PART FOUR

DIVORCE AND ANNULMENT
Chapter 11

Divorce

I. The Problem of Foreign Divorce

The conflicts rules concerning divorce are generally applicable not only to absolute divorce, i.e., dissolution of the bonds of marriage, but also to limited divorce, such as separation from bed and board and similar types of judicial separation, not merely temporary. Nevertheless, we shall confine our discussion in general to absolute divorce. Judicial separation has some particular features; for example, there are special rules in the United States respecting the recognition of foreign separation decrees.1

I. Aspects of the Problem

Divorce is to be studied here in three aspects. We have to consider first the connection that the parties to a divorce suit (or corresponding proceedings of a non-contentious nature) are required to have with the forum and, in the case where persons, not subjects of the forum, are permitted to be parties, the law applicable to the suit. In the second place, it will be presupposed that a divorce decreed in one jurisdiction is being examined for the purpose of recognition in another. Third, the extraterritorial effects of non-recognized and of recognized divorce decrees will be analyzed more precisely.

The subject to be discussed in this chapter has been somewhat neglected in comparative surveys and international discussions. Particularly in this country, endeavor to improve

1 Restatement § 114 and comment.
the actual situation in case a marriage may be regarded as existent in one state and dissolved in another, with all its tremendous consequences for the parties and their issue and third persons, has chiefly centered around the recognition of foreign decrees. In the highly spirited debate under the headline of *Haddock v. Haddock,*\(^2\) or now of *Williams and Hendrix v. North Carolina,*\(^3\) it has been asked what position should be taken by a state whose court is requested to recognize another state’s divorce decree, rather than what attitude might be suitable to that state whose court is to take cognizance of the original application for divorce.

Every state of the Union has the unquestionable power to determine by itself all of its divorce policy; on the other hand, by the impact of the Full Faith and Credit Clause as developed by the Supreme Court of the United States, recognition of divorce decrees is compulsory under certain conditions. Hence, not unnaturally, scrutiny of the more or less anomalous decrees rendered by the courts of about fifty jurisdictions and selection of those decrees that deserve recognition, has appeared the chief problem. The complement of the problem is, what limits every state ought to observe in opening its courts to divorce, so as to facilitate reciprocal recognition. Perfect mutuality has been reached by this method in such treaties as those of Montevideo and the Scandinavian states. The drafters of the successive uniform acts in this country\(^4\) also distinctly perceived the problem and found, in

\(^2\) (1906) 201 U. S. 562.


\(^4\) Draft of a Uniform Divorce Law, 14 Harv. L. Rev. (1901) 525; Resolutions, adopted by the National Congress on Uniform Divorce Laws in Washington, D. C., Feb. 19–22, 1906; Proposed Uniform Statute relating to Annulment of Marriage and Divorce submitted by the Subcommittee on Resolutions to the Divorce Congress of Philadelphia, Nov. 13, 1906. This statute was approved by the National Conference of Commissioners on Uniform State Laws in 1907 and adopted in Delaware, New Jersey, and Wisconsin, but was replaced by the Uniform Divorce Jurisdiction Act of 1930, 9 Uniform Laws
the writer's opinion, an adequate solution; yet these acts have encountered an amazingly unfriendly reception. 5 The restaters of the law of conflicts, too, saw the goal when they started to define "jurisdiction for divorce," 6 apparently as an absolute notion, good for the use of all courts concerned. But what they have stated can hardly be meant to bind the courts granting divorce; it has useful reference only to the problem of deciding in which cases the jurisdiction exercised by a divorce court should be recognized by a court of another state, i.e., the problem of jurisdiction in the international sense.

2. Diversity of Divorce Legislation

Comparative research in divorce legislation has revealed staggering diversity. However, for writers to claim for this reason alone that in cases of conflict of laws every state must stick to its own policy without regarding the outside world, is an overstatement. Certain contrasts are fundamental indeed; others are not.

The doctrine of the Catholic Church that marriage cannot be dissolved except by death, although having lost its force in many countries, actually prevails in Brazil, Chile, Colombia, Ireland, Italy, Paraguay, and Spain, and with respect to Catholics in some parts of Eastern Europe and the Middle East. 7 Absolute divorce was until recently excluded also in South Carolina. 8 Next to this group, we must place

Annotated (1932) 133. Uniform Divorce Recognition Act (1948), approved by the National Conference of Commissioners on Uniform State Laws and adopted in California, Louisiana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Washington, and Wisconsin.

5 See especially VREELAND 50. His own propositions were called politically impossible by STUMBERG, Book Review, 2 La. L. Rev. (1939) 207.

6 Restatement §§ 110–113; cf. ibid. at §§ 43, 77.

7 See infra p. 462.

the laws of New York and formerly of the District of Columbia, admitting divorce only on the ground of adultery.9

Looking to the opposite end of the line, we notice several institutions of a very diverse nature. There are remainders of the old patriarchal repudiation by which, for instance, an Egyptian Moslem may divorce his wife without any alleged cause. There was up to 1944 the ultramodern view of the Russian Soviet Republics allowing each spouse to terminate the marriage by unilateral declaration. Neither state nor church influenced this act.9a Again, we may add a few American and Mexican jurisdictions where the dissolution of marriages is offered, as the current expression goes,10 on a commercial basis; also, in addition to these open divorce markets, some states are disgraced by abusive practices. The Old Testament right of a sovereign head of a household, the Soviet emphasis on freedom of marriage, and the readiness of American courts to provide divorce, are certainly heterogeneous phenomena, but in common they result in permitting indiscriminately what the legislations of the first group refuse indiscriminately.

We may well call both groups of legislations radical and set them apart for the major purposes of conflicts law. In the rest of the world, divorce regulations form a block of kindred systems. To be sure, they are very far from being homogeneous. The old conception that divorce is a remedy given

9 D. C. Code (1929) tit. 14 § 64, was repealed by the Act of August 7, 1935, 49 Stat. 539, c. 453, § 1.
Laws of New York (Cahill, 1937), C.P.A. § 1147.
9a On July 8, 1944, an Edict of the Presidium of the Supreme Soviet of the USSR decreed a judicial divorce proceeding, without setting forth grounds for dissolution of marriage (arts. 23–27; German translation in BERGMANN, s. verbo UdSSR p. 5). The several Soviet Republics changed their Family Codes accordingly, e.g., RSFSR Code on Marriage, Family and Guardianship, arts. 18–22, Gsovski, 2 Soviet Civil Law (1949) 246.
10 Hatton, J., of Tonopah, sitting during the vacation of a judge in Carson City, Nevada, "asserted that the State Legislature, with commercial intent and under pressure, had legislated the present divorce law," in the cause of Mrs. de Forest Payne, N. Y. Times, Sept. 29, 1942, p. 12.
to an innocent against a guilty party vanishes more or less slowly; modern social aims are gaining acknowledgment here and there; private interest and public welfare are differently evaluated; many historical remainders and arbitrary predilections of local lawmakers increase the number of varieties. Vernier lists eight major and thirty-one minor causes for divorce in this country alone, irregularly distributed over fifty jurisdictions.\footnote{2 \textit{Vernier} § 62.} Defenses, principles of procedure, authorities empowered with granting divorce, are diverse. Nevertheless, the basis is a common one: marriage can be dissolved, if dissolution appears to be the minor evil, and whether it is must be controlled by an agency of the state in appropriate proceedings. A really basic difference occurs respecting the question whether a mutual agreement of the parties should be accepted as a self-sufficient ground for divorce decrees, but, strangely enough, this point has not been much emphasized as a consideration of public policy in conflicts law. On the whole, soberly examined, a modern statute on divorce is usually on the middle road, a product of compromise with an increasing admittance of social-hygienic ideas. There is little need for conjuring up the vision of bridgeless gulfs between conceptual antitheses.

