Annulment of Marriage

I. ANNULMENT DISTINGUISHED FROM DIVORCE

CONFLICTS rules determining the extraterritorial effect given to annulment of marriage are concerned in the first place with any decree or judgment declaring a marriage void or annulling it and intended to operate in rem throughout the world, i.e., with the effect of res judicata for all persons. These rules, however, must evidently also be applied to annulments, such as those in certain of the states of the United States, that are conclusive only against the parties and those claiming under them. All types of void and voidable marriages are included.

Annulment is no longer confused with divorce, as it was in former times, although some American statutes still speak of divorce granted for antenuptial causes such as bigamy, incest, duress, physical incapacity, or near kinship. It is certain that a decree of “divorce” in such cases has nullifying effect. In exact terminology, nullity cannot be based on grounds other than those existing at the moment of the solemnization of the marriage, while divorce must have a cause either posterior to the celebration or at least continuing during coverture. In the law of conflicts, this seems to be accepted.

Nevertheless, the Restatement mentions annulments, the causes of which antedate the marriage but the effects of which

1 Coke on Littleton (Hargrave and Butler) 235a; Blackstone 440.
2 Vernier §§ 50, 68, 70, 72, 73; Schouler, Domestic Relations §§ 1154, 1155; Reese v. Reese (1929) 128 Kan. 762, 280 Pac. 751.
3 See 27 C. J. S. (1941) 537-538.
operate only from the time of the decree. These are considered in the Restatement according to the rules of conflicts established for divorce rather than those relative to annulment. It is difficult to understand the reason for this treatment. The Swiss Code and also the German law as recently reformed contain precise parallels; they provide for rescission of marriages on grounds that existed at the time of the marriage celebration and with the effect of terminating rather than annihilating the bond of marriage. The effect described is similar to divorce. Yet, for the purpose of conflict of laws, the Swiss and German institutions have rightly been classified in the category of annulment. They are governed by the personal law of the person entitled to sue and not by the law which would govern divorce. Annulment can never be governed by the law of the forum, as divorce is in the United States. The reasons are perfectly understood in this country; an impediment vitiating the celebration of a marriage must be evaluated under the law establishing the requirements of that celebration.

5 Restatement § 115 (2). 1 Beale § 115.2 asserts that in most states annulment takes effect at the time of the decree of annulment and therefore takes place at the present domicile. A contrary statement that such effect is prescribed by only a few statutes is to be found in 38 C. J., Marriage § 139 with the citation of New York only, for which state the Restatement, New York Annotations, § 115 (2) declares that no such annulment exists there. In fact the text of the New York Domestic Relations Law § 7 on marriage “void from the time its nullity is declared by the court of competent jurisdiction,” has been construed as meaning retroactive operation of the judgment and destruction of the marriage ab initio. See Matter of Moncrief (1921) 235 N. Y. 390, 139 N. E. 550; Sealy, Law of Persons and Domestic Relations (ed. 2, 1936, New York) 562; Hammill, “The Impediment of Nonage,” 3 The Jurist (1943) 475, 477 n. 11.

6 Restatement § 136(a).

7 Swiss C. C. art. 132.

German Marriage Law of 1938, § 42 par. 1 which provides that the effects of a rescission of a marriage are determined according to the provisions concerning the effects of divorce.

8 RG. (May 7, 1936) 151 RGZ. 226 classified the Swiss action annulling the marriage under EG, art. 13 par. 1; Raape, 2 D.IPR. 145; his assertion that the wife does not lose the nationality acquired by the marriage (at 175) is inexact; cf. for Switzerland, Beck, NAG. 263 no. 159.

