See BW. amended by § 828a Rv. (law of May 16, 1934, S. 253) and H. R. (April 5, 1937) W. 1937, no. 661 declaring that the alimentary duty falls under the first book of the Code and also if based on a divorce pronounced in Germany. Cf. H. R. (March 8, 1934) W. 12752 for a decree of the Netherland Indies; see other cases in 1 Z.ausl.PR (1937) 210.
43 BG. (March 29, 1928) 54 BGE. II 85; Beck, NAG. 370 nos. 133ff.; ibid. 420 nos. 89ff.
44 BG. (Dec. 10, 1936) 62 BGE. II 265, Praxis 1937, 56. On modification of a domestic decree, if the defendant is domiciled abroad, see BG. (Nov. 22, 1935) 61 BGE. II 225; Clunet 1938, 973, and criticism ibid. 974.
45 Constant practice since BG. (June 13, 1912) 38 BGE. II 43, 49; see BG. (Dec. 10, 1936) 62 BGE. II 265, 267.
46 Cour Lyon (June 3, 1926) S.1928.2.121.
47 Trib. civ. Seine (Feb. 13, 1908) Clunet 1908, 832.
which the French *séparation de corps* has under the Civil Code (art. 311). But a separation from bed and board rendered in a Netherlands court necessarily effectuates a separation of property under article 298 of the Civil Code; if the parties be Germans, therefore, this effect would not be recognized by their national courts.

All remaining questions concerning property regimes must obviously be answered by the law governing the property relations of the parties during coverture. For instance, after a dissolution of community property by an absolute divorce, whether a domestic divorce or a foreign divorce recognized as valid, the mode of partition of the community fund is naturally governed by the law governing marital property.

Often a marital property settlement or a statute provides explicitly what must be done in case of divorce. Where such provision is lacking, a rule applicable in the event of the death of one spouse may reasonably be resorted to, while the *lex fori* of the divorce court is ruled out.

In agreement with this view, in common law countries the effect on movables of any divorce, domestic or foreign, and in Argentina of a foreign recognizable divorce, is governed by the law of the husband’s domicil at the time when the movables were acquired; the effect on immovables by the law of the situs. In accordance with this rule, a wife’s claim to dower depends upon the law of the situs regarding dower and estoppel rather than upon that of the divorce court, unless the implications of the divorce decree as to dower be recognized at the situs. In France, in conformity with the conflicts rules

48 Bartin in 7 Aubry et Rau 402, and Niboyet 752 are in doubt whether this effect belongs under the heading of rules on marital property or those on the personal relations of husband and wife.
50 M. Wolff, IPR. 132 n. 15; Staudinger-Engelmann § 1586 III A, c(4).
52 Degand, 5 Répert. 558 no. 96; Niboyet 752 II 1; M. Wolff, IPR. 132.
53 On the effect on the wife’s claim for dower, see Harper, “Effect of Foreign
on matrimonial property and in contrast with the conflicts rules on inheritance, immovables are not subject to special treatment. 54

The question, too, whether or when an agreement to regulate property relations after divorce is valid, has appropriately been decided according to the law governing marital property during coverture. 55

A particular position is taken in the United States when divorce courts are empowered to make dispositions of property of the spouses or to adjudicate damages between them. It would seem that a corresponding order of the court ought to supplement the regulation of property between the parties. In connection with the unsettled extraterritorial effect of personal decrees of a court of equity, dispositions of this kind, particularly when one party is ordered to convey land in another state to another party, have produced interstate difficulties. 56

3. Custody of Children

American courts disagree greatly on the conditions under which a court has jurisdiction in divorce proceedings to settle a dispute concerning custody of the children. It is disputed whether a pronouncement of this sort affecting the children

Divorce upon Dower and Similar Property Interests,” 26 Ill. L. Rev. (1931) 397; Harper and Taintor, Cases 1079 n. 32.


55 KG. (Dec. 21, 1935) JW. 1936, 2466, Nouv. Revue 1937, 98 (agreement valid under Hungarian Marriage Law of 1894, § 92, recognized according to EG. art. 15, setting art. 17 (law of divorce) aside). Contra: KG. (Sept. 25, 1933) IPRspr. 1933, no. 32 (applying EG. art. 17 not only to alimentary but also to property agreements).

is to be treated as a judgment in personam or as a judgment in rem. Statutory power conferred on a divorce court to award custody, however, seems to be recognized in other states unless circumstances are changed, provided both parties were residents of the divorce forum and the child, therefore, had no other domicil. For, in the most widespread and authoritative opinion, jurisdiction to determine the custody of children is primarily located at the domicil of the child.