There is something more to tone down the contrasts. A statute such as that of Nevada or of a Mexican state embodies the normal terms and provisions, at the most indulging in some clauses that promise secrecy or allow unnamed grounds for divorce at the discretion of the judge, while the experiences of other countries, we may discover, again and again reveal an average practice laxer than the official language indicates. Lawyers know this well, each with respect to his own state; probably it is a universal tendency. A few illustrations: When before the Matrimonial Causes Act, 1937,
adultery was the only divorce ground in England, scandalous maneuvers were in semi-official use to simulate evidence of adultery. The same revolting practice is said to be frequent in New York. Courts where desertion is not recognized as a cause, find a cause in cruelty and vice versa; in the numerous countries following the Code Napoléon, "injures graves" is an elastic notion. German courts were never seriously embarrassed by the provision that the defendant spouse must have caused the breaking up of the marriage by his reprehensible conduct. A reform of the law was demanded and finally accomplished, with the effect of legalizing the liberal practice and obviating the conventional lies of the parties, rather than of introducing a new rule.

Why are these practices admitted? In large centers of population, courts are unable to examine the individual circumstances as they might wish to do. As has well been observed in this country,\textsuperscript{12} collusion between the parties or abandonment of the cause by the weaker party characterize the overwhelming majority of cases. A divorce judge in any such country has the feeling of gliding down an inclined plane; no stop anywhere is firmly assured, once divorce has been permitted. Of course, there will always be judges more conscientious, or conservative, or formalistic than the average. But it is the general trend that counts. And even the general prohibition of divorce does not work without exceptions. Courts without absolute divorce at their disposal are inclined to grant annulment of marriage where in other systems divorce would be expected.

In addition, there are geographical limitations on legislative control. Italian couples went to Fiume for divorce, Ar-

gentines used to go to Montevideo, citizens of South Carolina to Georgia and North Carolina, and the answer to New York is given in Reno. That only wealthy people are able to escape their home laws aggravates the moral aspects of the situation.

Paradoxes reach a climax in the field of recognition. Foreign decrees are irregularly recognized in this country and encounter prohibitive defenses in Continental Europe, especially in the country to which a party belongs as a national. However, if "invalid" divorces are not a simple "myth" within the United States,\(^3\) the contention that they are to a large extent in fact recognized is true with respect to all countries.

3. Divergence in Method

In approaching the problem of the interstate and international treatment of divorce, we must be aware of a fundamental difference between the American method and that followed in the principal civil law countries.

In this country, it is a matter of course that every state grants jurisdiction for divorce without asking what extraterritorial effect the forthcoming decree will enjoy in other states. Moreover, so soon as jurisdiction is assumed by a court, there is no doubt that the case will be decided in exclusive accordance with the municipal statute of the forum (\textit{lex fori}), irrespective of any qualifications of the parties; no choice of law therefore is involved.

The most representative legislations of the civil law, however, take into consideration the position of the law of the state whose nationals the parties are, with regard to one or both of the following points:

(i) Jurisdiction in the case of foreign nationals is not as-

\(^3\) Goodrich §128 n. 46.
sumed unless the national law of the parties is willing to recognize this jurisdiction.

(ii) Divorce is not granted, unless it is agreeable to the internal law of the national state of the parties.

In the heyday of the principle underlying these ideas (the so-called principle of nationality), many writers went further, applying the pure national law of the parties. But with the Introductory Law to the German Civil Code (1896) and the Hague Convention on Divorce and Separation (1902) as models, it is now generally required that both the foreign and the domestic laws must concur in permitting divorce in the particular case. Hence, the law of the forum, although not exclusively governing, as in the common law countries and others, has more to say than in almost any other field of conflicts law. Its importance is further increased where one party is a subject of the forum and the other a foreign national.

4. Predominance of Lex Fori

Why in divorce involving foreign aspects, the law that a court must apply in purely domestic matters should have such an abnormal influence is usually explained by a general reference to the nature of the institution. It is said that divorce is permitted or refused in every state according to its tradition, religion, ethics, logic (or what is believed to be logic), and in conformity with hygienic and other considerations of population policy. This general reasoning is not adequate to the subject. Consideration of the three groups of divorce legislations set out under (ii) above, taken as a basis to measure affinity of divorce policies, suggests the following.

The standards of each of the three groups are basic. We may be astonished indeed by the grouping of states in which the Hague Convention of 1902 undertook to unify the rules

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14 Gierke, 1 Deutsches Privatrecht, 236; Regelsberger, 1 Pandekten 178; 5 Laurent 244, 276, 285, and others.
for granting divorce and for recognizing foreign divorce. There were, on the one hand, the states which had normal modern legislations and, on the other hand, Austria, Italy, Portugal, and the Czarist Russian Empire, where at that time divorce was either left to the ecclesiastical authorities of the various denominations, or forbidden at least to Catholics. Italy has remained a member and retained its ban on divorce; the Convention has prevented Italian nationals from being divorced in any participating state. This has been praised as a great progress in international cooperation, but it has resulted in the final withdrawal from the Convention of France, Belgium, Switzerland, Germany, and Sweden successively. It is quite as prejudicial to combine legislations of contradictory character for the purpose of reciprocal respect, as it is to exaggerate minor varieties of policy. In federations that guarantee mutual recognition of state acts between the single states, it should be presupposed that the aims of the several legislations, varied as they may be, are not fundamentally hostile to each other. In a Union including legislations of New York and Nevada, the Full Faith and Credit Clause cannot work smoothly. It is the writer's conviction that it is not so much the multitude of regulations in the United States as the extremes to which a few of them go that creates difficulties in the mutual recognition of divorce decrees.

On the side of the majority group, no such prominent differences obstruct mutual understanding. All these systems strive, through an institution controlled by the state, to assure sound domestic relations within the limits to which the assistance that law and legal machinery provide is subject. To apply the law of the forum among states of this group to foreigners as well as to citizens presumes a claim to a strin-
gent public policy that cannot be objectively justified by the accustomed standards of comparative law. Whether considerations pertaining to the field of conflicts rules better support that claim will be asked later.

5. "Migratory" Divorce

Our subject includes divorces described in the United States as "migratory" and probably best defined as divorces obtained in a state by persons who have just completed the minimum time of residence required by the local statute for granting jurisdiction over divorce. Technically, it is required that a bona fide domicil be established and, in the prevailing opinion, that the person must have had actual residence during this time. Hence, it is presumed by the law "of the books" that the newcomer has intended to transfer the center of his entire life to the state for an indefinite time. In contrast, it is not sufficient to take residence within the jurisdiction merely for the purpose of obtaining divorce, although the circumstance that the domicil is changed with the motive of securing a divorce is not prejudicial. The minimum requirement of "residence" is generally understood to evince the required mental purpose, which, to put it simply, is that of establishing a real and permanent domicil.

The actual picture looks so different from this legal structure that migratory divorces are currently identified with those obtained in evasion of the domiciliary statute, i.e., by a falsely pretended domicil. The rate of migratory divorces in the first sense, i.e., upon completion of minimum residence requirements, has been appraised for the year 1929 as constituting only 3 per cent of the total number of divorces in this country, a much smaller percentage rate than had been feared. The absolute numbers, however, are high. The

16 CAHEN, Statistical Analysis of American Divorce (1932) 78. The apparently optimistic views of this writer have influenced most sociological observers.
total of divorces was over 200,000 in 1929 and, after the drop caused by the depression, reached 250,000 in 1937 and about 264,000 in 1940. In the two counties in Nevada, Clark and Washoe, where Las Vegas and Reno are situated, divorces totaled 1756 in 1929, 4769 in 1931, and 3629 in 1935. The rate of divorce for 100,000 population has been estimated with respect to the year 1940 as 200 in the United States, 90 in the Middle Atlantic states, and 4710 in Nevada. More serviceable than many arguments used to moderate the apprehensions that must be aroused by the rapid increase in these rates is comparison. Although in Europe, excluding Soviet Russia, no country reaches even half of the American percentage, the highest percentage of divorces occurs in Switzerland, despite the repugnance to divorce in the Catholic inner cantons and the conservative character of the population in the entire country. In 1931 the rate of divorce for 100,000 population was 70 in Switzerland as against 147 in the United States. We may conjecture that the spirit of advanced democracy and industrial enterprise has some influence on the frequency of divorce. Yet, obviously, every divorce marks a regrettable failure even for a childless couple, and lawyers cannot fail to be moved by the inadequacy of

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18 According to a newspaper correspondence in 1943, there were 5910 divorces in Washoe County and 2720 cases in Clark County, an “all time high” rendering $200,000 in fees in these counties. The total of seventeen county courts in Nevada is given with 11,399 divorces again 8,616 in 1942, the fees amounting to more than $300,000.