9 Cf. on this point, the explanation of Goodrich 355.
II. Annulment of the Marriage of Foreigners

1. Jurisdiction

(a) Court of the place of celebration. When marriage was conceived of primarily as a contract,¹⁰ jurisdiction for deciding on its validity or invalidity was thought to be vested naturally in the tribunal of the place of celebration. This is still the rule in Argentina,¹¹ and as recently as 1938 a court in Paris tried to justify French jurisdiction over a marriage of foreign parties by a similar argument.¹²

The English authorities asserted the jurisdiction of the English courts to annul English marriages until recent years.¹³ The present decisions are understood to say that where the parties are domiciled abroad, the jurisdiction loci celebrationis of the English courts is neither exclusive nor complete; it concurs with that of the foreign domicil and is restricted to absolutely “void” marriages, such as those vitiated by bigamy or the non-observance of formalities. Annulment of “voidable” marriages on the ground of coercion, essential error, or impotence, is considered exclusively reserved to the domiciliary court, because it effects a change of status.¹⁴ This dis-

¹⁰ ¹ BEALE 510 professes this conception and strongly advocates the jurisdiction of the place of celebration.
¹¹ ² VICO no. 79.
¹⁴ Inverclyde v. Inverclyde [1931] P. 29; see the important comment by CHESHIRE 344; Goddard, L. J., in a dictum in Simons v. Simons [1939] 1 K. B. 490, 498, summarizes the law to the effect that since 1748 the court of the place of celebration has been regarded as having jurisdiction to pronounce the marriage null and void for failure of due celebration. The problem was ignored in Easterbrook v. Easterbrook (1944) 170 L. T. R. 26; see Note, 60 Law Q. Rev. (1944) 115.

DIVORCE AND ANNULMENT

tinction seems formalistic. It has also been pointed out that, in view of the British reluctance to recognize a change of domicil, a place where the parties live (without, however, being there domiciled) and have been married, provides a natural forum to try the validity of the marriage.\(^{18}\)

In the United States many cases have favored the older English rule,\(^{16}\) and some statutes have also preserved it, at least under certain circumstances.\(^{17}\) Thus, the jurisdiction of the place of celebration has not completely disappeared. But it no longer has a significant role—the principle of domicil has decidedly won out.\(^{18}\)

(b) Court of the domicil. At present, the regularly competent court is that of the domicil, and this is true, not only in the countries which use domicil as the test for determining status and consider paramount the interest of the domiciliary state in the validity of the marriage bond,\(^{19}\) but even in the countries generally following the principle of nationality.\(^{20}\) The motive of the rule is to permit domiciled foreigners to bring their matrimonial causes before the local courts instead of compelling them to travel to their national countries.

\(^{15}\) KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935), 4 at 16; MORRIS, Cases 179 criticizes the entire doctrine.

\(^{16}\) See 1 BEALE 511; GOODRICH 357, and, as a recent illustration, Mayer v. Mayer (1929) 207 Cal. 685, 696, 279 Pac. 783, 788.

\(^{17}\) See 1 VERNIER § 52 table XXI and Supplement.

\(^{18}\) See McMURRAY and CUNNINGHAM, "Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country," 18 Cal. L. Rev. (1930) 105.

\(^{19}\) GOODRICH 355.

\(^{20}\) The United States: Restatement § 115; GOODRICH 357.


Treaty of Montevideo on international civil law, text of 1889, art. 62; text of 1940, art. 59.

France: (if there is no domicil abroad) Trib. civ. Seine (June 17, 1927) Revue 1928, 332; Trib. civ. Seine (April 3, 1930) Revue 1930, 460.

Germany: C. Civ. Proc. § 606 par. 1; cf. KG. (June 4, 1934) IPRspr. 1934, no. 141; same for a declaratory statement that the marriage is non-existent: RG. (Jan. 5, 1925) 109 RGZ. 384.

Switzerland: The domicil of the plaintiff spouse is considered decisive by BECK, NAG. 252 no. 123.
As the matrimonial domicil is normally at the husband's domicil, the latter is usually regarded as decisive. There are exceptions not unlike those for granting divorce; they cannot be discussed here.

In contrast with divorce, which is refused to foreigners in a number of states when the jurisdiction of the forum is not recognized by the homeland, jurisdiction for annulment is not made dependent on such considerations, except perhaps in Switzerland.

(c) Court of the national country. Consistently with the nationality principle, in practically all Continental countries nationals of the forum may sue for annulment irrespective of their domicil. In a few countries this jurisdiction is exclusive of foreign courts. Sometimes a court defies its own general principle of domicil in order to help a national of the forum.