There is concern expressed in the literature, however, that the jurisdiction of the forum for awarding custody should not be obtained unilaterally by one spouse, drawing the child away without the other's consent.

Every court in the United States applies its own municipal law, so that again there is no question of choice of law. In England and Argentina, and under the Conventions of Montevideo and of the Scandinavian States, the forum coincides with the conjugal domicil. In France, the lex fori, rather than the personal law, is applied, even in cases such as the Ferrari case, where only one of the spouses had acquired French nationality; but probably not where two foreigners are concerned and the child is of foreign nationality too.

In Germany, however, the conflict of law problem has been thoroughly separated from that of jurisdiction and extensively discussed. The lex fori was applied in a single case where the divorced wife of foreign nationality had later acquired German nationality, on the ground that the domestic regu-

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57 Restatement § 146; see 27 C. J. S. (1941) Divorce § 329.
58 Restatement §§ 117, 145. Goodrich, "Custody of Children in Divorce Suits," 7 Cornell L. Q. (1921) 1 and Goodrich § 132. A disturbing element is the view "that a court having jurisdiction to award the custody retained jurisdiction to modify its award although the domicile of a child has been changed in the meanwhile to another state," Lorenzen, "Developments in the Conflicts of Laws 1902-1942," 40 Mich. L. Rev. (1942) at 798.
60 Cf. Weiss, 3 Traité 702. But Trib. civ. Seine (Nov. 29, 1904) Clunet 1905, 187 has applied French law to decide the provisional custody of the children in a suit of an American wife against her Turkish husband.
lation (BGB. § 1635) was mandatory.\(^{61}\) But this construction has been generally rejected as an excessive expression of the exigencies of public policy. According to another opinion the relationship between the former spouses as respects custody of the children was considered governed by the law determining the right to divorce (EG. art. 17), while other matters would fall under the conflicts rule determining the parent-child relation (EG. art. 19).\(^{62}\) But prevailing opinion now holds that every right of a parent to custody, education, or visiting affects the children’s interest and has to be determined by the law that governs legitimate filiation.\(^{63}\) Where German spouses have been divorced abroad by a recognized decree but custody was not awarded in accordance with German family law, the order is regarded as a temporary measure only.\(^{64}\)

In the Netherlands also, not the law of the forum, now repeatedly applied to govern divorce, but the ordinary conflicts rule on parental and filial relations is applied.\(^{65}\) Accordingly, the law of the child governs, while in Germany that of the father is applicable. The classification is the same, however, and would be suitable to any country.

By this time, it should be understood everywhere that custody of children or any other incident of parental relations is not a matter substantially ancillary to divorce, although the divorce court may have power to take care of these matters

\(^{61}\) RG. (Feb. 20, 1913) 81 RGZ. 373.

\(^{62}\) HABICHT 143, 152; LEWALT 120, 137. Another opinion suggested simply applying EG. art. 17 (law of divorce), see NIEDNER 54, art. 17 comment 4d; NIEMEYER, IPR. des BGB. 157; RGR. Kom. (ed. 8) prel. no. 6 to § 1616.

\(^{63}\) KG. (March 6, 1929) 41 Z. int.R. (1929) 413; KG. (Feb. 10, 1933) JW. 1933, 2065; KG. (May 3, 1933) JW. 1935, 2750; KG. (May 12, 1938) Nouv. Revue 1939, 251; OLG. Breslau (May 9, 1938) Dt. Recht 1939, 869 following RAAPPE 482; see also RAAPPE, 2 D. IPR. 187; NUSSBAUM, D. IPR. 164 n. 4.

\(^{64}\) See decisions of KG. preceding note.

\(^{65}\) See Rb. Amsterdam (June 24, 1937) W. 1937, no. 970; Hof Amsterdam (Feb. 11, 1937) W. 1937, no. 950.


Italy: Trib. Napoli (July 13, 1932) Rivista 1933, 281 (Italian law, the parents having, after Hungarian divorce, recovered Italian nationality).
and a divorce is a seasonable occasion to regulate custodianship. If the court applies its own family law, as it does in this country, it should qualify its application in the not infrequent cases where the applicant has been able to choose the forum at will. Whatever the principle of assuming jurisdiction may be and whatever the binding effect of an award of custody, the applicable law should be determined in conformance with the standard adopted in filiation matters.