19 This fact has been observed by Swiss authors. GMÜR, 2 Familienrecht 150, with respect to the decade of 1900 to 1909. It is confirmed by the following figures regarding the year 1927: divorce rate per 100,000 population: England and Wales, 7.3; Belgium, 31; France, 45; Germany, 57.6; Denmark, 55; Switzerland, 62; Japan, 79; United States 160; Leningrad, 583; Moscow, 959. REUTER and RUNNER, The Family (1931) 210; HANKINS, “Divorce,” 5 Encyclopaedia of the Social Sciences (1935) 177. Higher figures in similar proportion have been indicated for 1935, omitting Switzerland, see JACOBS, Cases on Domestic Relations (ed. 2, 1939) 352. The relation to “married persons” or “existing marriages” would be more instructive, but this is not available.
their machinery. The divorce mills complete the evils of familial maladjustments; not only do they work against the intentions of sister state legislatures, in itself a sign of unsound relations, but they also enable legislatures, courts and attorneys to destroy homes for the sake of local profits.

6. Ex Parte Proceedings

The many cases in which, under modern statutes, a spouse can sue for divorce while the other party is resident in another state, need particular care by legislatures and courts. Not only do almost all legislations of the world allow in such cases subsidiary use of service by publication and the grant of divorce despite the absence of the defendant, but often the procedural guarantees are handled unsatisfactorily.20 Facts alleged by the plaintiff are not sufficiently verified. Even fraudulent maneuvers—for instance false indication of the defendant's address designed to prevent due notice of the trial—are not efficiently counteracted, whatever the law of procedure may be.21 No wonder that the international attitude is simple mistrust. Easily gained divorces may be attacked in the courts of other states, if enforcement is sought or, alternatively, annulment is asked. And this, despite the fact that everywhere, by customary law or statute or express clause of international treaty, proper service and a decent opportunity for defense are made primary conditions to the recognition of foreign divorces. Any observer will note that all those states whose courts indulge in routine

20 Very conveniently, Sayre, "Recognition by Other States of Decrees for Judicial Separation and Decrees for Alimony," 28 Iowa L. Rev. (1943) 321, 339 suggests "more effective substituted service than is required now" as part of the process.

21 Among the endeavors to help the victims of divorce, the activities of the International Migration Service are particularly deserving. See Wainhouse, "Protecting the Absent Spouse in International Divorce," 2 Law and Cont. Probl. (1935) 360.
service by publication, are among the severe censurers of the same act by foreign courts.

We have, however, to limit our survey to the two main questions of jurisdiction and choice of law.

II. JURISDICTION

A divorce suit is considered to belong to a court either by virtue of some domiciliary connection or the nationality of both, or possibly one, of the parties.

Other grounds for assuming divorce jurisdiction have sometimes been deemed to include the place where the marriage has been celebrated or the place where an offense against the marriage has been committed. The first conception is derived from regarding marriage as a contract and dissolution of marriage as a rescission thereof; the second reflects the idea that divorce is of a penal nature and therefore governed by the law of the place of the wrong. These conceptions no longer retain roots in the present legislations; their after-effects may be discerned in certain rules of choice of law and, in this country, in some additional provisions relative to jurisdiction over divorce, rather than in the main principles.

The existence of a third ground for jurisdiction is quite uncertain. Generally, it is emphatically denied that in matrimonial causes the parties may agree on a court. Nevertheless, sometimes openly, courts are induced to take jurisdiction

21a The recently enacted Ecuadorian law of October 21/25, 1956, art. 3 provides that a marriage concluded in Ecuador by an Ecuadorian national can only be annulled or divorced by an Ecuadorian court, see Karger, 22 Z. ausl. Pr. (1957) 525, 527; cf. also infra n. 151, 152.

22 There are exceptions such as the permission by Mexican state laws to grant jurisdiction in divorce when both parties submit to the court. The Federal Supreme Court holds recognition due in the Federal District and Territories in the case of express submission as contrasted with tacit agreement, on the basis of art. 602 of the Cod. Fed. de Proc. Civ. See decisions (April 2, 1935) 44 Seman. Jud. 72 as to the state of Chihuahua, and (Dec. 7, 1934) 42 Seman. Jud. 3596 as to the state of Morelos.
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without close scrutiny, when the defendant consents to the suit. 23 In any event, jurisdiction is quite frequently assumed everywhere on undisputed false allegations of domicil, without any inquiry by the court, which is equivalent to making the parties domini litis as to jurisdiction, and—more legitimately—a separate domicil of the wife is recognized when the husband consents.

I. Nationality as Basis

The faculty offered by most civil law countries to their nationals to bring suit for divorce even when the plaintiff is domiciled in another country may be briefly mentioned. 24

A few countries go so far as to reserve all matrimonial suits involving a national to their own courts exclusively, even if the parties are domiciled abroad and in the most distant regions. Once the Czarist Russian and the Austrian Empires were in this group. Today the list includes—after many doubts are discounted 25 and leaving Austria aside 26

23 Submission to divorce jurisdiction is treated as actually effective in Greece by 2 Streit-Vallindas 379.

It has been considered but rejected in Argentina, see Lazcano, 57 J.A. (1937) 463 ff. n. 128.

The Brazilian Supreme Court, however, seems to have construed arts. 318-323 of the Código Bustamante, allowing submission to a court, so as to include jurisdiction in divorce; Fed. Sup. Ct. (July 17, 1940) 58 Arch. Jud. 83.

In the English case of Hussein v. Hussein [1938] 54 T.L.R. 632, marriage was celebrated in England but the husband was not even a resident. The court took jurisdiction on the undefended suit by the wife, a decision presented as model to Scotch courts in 50 Jurid. Rev. 195.

24 For details see French Cass. (req.) (April 29, 1931) S.1931.1.247.


Switzerland: NAG. art. 7 g.

25 In Greece exclusive jurisdiction is no longer claimed by the courts except for Greeks domiciled in Greece. See Streit, 20 Recueil 1927 V 151; Fragistas, 7 Z. ausl. PR. (1933) 297; 2 Streit-Vallindas 382; cf. Trib. Athens 1933, no. 1676, Clunet 1934, 1041; Trib. Athens i (st inst.) 1935 no. 8250, 47 Themis 582, Clunet 1937, 597, Tenekides, Clunet 1937, 598.

Portugal: i Bergmann (Portugal p. 5).

Czechoslovakia: A Czech writer claimed that the Code of Civil Procedure (1950) § 612 par. 1 conferred exclusive jurisdiction on Czech courts, Stajgr, "Rapports juridiques avec l'étranger dans la loi sur la procédure en matière
—Hungary,\textsuperscript{27} Poland,\textsuperscript{28} the Soviet Union,\textsuperscript{29} and Turkey.\textsuperscript{30}

On the other hand, such exclusive jurisdiction is not claimed by the vast majority of states, and, although at one time nationality of the husband was considered the only generally sufficient condition for divorce jurisdiction,\textsuperscript{31} in some countries nationality alone, without domicile or at least residence, of one party in the state is considered insufficient for suing or
civile,” 9 Bulletin de Droit Tchécoslovaque (1951) 64, 68. \textit{Contra:} I BERGMANN (Tschechoslowakei p. 8); RAAPE, IPR. 290 n. 86.

\textsuperscript{28} Austria: § 81 no. 3 of the “Jurisdiction Law” (Exekutionsordnung) was understood as reserving divorce jurisdiction over nationals to the Austrian courts, see WALKER 724. This interpretation has been superseded by the Decree of Oct. 15, 1941 (§ 24), which is still in force. Today, Austria no longer claims an exclusive jurisdiction.

\textsuperscript{27} Even, if only one party is Hungarian: Code of Civil Procedure, Executive Decree no. 22/1952, § 15(a); I BERGMANN (Ungarn p. 10). This rigid rule has been mitigated by bilateral treaties on judicial assistance with the neighboring countries, e.g., Treaties with Yugoslavia of Nov. 11, 1930, art. 28, with Czechoslovakia of March 6, 1951, art. 21, with Bulgaria of Aug. 8, 1953, art. 23.