Moreover, for a wife who had belonged to the forum up to the time of her marriage, jurisdiction is assumed without difficulty on the consideration that a void marriage did not actually change her nationality.

21 Restatement § 115 and about eleven state statutes allow suit to be brought in the country where either party resides; see VERNIER § 52.

22 German C. Civ. Proc. § 606 par. 1 is limited by par. 4 only with respect to divorce; see KG. (Nov. 7, 1933) 27 Warn. Rspr. 1934; 3 FRANKENSTEIN 203 n. 55.

23 OG. Zürich (Oct. 10, 1928) Bl. f. Zürch. Rspr. (1929) 139, no. 66, Clunet 1930, 524. To the contrary effect, App. Bern (Oct. 27, 1927) 24 SJZ. (1927-1928) 235 no. 54 assumes that the legislator forgot the case, and that the German provisions furnish the best solution; in the instant case jurisdiction is granted to a former Swiss woman who married an Italian in Switzerland.

24 Cf. for instance France: Cour Paris (May 28, 1880) Clunet 1880, 300; GOULÉ, 9 Répert. 80 nos. 403ff.

Germany: C. Civ. Proc. § 606 par. 2 sentences 1 and 2; ibid. par. 3, sentence 2, extensively interpreted by STEIN-JONAS, 2 ZPO. § 606 V.


25 Supra pp. 397-398.

In the Netherlands, art. 154a of the BW. has been interpreted as requiring a petition of the Dutch State Attorney and annulment by a Dutch court; see Rb. s'Gravenhage (August 26, 1938) W. 1939, no. 36.

26 See, for instance, Denmark: Ostre Landsrets Domme (May 12, 1920) U.f.R. 1920, 628, 2 Zausl.Pr. (1928) 866, applying, moreover, the Danish law instead of that of the domicil.
2. Applicable Law

(a) Rule. It has been explained above that the rule embodied in section 136 of the Restatement is universally adopted. A court will apply the sanctions of the same law that is applied in ascertaining whether a marriage has been validly celebrated. While in the United States this means that generally the law of the place of celebration alone is consulted, with the sole exception of certain absolute prohibitions of the law of the domicil of either party, in most countries formalities and intrinsic validity are tested by different criteria. The law of the forum, so significant for divorce, in principle is immaterial for annulment.

In consequence, the judgment usually pronounces the kind of nullity provided for by the applicable law rather than that of the lex fori. The German Supreme Court, for instance, in a case where a Swiss national obtained an annulment on the ground of having been deceitfully induced to enter into the marriage, adopted the sanctions of the Swiss Civil Code rather than those of the German law, and declared the marriage void ex nunc only, with the effects ordained by Swiss law. The Swiss Federal Tribunal declared a marriage void under the Austrian law of the parties whereby the marriage was retroactively destroyed (Allg. BGB., § 160), holding no support for the time previous to the judgment to be due, contrary to Swiss law (C. C. art. 132, par. 2).

27 KG. (June 14, 1913) 27 ROLG. 108; RG. (May 7, 1936) 151 RGZ. 226.
28 Supra pp. 229, 286.
29 See Lasala Llanas 130, 133; Trías de Bes 83, 100. In Spain the jurisdiction of state courts applies to few nullity cases only for which the writers seem to favor the lex fori.
30 This has been confirmed, against contrary opinions in Switzerland, by BG. (Dec. 2, 1943) 69 BGE. II 342, 344.
31 RG. (May 7, 1936) 151 RGZ. 226; cf. Massfeller, JW. 1936, 1949; Lorenz and Eckstein, 7 Giur. Comp. DIP. 54.
32 BG. (Feb. 22, 1934) 60 BGE. II 75 no. 2.
(b) Policy of the forum in favor of marriage. The principle described above has been limited by special clauses in favor of the marriage in Sweden and Switzerland. The Swedish statute provides that a marriage between two foreigners, formally valid but void because of an intrinsic defect under the national law of one or both of the parties, should not be annulled in Sweden, unless it is also void under Swedish law or unless the King orders the foreign law to be applied.\textsuperscript{33}