\textsuperscript{29} A contrary liberal doctrine was clearly adopted by the Polish Law of 1926 on international private law, art. 17 par. 3, on which a great many German decisions were based, see RAAPE 397. It was the declared intention of the judicial commission of the Polish Sejm, as the Polish Ministry of Justice recognized, to facilitate the divorce of Polish emigrants before foreign courts. See documentation of the decision of App. Danzig (Oct. 21, 1937) 4 Z.Europ.R. (1937) 304. Yet, the tendencies were reversed, and by a rather surprising interpretation of the Polish Code of Civil Procedure of 1932, § 528, recognition of any foreign divorce decree was refused except for the reciprocity provided by treaty. See ZOLL, 8 Z.ausl.PR. (1934) 716; Polish Supreme Court (Feb. 5, 1931) Z.f.Ostrecht 1932, 383; Polish Supreme Court (April 23, 1936) Clunet 1937, 617; and Polish Supreme Court in Plenary Civil Chambers (May 29, 1937) published in Dr. Justiz 1938, 251; cf. RABEL, 8 Z.ausl.PR. (1934) 718; 9 \textit{ibid.} (1935) 290. MASSFELLER, “Einzelfragen aus dem deutschen internationalen Ehescheidungsrecht,” JW. 1935, 2465. Correspondingly, jurisdiction was denied by RG. (Feb. 24, 1936) 150 RGZ. 293; RG. (July 3, 1939) 160 RGZ. 396, 399; OLG. Stettin (Sept. 23, 1938) JW. 1939, 249; OLG. Hamm (July 18, 1949) IPRspra. 1945-49 no. 66.

\textsuperscript{29} Since 1944, the Soviet Union has claimed exclusive jurisdiction in matrimonial suits in which both parties are Soviet nationals, not however, in suits concerning mixed marriages, LUNZ 306; HOYER, Anerkennung von Entscheidungen in Ehesachen im Ausland auf Grund inneren Staatsrechts (1951) 34; 4 Schwz. Jahrb. (1947) 263.

\textsuperscript{30} Turkey: Art. 13 no. 6 of the Law of April 22, 1924, amending § 18 of the Code of Civ. Proc., see I BERGMANN (ed. 2) 768.

\textsuperscript{31} See Gebhardsche Materialien 154.
being sued.\textsuperscript{32} Even so, many conditions attach to recognition of foreign divorce decrees by the national states, including such powers of re-examination as approximate exclusive jurisdiction.\textsuperscript{33}

The conflicts between the claims of the national and the domiciliary jurisdictions have attracted a great deal of attention. Generally, the only remedy envisaged has been in concessions by the states of domicil to those states to which the parties involved belong. Not only has the Hague Convention sanctioned this trend, but more moderately, even an English authority has suggested that divorces rendered at the competent court of the national state should be recognized in England the same as decrees of the matrimonial domicil.\textsuperscript{34}

2. Domicil as Basis \textsuperscript{35}

By common law, coverture effects a merger of the personalities of husband and wife. The wife necessarily shares the domicil of the husband. This "matrimonial domicil" is, if any, the most suitable place for the dissolution of the marriage or, in the terminology of the common law, to locate the "\textit{res}" that constitutes the object of the action \textit{in rem}, as the action for divorce is commonly regarded. It happens that under common law the private relations of individuals are generally governed by the law of their domicil, and this, of course, is interrelated with the domiciliary principle of jurisdiction. But the idea that the domicil of the parties, even of

\textsuperscript{32} E.G., the German Law on Divorce of January 24, 1935, § 1; Swiss NAG. art. 7g par. 1 also involves restrictions; see BG. (Oct. 10, 1930) 56 BGE. II 335, at 341.

\textsuperscript{33} See infra pp. 510, 516–518.

\textsuperscript{34} GUTTERIDGE, "Les conflits de compétence juridictionnelle en matière de divorce et de séparation de corps," Revue Dr. Int. (Bruxelles) (1938) 1, 7, 16, 28.

one party, in a state suffices to give that state jurisdiction for divorce, because divorce is a matter of "status"—this "generally accepted doctrine," in the words of Beale—may be questioned after a glance at the rules of the civil law countries. In most of these, status and capacity of an individual are governed not by the law of his domicil but by that of the country whose national he is (principle of nationality). Nevertheless, also in these countries, jurisdiction for granting divorce is ordinarily assumed at the matrimonial domicil or at the domicil of one party. Certainly, divorce alters the family status of a person, and, therefore, the states following the nationality principle have partly opened their courts to nondomiciled nationals also. But the reasons why jurisdiction is given at the "domicil" and the more precise determination of domicil for this purpose are not to be found in any doctrine. They are policy considerations that we shall subsequently try to analyze.

(a) Common domicil. Where, under the conception of the court applied to for a divorce, both spouses are domiciled, in the full sense of this word, within the forum, jurisdiction is granted in all states acknowledging the dissolution of marriage inter vivos. There are two groups.

The matrimonial domicil is sufficient everywhere for assuming jurisdiction. However, in Great Britain since the subject was clarified in 1895 until recently, in the British dominions except Australia and South Africa, and under the

36 I BEALE § 110.1.
38 South Africa: Matrimonial Causes Jurisdiction Act, 1939, as amended 1953, s. 1 (1) (b,c), but limited to cases in which residence and domicil are in different jurisdictions of South Africa.

General exceptions in favor of wives living separately are made in New Zealand: Divorce and Matrimonial Causes Amendment Act, 1930, s. 3; and in Australia: Commonwealth Matrimonial Causes Act, 1945-1955, ss. 10 (1), 12 A, in consequence of the English cases in misericordia, see below n. 128. For particulars, see GRISWOLD (supra n. 35) 202 ff.
present Treaty of Montevideo, the matrimonial domicil has remained the sole test of jurisdiction for the purpose of divorce. The wife has her domicil with that of the husband by operation of law. It is the most certainly recognized case of divorce jurisdiction also in this country.

This simple system of conferring jurisdiction also provides an appropriate test to determine the applicable law, since the statutes of the state where the marriage is located work in the double function of lex fori and lex domicilii, and moreover, among the states adopting this system, mutual recognition of divorce decrees is easy.

In countries acknowledging a separate domicil of the wife or ignoring the institution of legal domicil, the principle has to be modified. Jurisdiction is exercised when both spouses have their domicil within the state, either together or separately. Naturally, this rule obtains in the United States.

The reasons supporting these rules and underlying the "res" theory are obvious. A community in which the spouses have centered their lives may feel competent to adjudicate the continuation of their marriage. Insofar as the conduct of private persons may deserve consideration in determining jurisdiction, an element of submission to the state activity may be implied. On the other hand, it appears a superfluous hardship to send the parties away to their distant homelands; this would sometimes mean their ruin.

(b) Presumption of common domicil. If in the eyes of the forum the parties have their domicils in different states, an

39 Treaty of Montevideo, text of 1889, art. 62; text of 1940, art. 59.
40 Haddock v. Haddock (1906) 201 U. S. 562; Atherton v. Atherton (1900) 181 U. S. 155; Restatement §§ 110, 114.
41 Hague Convention on Divorce of 1902, art. 5 no. 2 § 1: "... before the competent authority of the place where the parties have their domicil."
Under the Scandinavian Convention, art. 7 par. 1, this is the main ground for jurisdiction.
42 Restatement § 110.
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attempt has been made to maintain the original system in one of two ways.

One way is this: The last matrimonial domicil of the parties is held competent for the purpose of divorce, even though it has been deserted by the husband. Thus, the ancient construction is superseded, whereby the husband would transfer the matrimonial domicil to his new place. This progress was made in the United States as the earliest step to improve the situation of married women as against offending husbands. The same step has been made in British countries and, as late as 1937, in England. The draftsmen of the recent revision (1940) of the Montevideo Treaty added a similar clause to their text, after the Argentine practices had taken a kindred view. Analogous clauses in the Hague Convention and the Swedish law permit divorce at the former common domicil in case the defendant has deserted his spouse or has left the country after a cause for divorce arose, and, more generally, the Scandinavian Convention gives jurisdiction to the state where both spouses "had their last common domicil and one of them is still domiciled." Traces of this stage of the development are frequent in this country.