The Swiss statute contains another clause; a marriage celebrated abroad, invalid according to the laws of the place of celebration, cannot be declared invalid in Switzerland, unless it is also invalid according to Swiss law.\textsuperscript{34} Hence, no marriage is annulled for formal defects. The Federal Tribunal, in a recent decision, restricts this provision to Swiss citizens.\textsuperscript{35}

Both provisions give substance to the otherwise very obscure rule that traditionally goes through the Continental literature—that, even in the field of conflicts law, public policy of the forum is more favorable to the marriage after its celebration than when its celebration is still pending. In general, the difference between curable and nullifying defects is taken care of by the private law distinction between directory and mandatory prohibitions of marriage, and there is usually no question but that this distinction is observed in accordance with the law governing marriage requirements, without consulting the laws of the forum.

(c) Policy of the forum against the marriage. The forum may nevertheless impose its own grounds for impeaching a marriage. American courts, exercising jurisdiction for annul-

\textsuperscript{33} Sweden: Int. Fam. L. of 1904, c. 2 § 1.
Chile: C. Sup. (Sept. 26, 1939) Gac. Trib. 1939 II 182, likewise refused annulment of a German marriage on a ground of German law unknown to the forum.

\textsuperscript{34} NAG. art. 7f par. 2.

\textsuperscript{35} BG. (Dec. 2, 1943) 69 BGE. II 342, 345. Many other doubts exist. Gaultzhi, "Über die Anerkennung ausländischer Eheschliessungen" 27 SJZ. 321, 323 explained that foreign marriages may be simply contested by collateral attack so long as they have not been recorded in the Swiss register.
ment, are inclined to consider nullity on the ground of bigamy or incest without regard to the law of the place of celebration or that of the domicil.\(^\text{36}\) Moreover, in particularly shocking cases, public policy will be affirmed.\(^\text{37}\) In Europe, the best formulation of prohibitive public policy seems to agree with the result attained in practice in this country and in England with respect to polygamous marriages. A marriage valid under the law applicable according to the ordinary rule of conflicts will be regarded as valid at the forum, provided not only its celebration but also its existence within the forum does not offend the local public order.\(^\text{38}\) In this field, it may happen that any law may be applied in order to help a deceived woman.\(^\text{39}\)

(d) *Adjustment of the applicable law.* We may recall here the conflicts arising out of the varied scope of annulment of marriage in the national laws. While under Soviet Russian law a marriage may be very simply dissolved but cannot be annulled, some German writers suggest either that a Soviet marriage may nevertheless be annulled\(^\text{40}\) or that it may be dissolved,\(^\text{41}\) on the assumption that the Russian institution of divorce also covers the ground of the German annulment. Analogous cases may occur everywhere.

But where divorce is forbidden and annulment allowed on an abnormal scale, especially by a broad construction of error

\(^{36}\) See Stumberg 266.

\(^{37}\) In Cunningham v. Cunningham (1912) 206 N. Y. 341, 99 N. E. 845, Clunet 1913, 663, an 18-year-old girl married the valet of her parents secretly in New Jersey; the Court annulled the marriage on the ground of nonage and lack of parental consent according to the principles of discretion prevailing in New York irrespective of the unsettled question whether the marriage was valid in New Jersey.

\(^{38}\) See, for instance, Raape 802; M. Wolff, 4 Rechtsvergl. Handwörterb. 402.

\(^{39}\) Brazil, Sup. Trib. Fed. (April 20, 1932) App. Civ. no. 3533, 23 Arch. Jud. 421 applied the New York law to the marriage of a German wife with a husband, native of Austria and naturalized United States citizen, in view of the fact that under German law, applicable to a deceived party, her action was lost by limitation.

\(^{40}\) 3 Frankensteirn 196.

\(^{41}\) Raape, 2 D. IPR. 177.
in marrying, neither divorce nor annulment will be granted to foreigners against their personal law.