43 See 1 Beale § 28.2.
44 Canada: Divorce Jurisdiction Act (1930) 20–21 Geo. V, c. 15 § 2. Australia and New Zealand: see the detailed statements by Read, Recognition and Enforcement 224.
South Africa: Matrimonial Causes Jurisdiction Act, 1939 as amended 1953, s. 1 (x) (a).
46 Treaty of Montevideo, text of 1940, art. 59 par. 2.
47 Cám. civ. 2 Buenos Aires (March 24, 1933) 41 J. A. 420; the law of the matrimonial domicil determines also the question whether the husband has deserted his wife, Cám. civ. 2 (Oct. 7, 1935) 52 J. A. 144.
48 Hague Convention on Divorce of 1902, art. 5 no. 2 par. 1 sentence 3; Sweden: Int. Fam. Law of 1904 with subsequent amendments, c. 3 § 1 par. 1 sentence 2.
49 Scandinavian Convention art. 7 par. 1.
50 In particular, venue exists in the county where the parties lived as hus-
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The other way has been demonstrated by the German procedural code. Where both parties are of foreign nationality, the actual domicil of the husband within the state was sufficient and necessary for suits of either party, without regard to the domicil of the wife, \(^{51}\) whether or not it be recognized elsewhere or for other purposes.

(c) Admission of separate domicil for married women. During the second third of the nineteenth century, the courts in the United States successively began to acknowledge the capacity of a married woman to acquire a separate domicil in a steadily increasing number of situations. Ultimately, even the most conservative courts acceded to this for the purpose of bringing a suit or being sued, for divorce.\(^ {52}\) Consequently, American courts and statutes no longer distinguish, for this purpose, between husband and wife but treat them equally as parties. Despite the diversity of the clauses—that there are seventeen different kinds \(^ {53}\)—in all jurisdictions, suit for divorce can be brought by the plaintiff at his own domicil.\(^ {54}\) Optionally, it can be instituted in most states also at the domicil of the defendant by a non-resident plaintiff.


\(^{51}\) Germany: Code of Civ. Proc. § 606 par. 1; cf. the Netherlands: BW. art. 262 par. 1. However, under the principle of equality of the sexes, the situation has been remedied in both countries; jurisdiction is now based on the residence of either party within the country. Western Germany: Code of Civ. Proc. (as amended by Law of June 18, 1957) § 606 par. 2; the Netherlands: BW. art. 262 par. 1 (as amended by Law of June 14, 1956).

\(^{52}\) 1 Beale § 28.2.

\(^{53}\) 2 Vernier § 81.

the status of its domiciliaries and is thereby entitled to alter the married status of a person domiciled in the state, even though the other party may be domiciled in another. Thus, the marriage status of one spouse is treated in the same manner as the marriage of a married couple was under the older doctrine. In the words of a New Jersey decision of 1934, the husband's or the wife's domicil "carries with it the complete (marital) res or a part of it," so as to give the state court jurisdiction. How can this be? Vreeland may well ask:

"Since the status is that of two persons, and not one, does the wife upon acquiring a new domicil take half of the res with her and leave half with the husband, or does it all stay where it last was, or do they both have a sort of tenancy by entirety in the res . . . ?"

On the practical side, we are made aware by Goodrich that, merely as a matter of logic, the out-of-state spouse would not be affected, but consistency compels the courts to assume further that the divorce destroys also the married status of the non-domiciled party. In counterpoise to this convincing reasoning, we may remark that the Michigan statute allows its courts to divorce, in their discretion, any party who is a resident of the state and whose husband or wife has obtained a divorce in another state, whether the foreign divorce is valid or not. The explanation given by the Michigan Supreme Court is that the courts of both domicils possess jurisdiction to grant divorces only "so far as the party resident within its own limits is concerned; if one proceeds first, there is no legal impediment to the other's taking like steps afterwards."

55 See I BEALE at § 10.8, 110.1.
57 VREELAND 28.
58 GOODRICH 412.
The fact is that the American divorce law has outgrown the doctrine of jurisdiction in rem. From the time that the wife acquired the power to assume a domicil of her own, duality of domicil as a basis for divorce jurisdiction has been possible, and all conceptions born of the ancient idea of marital unity have lost their sense. Domicil has remained an essential prerequisite of jurisdiction only insofar that, according to the best settled rule of this unstable field, no jurisdiction is granted when neither of the spouses is domiciled within the state. The entire question depends upon the extent to which a state chooses to shoulder the responsibility of entertaining divorce suits, or to leave them to other states. Individual legislatures have tried to solve the problem in such a variety of ways as to indicate that there is no logical necessity to follow any of them.

Indeed, no exact analogy to the American doctrine exists elsewhere, and very few foreign regulations approach it. Even these cannot be compared with it without understanding that they deal with parties of foreign nationality, while in this country the law has been developed with American citizens in view and is applied to aliens with very few qualifications. The nearest parallel is afforded by the Swiss law. In Switzerland, jurisdiction is assumed at the instance of a plaintiff of foreign nationality if he is domiciled within the country, irrespective of whether husband or wife is suing and whether the defendant is a Swiss national or domiciliary.61 In France and other countries, the defendant spouse must be a domiciliary, but the husband's domicil determines that of the wife, except where she has been judicially separated.62

61 See Beck 404 no. 37, comment to NAG. art. 7h par. 1.
Uruguay since 1946: Alfonsin, Régimen Internacional del Divorcio (1953) ff.
62 France: Glasson et Tissier, 5 Traité de Procédure Civile (ed. 3, 1936) no. 1609.
Belgium: Novelles Belges, 2 D. Civ. 144 no. 471.
The Hague Convention allows an option for the domicil of the defendant where the parties have not the same domicil. The general rule of reference to the defendant's domiciliary law is also resorted to by the Federal Supreme Court of Mexico in interstate divorces, in case the laws of the Mexican states determine jurisdiction for divorce differently (domicil of the husband, marital domicil, domicil of the deserted wife).

Hence, we find the American law rather isolated. But the French practice sheds some light on one motive that is of universal validity. The French courts have proclaimed the doctrine that they must refuse to entertain jurisdiction over parties who are both of foreign nationality, at least if they have not their common domicil in France. However, in practice jurisdiction is exercised when the defendant does not prove that he has maintained a foreign domicil at which he can be actually sued or, in another version, when there is no foreign jurisdiction in which the suit can be prosecuted without hardship. The desire to avoid what would look like a denial of justice, is a legitimate one among the many impulses for entertaining causes presented.

The reverse side of this obliging attitude was well known in this country from the wave of divorces of Americans in Paris until the decline of the 1920's.

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63 Hague Convention on Divorce of 1902, art. 5 no. 2 par. 1 sentence 2. The provision has prevalingly been understood so as to characterize the domicil of a party generally under his national law. See German RG. (April 5, 1921) 102 RGZ. 82, 84; LEWALD in 1 Strupp's Wörterbuch des Völkerrechts und der Diplomatie 469.


66 GLASSON ET TISSIER, supra n. 62.


The wider such "hospitality," the more conflicts are likely to appear. Conflicts are not even confined to that diversity of national and domiciliary divorce laws that has been receiving paramount attention in Europe. The different views, for instance, regarding the wife's domicil have the result that a court of Uruguay, predicing jurisdiction upon the matrimonial domicil, will divorce an American citizen domiciled in Montevideo from his wife who lives in the United States, while a New York court, if the wife lived there, would probably consider her domiciled in the state and protected by certain special rules against the Uruguayan decree. A series of Canadian decisions has invalidated decrees rendered in this country because the finding of domicil was in contradiction to the Canadian doctrines. Where a Swiss court, assuming jurisdiction because of her separate Swiss domicil, had divorced a woman of Belgian nationality, a Belgian court denied recognition to the decree; not even for the purpose of jurisdiction could a Belgian wife have a domicil separate from her husband. Well known is the number of divorces unrecognized within the United States despite the Full Faith and Credit Clause of the Constitution, and in the second Williams case, the U.S. Supreme Court has expressly confirmed that a divorce decree obtained at the domicil (for purposes of divorce court) of one spouse need not be recognized in another jurisdiction denying that domicil under its own qualification.