III. Recognition of Foreign Annulments

In the recognition of foreign annulments, reference may be made in every respect to the principles governing the recognition of foreign divorce decrees. The Restatement, § 115, even considers the matter identical with dissolution of marriage by divorce.

Thus, it has been decided according to this principle in England that a nullity decree pronounced by the court of the foreign matrimonial domicil is entitled to universal recognition; while this was first settled only with respect to a marriage celebrated abroad,\(^{42}\) it has now been declared also in the case of an English marriage.\(^{43}\)

In France, it has been held that in the event one party is of French nationality, French law must be applied and a decree of exequatur is indispensable for recognition.\(^{44}\)

In Italy, jurisdiction of the state courts is not exclusive,\(^{45}\) but a canonical marriage with civil effect celebrated in Italy after the effective date of the Concordat cannot be annulled by any temporal tribunal.\(^{46}\) A fraudulent, i.e., not serious and


\(^{43}\) This point, left open by the House of Lords in the Salvesen case, was decided more definitely than in De Massa v. De Massa [1939] 2 All E. R. 150 (Note, 48 Law Q. Rev. (1932) 13; CHESHIRE 352), in Galene v. Galene [1939] P. 237, [1939] 2 All E. R. 148 (English marriage, French domicil of the husband, French decree of nullity on the ground of want of the father's consent; the decree was recognized irrespective of the choice of law).

\(^{44}\) See VALERY 838 no. 594, and 1074 no. 749, and the French diplomatic note in RG. (March 19, 1936) 150 RGZ. 374.

DIVORCE AND ANNULMENT

effective, change of domicil by the parties does not create international jurisdiction for annulment. 47

Where a foreign annulment based on the incapacity of a party has applied a law other than the national law of the party, the court of the national country, following the principle of nationality, will not recognize the decree. 48 But it will, if the legal provisions are fairly similar. 49

A curious combination of recognition and exclusive jurisdiction is illustrated by an Austrian case of 1937. 50 The marriage of an Austrian with a Yugoslav woman was annulled by the competent ecclesiastical court in Yugoslavia. The Austrian court found that the decree was to be recognized under the treaty existing between the two countries. But to satisfy formally the constant axiom that the Austrian courts have exclusive jurisdiction over the status of nationals, the marriage was again annulled. This recalls certain duplications of divorce, such as in Michigan. 51

IV. EFFECTS OF ANNULMENT

1. Partly Effectual Void Marriage

A delicate question concerns the phenomenon that a void or annulled marriage may nevertheless produce legal conse-

49 App. Trieste (Sept. 17, 1936) Monitore 1937, 17, Clunet 1937, 389 (decree of Lima, Peru, annuling the Italian marriage of two Italians on the ground of impotence according to the Peruvian C. C. (1851) art. 167, art. 107 of the Italian C. C. being similar "in substance"). While Swiss nullity decrees based on impotence are also generally recognized, in the case of App. Milano (May 28, 1936) Monitore 1936, 456, Clunet 1937, 164, recognition was refused for other reasons, among which was the fact that the allegedly incapable woman had a living child; in this respect an element of re-trial entered under the guise of public policy. Contra: Cass. civ. (June 11, 1937) Giur. Ital. 1937, I, 1, 762; and see on the problems involved, PAGANO, Note to Cass. civ. (April 17, 1939) Giur. Ital. 1939, I, 1, 705; App. Bologna (Jan. 16, 1939) Giur. Ital. 1939, I, 2, 309.
50 OLG. Graz (March 31, 1937) 55 Zentralblatt (1937) 437 no. 248.
51 See supra pp. 404, 520, n. 16.
ANNULMENT OF MARRIAGE

quences. There are institutions marking a middle ground between valid and invalid marriages; the most widely known and, indeed, the most benevolent of them is the French *mariage putatif*, which has its roots in the canon law and its ramifications in numerous jurisdictions including Louisiana, Quebec, and Latin America. Yet French writers and courts disagree hopelessly on the proper conflicts rule.