Residence is sometimes taken as a substitute for domicil, particularly for the purpose of jurisdiction for limited divorce; as such it may suffice.

70 See infra p. 533, n. 143.
We have now to investigate the additional rules that restrict the assumption of jurisdiction.

3. Restrictions on the Assumption of Jurisdiction

It is a comforting experience that modern legislatures have felt the need to limit their own domiciliary jurisdiction over divorce, partly for the express purpose of avoiding at least certain conflicts with other jurisdictions, partly with less distinct intentions to the same effect. However, these additional requirements are of a very different nature in this country from those on the European Continent.

(a) Additional requirements. In the United States, the prerequisite that one party or the plaintiff be domiciled in the state at the time of the commencement of the action, is usually accompanied by further qualifications. The statutes have varied and mixed the requirements so "as to defy classification," Vernier attests.\(^73\) The author must confess that he has not succeeded so far in completely understanding the meaning of several such combined versions and would most welcome a thorough discussion of all these clauses by a more competent writer. It seems that there are three main statutory clauses:

Sometimes it is required that the parties have, at some time before suit, both lived in the state. This is obviously derived from the idea of the matrimonial domicil, upon return to which either spouse is entitled to sue the other.

A considerable number of various clauses emphasize the importance of the place and the time where the cause of action accrued. Of this group, certain are important as direct measures to reject petitions evasive of foreign divorce law and will be considered separately.

\(^{72}\) With respect to the United States see 1 BEALE § 10.8, § 110.5.

\(^{73}\) 2 VERNIER § 81 and p. 107.
In their vast majority, the statutory clauses require a definite period of "residence" of that party whose domicil is decisive, previous to the filing of the action; almost always it is provided or understood that this period should immediately precede the suit. The period is from six weeks to two years in particular states and varies also in different cases. It may make a difference what the cause for divorce is. In linking the ideas just mentioned with the minimum residence requirement, the length of time is declared unnecessary or reduced, if the party, or both parties, lived in the state before, or lived there at the time when the cause of action arose, or if the cause occurred in the state, etc. A typical formula is presented in the Uniform Annulment of Marriage and Divorce Act of 1907, whose first provision gave jurisdiction:

"When, at the time the cause of action arose, either party was a bona fide resident of the state, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced for any cause other than adultery or bigamy, unless one of the parties has been for the two years next preceding the commencement of the action a bona fide resident of this state." 74

As this wording shows, no exception is made in the case of both parties being domiciled in the state at the time of suit. 75 Similarly, in the great majority of the statutes no particular exception seems to be intended to that effect, although the requirement of residence may be released in related situations, such as where the defendant is personally served. 76 There

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74 Proceedings of the Seventeenth Annual Conference of Commissioners on Uniform State Laws, Draft of an Act to Make Uniform the Law Regulating Annulment of Marriage and Divorce (1907) § 8(a).
75 Statutes formed after this model speak expressly of both parties.
76 See, for instance, Iowa Code (1954) § 598.3 (defendant resident and personally served).
are, however, a few statutes which state that actual domicil is sufficient, if both parties are domiciled in the state.\textsuperscript{77}

Disregarding the labyrinth of the statutory details, we may take it that the restrictions of the last type counter-balance the ruthlessness of divorce jurisdiction at the domicil of one party by qualifying this domicil in a possibly very effective manner. The requirement of residence previous to the suit is generally understood as meaning domicil and, in most jurisdictions, actual presence in the state as well, although a temporary absence is innocuous.\textsuperscript{78} The lapse of time guarantees that the individual has become a participant in the life of the state and serves as evidence that the change of abode includes a serious change of domicil. If applied to the case where both parties have come to the state, the requirement is intended to foil evasive demands as well as to protect one spouse against the other's arbitrary choice of the forum. In both applications, the requirement is usually held to be mandatory.\textsuperscript{79}

Unfortunately, the great purpose of this restriction has often been forgotten. It is buried under the maze of confusing details accumulated in the various statutory experiments. Moreover, two defects are rightly much criticized. While some states formerly demanded a residence of five years, an unjustifiably long period, others are content with three months, or, since the famous competition of Nevada with Idaho and Florida, with six weeks. It has become the only purpose of such a requirement to benefit the local hotels and shops. The other evil is lax enforcement of the normal resi-

\textsuperscript{78} I. BEALE § 10.8.
\textsuperscript{79} Hetherington v. Hetherington (1928) 200 Ind. 56, 160 N. E. 345.
dence period; strange stories have been told in the literature in this respect. 80

Could these faults be corrected, this dependence of jurisdiction on a residence period would be calculated greatly to inspire legislation in other countries where thus far a minimum period of residence has only occasionally been provided. 81

(b) Conformity to National Law. In Europe, while as a rule jurisdiction over foreigners is taken at the matrimonial domicile or in some countries at the domicile of one party, measures are taken to avoid collision with the national law.

The Hague Convention. The Hague Convention, 82 followed by the statutes of Sweden and Poland, 83 has recognized, in special clauses, the claim for exclusive jurisdiction of divorce, which today is asserted by such countries as Soviet Russia, Hungary, and Poland. 84 If the jurisdiction of a state over petitions for divorce or judicial separation is exclusive for its nationals, such jurisdiction is recognized by the other states as the only one competent. The Belgian courts observe the same restraint in the absence of an enacted rule and without being bound any longer by the Hague Convention. 85

81 Poland: Law of 1926 on interlocal private law, art. 2 (one year for change of personal law).

Sweden: Law of July 8, 1904, as amended, c. 7 § 2 par. 2 (one year in case of Swedish spouse); c. 7 § 4a (two years for certain foreign fiancés).

France: the now superseded decree of Nov. 12, 1938, requiring a police permit for at least a year's residence for recognizing the domicile of a foreigner (supra p. 152) evidently was applicable to divorce.

82 Hague Convention on Divorce of 1902, art. 5 no. 2 par. 2.
83 Sweden: Int. Fam. Law of 1904 with amendments, c. 3 § 1 par. 2.

Poland: Law of 1926 on international private law, § 17 par. 4.

84 See supra p. 426.

Germany. The German law goes even further. German courts may not exercise jurisdiction in divorce cases where the national country of the husband would not recognize the resulting judgment because of lack of jurisdiction of the German forum. The German provision prescribes that, if both spouses are foreigners, action for divorce may be brought at the forum, provided that the domestic court has jurisdiction also according to the laws of the state of which the husband is a national.\textsuperscript{85a} According to one opinion, this text requires that the national country should recognize also the specific court where the suit is brought as having jurisdiction.\textsuperscript{86} Better authorities, however, declare it sufficient that any German court, this or another, be considered endowed with jurisdiction in the eyes of the national law, that is, that German courts have jurisdiction in the international sense.\textsuperscript{87}

The prohibition does not extend to the case where the resulting decree of divorce would not be recognized on another ground, for instance, because of lack of reciprocity or because of service of the defendant by publication.\textsuperscript{88}

This prohibition, however, covers many more cases than just those of exclusive jurisdiction mentioned above. It extends to all situations where one or both of the foreign spouses are domiciled in a country that does not recognize the effectiveness of the German decree within its borders.