*Illustration:* In the case of *Stephens v. Falchi*, which came up in Quebec, the parties were domiciled and married in Montreal and divorced in a French court. The woman then married in Paris an Italian, Falchi, who was domiciled in Italy. A marriage settlement was expressly made subject to Italian law. The Stephen divorce was invalid under the law of Quebec (and, hence, also in Italy). Therefore, the second

52 French C. C. art. 201 declares that marriage that has been declared null produces nevertheless civil effects as regards both the spouses and their children when contracted in good faith. According to art. 202, if only one of the spouses acted in good faith, the marriage produces its civil effects only in favor of this spouse and the children born of the marriage. This provision goes so far as to treat the protected persons as though the marriage were valid. Furthermore, it includes all possible defects of marriage and even non-existent marriages; see Cass. (req.) (March 14, 1933) D.1933.1.28, Gaz.Pal.1933.1.666; cf. for an invalid ceremony before an English consul, Cour Paris (Jan. 16, 1895) Clunet 1895, 1057, and for bigamy, Trib. civ. Seine (May 11, 1933) Gaz. Pal.1933.2.202; Trib. civ. Seine (Nov. 25, 1936) Nouv. Revue 1937, 85; Cour Paris (March 30, 1938) Nouv. Revue 1938, 353. In the case of a marriage of Canadians from Quebec before a Catholic priest in France, see Berthiaume v. Dastous [1930] A. C. 79, supra p. 212; cf. LEE, "Cases on the Conflict of Laws from the Law Reports of the British Dominions (1935-1937)," 21 Journ. Comp. Leg. (1939) 28. Finally, good faith is presumed; cf. BAUDRY-LACANTINERIE, 1 Précis 229 No. 478; BINET on Cass. (civ.) (Nov. 5, 1913) D.1914.1.281. To contrary effect, e.g., the Belgian Rb. Antwerp (Oct. 28, 1939) Rechtsk. Wkbl. 889 no. 146, declares that a non-recorded religious marriage between Polish Jews in Warsaw is non-existent and does not produce the protection under C. C. art. 201.


54 C. C. Lower Canada: arts. 163, 164.


marriage was "annulable." Suppose it was annulled. Should the provisions of the French, the Italian, or the Quebec statutes be applied to determine whether the second husband married in good faith, and whether he could sue for the usufruct arising from the settlement?

Are there no such questions in the common law countries? In England, in fact, there are none, since an annulment of a marriage seems to annihilate all its effects. The courts of many of the states of the United States, however, have the power, by or without a statute, to grant alimony or compensation in the decree of annulment and to dispose of the property of the spouses "as in divorce." It has probably never been doubted that such powers are to be exercised exclusively in accordance with the rules of the forum, even when the voidness of the marriage was based on the fact that the parties had gone through a formally defective marriage ceremony in Louisiana or that one of them had been incapable of marrying as a domiciliary of Louisiana.

In both England and the United States, however, problems of conflicts law have arisen with respect to the legitimacy of children born of void marriages.

On the effects which a putative marriage exercises on the personal rights and duties of husband and wife, the following theories have been advanced by writers and adopted by courts on the Continent and especially in France:

(a) The personal law should govern, a theory that comprises several propositions:

(i) If both parties are nationals of the forum, the law of the forum should be applied under all circumstances.

57 Because the marriage never was annulled, the court awarded the usufruct flowing from the marriage settlement according to Italian law, upon a complete, though unconvincing, reasoning under the French law of the place of celebration. It is not clear why the doctrine of putative marriage is also mentioned.

58 See 1 VERNIER § 53.

59 See infra n. 73.

60 Cass. (civ.) (March 25, 1889) Clunet 1889, 642 and other decisions; see VALÉRY 1976 no. 750.
same should be done, if the personal law of both spouses contains rules approximately similar to the *lex fori*. 61

(ii) In mixed marriages, the old rule that the law of the husband governs the personal marital relations has been extended to questions of what effects of marriage survive an annulment. 62

(iii) According to another opinion, where one party is a French national, this party should always enjoy the far-reaching benefit of the French Civil Code, article 299. 63 In a generalized and now widely adopted version, a party having married in good faith enjoys the benefit which may be granted to him by his national law. 64

(b) Some courts have applied the law of the forum “for reasons of justice and good morals” 65 or without any justification. 66


62 *App. Alger* (May 26, 1879) D.1880.2.161; *App. Orléans* (Jan. 10, 1894) Clunet 1894, 536; Cour Paris (Aug. 3, 1898) Clunet 1898, 1080; Pilet, 1 Traité 566 no. 268; Niboynet 737 no. 627; Cunha Gonçalves, 1 Direito Civil 687. *Contra*: 2 Arminjon 460 reproaches the writers that they forget that the existence of a marriage is precisely in question. But see the text against this pseudo-logic.

63 Valéry 1076 no. 750; Audinet, Clunet 1930, 322; Niboynet, Revue Crit. 1934, 134.

64 Wahl, Note to Cass. (civ.) (July 30, 1900) S.1902.1.225; cf. *App. Alger* (May 26, 1879) S.1879.2.281; Trib. civ. Seine (May 11, 1933) Revue Crit. 1934, 129; Trib. civ. Seine (Nov. 25, 1936) Revue Crit. 1938, 84 (expressly against the *lex fori* and the *lex loci celebrationis* and for the personal law); Bartin, 2 Principes 212 § 291; Lerebours-Pigeonnière 389 no. 331; in Italy, Fedozzi 455.


Brazil: Sup. Trib. Fed. (April 12, 1933) 28 Arch. Jud. 456 in the case of a Brazilian woman separated by judicial decree, marrying in New York an Eng-
(c) A theory allegedly flowing from general principles, and for this reason preferred by recent German writers, considers that the law violated by the attempted marriage is the naturally competent law to determine what legal effects are left to the apparent conclusion of the marriage.\textsuperscript{67}

As a matter of fact, the French courts have always found a ground for applying the French provision in favor of a French party, unless his or her bad faith was proved or both parties had fraudulently evaded the French marriage requirements, in which case good faith was considered absent.\textsuperscript{68} This practice involves exaggerated protection of nationals and is a measurably excessive extension of public policy to an ordinary rule of private law, as Battifol has pointed out.\textsuperscript{69}

A suitable theory may perhaps be derived from the opinion described under (a), (ii), referring to the law of the husband. We should, however, consider on the one hand that the conflicts rules by no means have to be identical for personal relations between husband and wife (maintenance, name of the wife, alimony), property relations, custody of children, and succession on death.\textsuperscript{70} On the other hand, the protection which the French, German, Swiss, and other systems in varying degree grant to an innocent pseudo-spouse should be technically

\textsuperscript{67} CHAMPCOMMUNAL, Revue 1910, 56; 2 ARMINJON 460; AUDINET, 11 Recueil 1926 I 175 at 210 and in Clunet 1930, 322; Cass. (civ.) (July 30, 1900) D.1901.1.317, S.1902.1.225.

\textsuperscript{68} Germany: KIPP-WOLFF, Familienrecht (1928) § 39 A III at 144, and M. WOLFF, IPR. 122; RAPE 339, 451; rejected by the Reichsgericht (Nov. 11, 1937) JW. 1938, 108 infra n. 73.

\textsuperscript{69} BATIFFOL, Revue Crit. 1937, 432. To the opposite effect, § 1344 of the German BGB, is believed of public order by RAPE 340; WIERUSZOWSKI in 4 Leske-Loewenfeld I 55; M. WOLFF, IPR. 122.

\textsuperscript{70} See 2 ZITELMANN 751 and 3 FRANKENSTEIN 217 (not one but several different "statutes"). But for property relations, the latter (3 FRANKENSTEIN 396), like his adversary, RAPE, 340, applies a separate personal law of the wife in contradiction to the German Code, EG. art. 15.
construed as a residuum from the parties' attempted marriage, some shelter left in the ruins of the house. The benefit to that party is not so much an effect of the violation of prescriptions, as suggested in connection with the opinion under (c), as it is an effect of the marriage despite its "nullity." We may observe generally that what in legal terminology is called void may nevertheless have some effects. Such rudimentary consequences, however, must lie within the framework of the normal effects which the transaction would have had if it had been valid. 71