\textsuperscript{85a} Germany: Code of Civil Procedure, § 606 b no. 1; similarly Bulgaria: Family Law of 1949, art. 59 par. 2.
\textsuperscript{86} RG, (Nov. 21, 1929) 126 RGZ. 353, JW. 1930, 1309; KG. (Oct. 25, 1937) JW. 1937, 3249, but cf. Massfeller, JW. 1936, 3579.
\textsuperscript{87} Schöndorf, 75 Jherings Jahrb. 66; Rühl, JW. 1930, 1310; 3 Frankenstein 505; Pagenstecher, 11 Z.ausl.PR. (1937) 480.
A \textit{via media} is followed by Stein-Jonas-Schönke, 2 ZPO. (ed. 17, 1951) § 606 III suggesting to ask the foreign law whether it requires the jurisdiction of a specific court or that of any German court.
\textsuperscript{88} RG, (Nov. 21, 1935) 149 RGZ. 232; cf. KG. (Dec. 19, 1932) IPRspr. 1932, no. 76. On the application of the provisions to religious divorce forms, see below, p. 413. On the case of subjects of a country where divorce cannot take place except by bill of parliament, see Niboyet 506 no. 417; \textit{ibid}. 744 no. 635; 2 Bergmann 79; Rabel, 5 Z.ausl.PR. (1931) 262.
Similarly, exclusive jurisdiction has been claimed by many American cases for the courts of the domicil, and likewise by Switzerland, which does not recognize a foreign divorce of two Swiss citizens, one of whom is domiciled in Switzerland. Before assuming jurisdiction to divorce an American husband, a German court must therefore ascertain, among other points: (1) where the husband is domiciled, under the American definition of domicil, requiring in particular the animus manendi in the American sense; (2) if he thus is found to be domiciled in Germany, whether the American conflicts rule recognizes the jurisdiction of the domicil, and as of what time.

This subject needs more discussion in connection with renvoi.

Switzerland. Still broader is the scope of the former Swiss and Hungarian and the Czechoslovakian provisions that require not only the jurisdiction but also the decree to be recognized by the national law, insofar as the acting court is able to predict. Also, the Court of Appeals in Zurich was denied jurisdiction, because personal service on

89 BG. (Oct. 10, 1930) 56 BGE. II 335; BG. (May 13, 1938) 64 BGE. II 74, 78; cf. for more difficult situations, Beck, NAG. 363 nos. 112-115.

90 Cf. in particular RG. (Nov. 21, 1929) 126 RGZ. 353, IPRspr. 1930, no. 376.

91 Law on Civil Status of Dec. 24, 1874, art. 56, now superseded by NAG. art. 7h par. 1.

92 Hungarian Marriage Law of 1894, § 116: ... if the judgment has force in the state whose citizens the spouses are; though the new Marriage Law of 1952 lacks a comparable provision, the requirement of enforceability has been maintained as a principle of public policy, Torzsay-Biber, "Problems of Private International Law in Matrimonial Actions in Hungarian Courts," 3 Highlights of Current Legislation and Activities in Mid-Europe (1955) 15.

92a Czechoslovakian Code of Civil Procedure § 612 par. 2 sentence 2, requiring recognition by the national law of both spouses.

93 App. Zürich (Jan. 11, 1936) Bl. f. Zürich. Rspr. (1936) 359; the treaty is that of Nov. 2, 1929, App. Zürich (1937) 38 Bl. f. Zürich. Rspr. (1939) 78 no. 36 denies jurisdiction to the wife, because, under the applicable Polish law, she shared the domicil of her husband who lived in Antwerp, Belgium. Similarly, in the case of a wife suing her British husband domiciled in Canada, 37 SJZ. (1940-1941) 31 no. 5.
the defendant was impossible and German courts, under the German-Swiss treaty on mutual recognition and execution of judgments, therefore, would not have recognized the decree.

There is some uncertainty in applying either of these self-imposed restrictions, due to the difficulties of knowing exactly the position of the foreign law. The possibility that the national court in reviewing the decree will even re-examine the jurisdictional facts further aggravates the problem. The Swiss law was therefore significantly changed in the wording of its provision. Former article 56 of the Swiss Law on Civil Status required proof that the future judgment would be recognized in the homeland. As this was found to be an impossible task, the actual text (NAG. art. 7h par. 1) demands proof only that the Swiss jurisdiction would be recognized. But it is not clear whether by this change the evidence has been made easier to produce. Once, a Swiss court tried to consult the Supreme Court of the United States on the "American" divorce law but was informed that neither courts nor administrative agencies in this country are prepared to give advice. At any rate, the court can only guess at the chances of recognition, if it does not want to refuse to assume jurisdiction in virtually every case, and experience shows that no court wants that.

In some cases, it may be suspected that Continental courts

94 Examples regarding American citizens: Bez. Ger. Zürich (June 18, 1930) 27 SJZ. (1930-1931) 87, no. 14 (wife under medical treatment in Zürich, intending to stay "permanently" in order to study there. Jurisdiction was granted in view of the husband's submission to the court and the certainty that the decree would be recognized in Minnesota). Same court (Nov. 3, 1931) 28 SJZ. (1931-1932) 259 no. 217 (the wife paid taxes and attended classes at the University. The husband in Boston consented to the separate domicile. The divorce ground would also be recognized in Massachusetts). In both cases the assumption of domicile was questionable, but the husband's consent to its establishment would be termed decisive. The same observations are true for a case of British subjects, Bez. Ger. Zürich (Oct. 25, 1935) 32 SJZ. (1936) 202, no. 41.

95 Burckhardt, 4 Schweizerisches Bundesrecht 142 no. 1674 II.
have too lightly presumed American and especially English willingness to recognize a domicil at and, therefore, jurisdiction of, the forum.

4. Religious Divorce

When a court applying the rule of nationality finds that under the national law of a party divorce can be pronounced only by an ecclesiastical authority (as in the countries influenced by the Greek Orthodox Church and by Islam), the court faces the problem whether it may exercise jurisdiction or must refrain from it. The German courts feel prohibited from assuming jurisdiction by the provision that jurisdiction must be in accordance with the national law of the husband, for a national law giving exclusive powers to the churches is deemed to exclude any judicial activity of temporal tribunals, even abroad.

In France, jurisdiction was likewise denied, especially by the Supreme Court in the famous case of Levinçon, a Russian Jew. Since the Russian law at the time left divorce proceedings to the religious authorities, a French court was held unable to apply the national law of the party in its true form without injury to the religious feelings of the parties. This example was followed by many other French decisions, most of which had to deal with subjects of the former Russian parts of Poland and Lithuania.

96 KG. (Dec. 19, 1905) 14 ROLG. 241, aff'd RG. (Oct. 4, 1906) 19 Z.int.R. (1909) 263; RG. (Feb. 21, 1925) Clunet 1925, 1055. This is also the meaning of the Hague Convention on Divorce, Actes de la Troisième Conférence de la Haye (1900) 211. An analogous position was taken in Switzerland by the Trib. Zürich (Sept. 22, 1936) 34 SJZ. (1937-1938) 313 no. 591, although in the instant case jurisdiction was assumed because the marriage was void under the national (Palestine) law.


In France, however, some courts and writers have expressed contrary opinions, mainly because of the hardship imposed on the parties but also because of two legal arguments. First, public policy is invoked on the ground of the declared neutrality of the French state toward the churches and the impropriety of granting more prerogatives to foreign churches than to its own. Second, religious divorce rules are analyzed as composed of substantive rules, concerned with the permissibility and the causes of divorce, and procedural rules giving way in a French tribunal to the French rules of procedure. A recent Belgian critic of the dominant doctrine remarks that neither the consistories of the Orthodox Church nor the rabbinate tribunals use any formule sacrée, prayers or deprecations; they exercise purely judicial functions. Courts of other countries, too, are divided on the question.

in Belgium: Trib. civ. Bruxelles (June 25, 1930) Pasicrisie 1931.3-36; see also Poulet 443 no. 378; Trib. civ. Bruxelles (Dec. 6, 1939) J.d.Tr. 1940, col. 120 (Spanish Catholics).

Trib. civ. Seine (June 11, 1921) Clunet 1921, 525 (Greek Orthodox Russians); Trib. civ. Seine (Dec. 24, 1921) Clunet 1922, 177 (Russian Jews).

See in this sense BARTIN’s note to the decision of Cour Paris (March 17, 1902) D.1903.2.49 and (implicitly) Trib. civ. Seine (Feb. 25, 1937) Clunet 1937, 523 (Lithuanian Jews); PILLET, 2 Mélanges 359, 373, NIBOYET 367 no. 752 and 5 Traité 1938 (separation of Spanish Catholics); Trib. civ. Toulouse (June 8, 1938) Revue Crit. 1939, 105 (Russian-Polish Jews); Cour Paris (Jan. 9, 1943) S.1943.2.29 with affirmative note of NIBOYET (separation of Spanish Catholics).