Hence, it is submitted that all relations between the parties should be determined by the law that would have been applied to the respective kind of relation, had the marriage been valid. 72 Consequently, in common law countries the personal relations of the parties should be treated according to the law of the domicil on the ground of which jurisdiction has been assumed. Suppose a party to a marriage celebrated in Louisiana was under age and the marriage therefore void, either because the party was domiciled at the time in Louisiana or because of the law of his or her domicil applied by Louisiana according to its domiciliary principle. The personal relations of the parties have to be treated without regard to the Louisiana doctrine of putative marriage, if the marriage is annulled in a common law state where the parties are now domiciled. This solution agrees with the result of a lex fori theory but is based upon the lex domicilii as governing the personal effects of marriage. With respect to movables, the law obtaining at the domicil when the movables were acquired governs, as it would if the marriage were valid, in favor of the party acting in good faith, et cetera.

72 This suggestion seems to agree with some remarks of DIENA, 2 Princ. 156 and UDINA, Elementi 180 no. 130.
DIVORCE AND ANNULMENT

The status of children born of void marriages must certainly be treated under the law governing legitimacy 73 (unless a special rule is devised as in the Código Bustamante), 74 and the share which a pseudo-spouse may be allotted in the distribution of assets of the other party is governed by the rules on inheritance. 75 Whether an innocent wife may also acquire the nationality of the husband by a putative marriage is a matter of public law, but in France it seems by prevailing opinion to be included in the "civil effects" of marriage. 76

2. Protection of Third Parties

Under a probably general American rule, a man is liable for necessaries furnished to a wife to whom he is not legally married, if he lived with her and held her out to the world as his wife. 77 The conflicts rule on necessaries, as stated in section 459 of the Restatement, recognizes an implied authorization by the husband, either as part of the law of the man's domicil or under circumstances defined by the law of the state where the necessaries are furnished. Is this rule applicable also if

73 The United States: Restatement § 137 and comment; Moore v. Saxton (1916) 90 Conn. 164, 96 Atl. 960; Green v. Kelley (1917) 228 Mass. 602, 118 N. E. 235; McNamara v. McNamara (1922) 303 Ill. 191, 135 N. E. 410. Cf. on the statutory provisions declaring legitimate the issue of prohibited marriages 1 VERNIER § 48; 4 ibid. § 247.


Germany: RG. (Nov. 11, 1937) JW. 1938, 108 (against RAPE 451); KG. (July 9, 1937) JW. 1937, 2526, Clunet 1938, 341; also KG. (Dec. 9, 1921) 42 ROLG. 97; KG. (Feb. 27, 1931) IPRspr. 1931, no. 83: they apply the law governing filiation, i.e., EG. arts. 18 and 19.

74 Código Bustamante art. 49 as compared with art. 57.

75 See supra p. 376.

76 A contrary decision of Trib. civ. Boulogne (Dec. 20, 1935) Clunet 1936, 375 was reversed by App. Douai (April 1, 1936) D.1936.2.70, with note by Rouast; Revue Crit. 1937, 75, with note by Caleb at 78; see also VALÉRY 237 no. 200; NIBOYET 194 no. 147; LEBÉBOURS-PIGEONNIÈRE 124 no. 104.

the man is not a husband legally? No reason seems to exist why the answer should not be in the affirmative.

A related question was prompted by the provision of the German Civil Code protecting a third person who has entered into a transaction with, or obtained a judgment against, a spouse of a void marriage. The nullity cannot be set up to defeat his rights, if it was not pronounced in a judgment and was unknown to him (BGB. § 1344, German Marriage Law of 1938, § 32). It has been suggested in Germany that this domestic provision be extended by analogy to international situations, i.e., where German spouses have celebrated an invalid marriage abroad and live in the forum, or foreign spouses whose marriage is void under their national law are domiciled in the forum.78 Third parties should be protected against the effects of a nullity not stated in a judgment and unknown to them.

78 M. Wolff, IPR. 122 IV.