For denying jurisdiction: Trib. civ. Bruxelles (June 25, 1930) Pasicrisie 1931.3-36 (Spanish Canon marriage—no divorce possible); App. Bruxelles (July 9, 1932) Revue 1933, 511; Trib. civ. Bruxelles (June 25, 1930) Clunet 1932, 487, 489; Trib. civ. d’Anvers (March 1, 1939) Pasicrisie 1939.3-76; also Poulet 443 no. 378; VAN HILLE, 65 Revue Dr. Int. (Bruxelles) (1938) 295; DE VOS, 1 Problème 165.

For exercising jurisdiction: Trib. Roma (June 22, 1898) Giur. Ital. 1898, I, 2, 647 (separation of Spanish Catholics married according to canonic formalities); for denying jurisdiction: App. Roma (June 6, 1899) La Legge 1899.2.45.
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The role of the religious element under the national law, however, may be less important. The Austrian Civil Code prescribed that Jews are to be divorced in court but that in the case of a mutual divorce agreement a preliminary attempt at conciliation must be made by the priest or teacher.\(^{103}\) The Marriage Law of 1836 of the Warsaw District required as a preliminary to court proceedings a certificate of a rabbi on the ecclesiastical aspect of the case.\(^{104}\) French and German courts have considered such regulations no obstacle to litigation at the forum.\(^{105}\) They find it more difficult to adjust their own procedure to the singular presuppositions of the foreign laws. But some courts have even agreed to recognize the activities of local religious authorities corresponding to the foreign customs.\(^{106}\)

\(^{103}\) Allg. BGB. §§ 133, 134.

\(^{104}\) Marriage Law, Kingdom of Poland, art. 189, as generally interpreted. Although art. 196 of the Code required ecclesiastical jurisdiction also for Catholics and Protestants, the German LG. Bremen (May 8, 1934) JW. 1934, 2353, IPRspr. 1934, no. 55, concluded from the Polish international private law of 1926 that jurisdiction should be assumed, and tried to apply the rules of both these churches to a mixed Catholic-Protestant marriage.


Germany: RG. (Feb. 15, 1926) 113 RGZ. 38; RG. (May 20, 1935) 147 RGZ. 399; KG. (Dec. 11, 1933) JW. 1934, 619, IPRspr. 1934, no. 50 (Russian-Polish Jews), overruled see infra n. 106.

Of Greek Jews, the Greek laws do not speak; cf. CARABIBER, 6 Répert. 430 nos. 95, 96; but in view of the entirely judicial and temporal procedure in Greek legislation following Law no. 3222 of August 28-30, 1924, the Cour Paris (Dec. 29, 1925) Revue 1929, 258 has granted jurisdiction.


The sacrifices involved in such concessions to foreign claims are admirable instances in the development of international cooperation. But they originated from such a superstitious belief in the legitimacy of the nationality principle, that the most unreasonable of all its claims, that for exclusive jurisdiction over emigrated married couples, was not questioned. Foreign law must not be recognized, unless it is fit for international use.

III. COMMON SCOPE OF THE *Lex Fori*

To evaluate the domain of choice of law in the countries observing the personal law, it is necessary to go beyond the question of jurisdiction and to realize that important questions are everywhere governed exclusively by the law of the forum.

1. Procedure

Procedure, of course, is the concern exclusively of local rules. The law of the forum determines the necessity of contested and the permissibility of uncontested proceedings, as well as the acts constituting procedure.\(^{107}\) Provisional decrees for separate residence or maintenance rendered during a divorce suit also follow the procedural rules.\(^{108}\)

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\(^{107}\) Deviating from this principle, the Appeal Court of Paris in Affaire Chiger, Cour Paris (April 30, 1926) Clunet 1926, 943, Revue 1927, 243 declared that a French court could appropriate the power to determine causes for divorce in its discretion, a power provided for by the Soviet Russian law of the time, with respect to a controversial divorce between Soviet Russian nationals. This decision was much criticized; cf. BARTIN, 2 Principes 302, 303.

In Greece, the requirement of a previous conciliation is recognized as a procedural question, 20 Zausl.PR. (1955) 151.

\(^{108}\) Hague Convention on Divorce, art. 6; Poland: Law of 1926 on international private law, art. 17 par. 4 sentence 2; for comment, see KAHN, 2 Abhandl. 360 ff.
2. Decrees

The law of the forum controls the form in which a divorce is granted, if at all, including the choice of the persons or authorities entrusted with granting divorces.

In certain countries, divorce is granted by the king or an administrative authority,\(^{109}\) in others by the parliament,\(^{110}\) often by ecclesiastical tribunals,\(^{111}\) or it is a private agreement between the parties either with or without some religious\(^{112}\) or public control.\(^{113}\) Whatever form divorce has in a country for its own subjects, is also permitted between foreigners. Divorce, conversely, if allowed at all, must not be granted to foreigners according to formalities nor by persons, other than those prescribed for subjects of the forum. Hence, religious and private divorces are out of the question in the United States,\(^{114}\) as well as in Western and Central Europe. French and German courts annulled scores of divorce decrees rendered in their territories by religious authorities, especially in cases of Czarist Russians of various denominations, Polish Jews, members of the Orthodox

\(^{109}\) Denmark, Norway.


\(^{111}\) Greece (since Law no. 3222 of 1924 for Mohammedans only and perhaps Jews). With respect to limited divorce: Italy, Spain, and Colombia.

\(^{112}\) Jewish law as chiefly in use in Israel and formerly in some eastern European countries. The rabbis assist in varying degrees, but constitutive is the offer and acceptance of the “Gueth”; see the observations of HAIM H. COHN, Advocate General of Israel, Revue Crit. 1950, 559. The old Austrian and Polish law had modified this principle, see supra p. 446.

\(^{113}\) Mussulman countries excluding Turkey.

\(^{114}\) Chertok v. Chertok (1924) 208 App. Div. 161, 203 N.Y.S. 163 (divorce decree by the rabbi of Brooklyn granted to a husband in New York against his wife living in Russia, held invalid despite recognition by the Russian Government); In re Spiegel (S.D.N.Y. 1928) 24 F. (2d) 605.
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Church, and others. For instance, a divorce of a Yugoslav and a Russian of Greek Orthodox faith by the Orthodox diocesan council in Paris was annulled by the Tribunal de la Seine in 1930.

This, of course, is a purely negative proposition, leaving unsolved the dilemma whether such persons should be granted divorce according to the formalities of the forum or denied divorce on the grounds of lack of jurisdiction because their personal law requires religious proceedings.

Exceptions to the principle of exclusive municipal formalities are very rare. Even a consulate of a foreign power is


Germany: Law of Jurisdiction of 1877 (Gerichtsverfassungsgesetz) RGBI. 1877, 41, § 15 par. 3 declares that the exercise of ecclesiastical jurisdiction in temporal matters is without civil effect. Though this provision has been abrogated by the Law of the Federal Republic of Oct. 1, 1950, the principle persists (RAAPE, IPR, 293). The rule applies especially to marriage and divorce: RG. (April 21, 1921) 102 RGZ. 118; RG. (Feb. 15, 1926) 173 RGZ. 41; KG. (Dec. 16, 1920) Warn. Rspr. 1921, no. 35; RG. (Feb. 21, 1925) Warn. Rspr. 1925, no. 133; KG. (Dec. 21, 1931) IPRspra. 1931, no. 143; KG. (March 21, 1932) IPRspr. 1932, no. 77 (privilegium Paulinum recognized by the Marriage Law of Warsaw (Kongresspolen) of 1836, art. 207); OLG. Kiel (Nov. 30, 1926) 91 Schlesw. Holst. Anz., N.F. (1927) 145 (repudiation under the law of Russian Jews); LG. Berlin (Oct. 19, 1937) JW. 1938, 2402 (sending of divorce bill by a Russian Jew from Germany to Russia ineffectual under German law); OLG. München (Nov. 21, 1949) StAZ. 1950, 130; L.G. Mannheim (March 17, 1953) JR. 1955, 61.

Switzerland: Justice Dept., BBl. 1937, III 141 no. 9 (divorce by the Council of the Russian Orthodox Church in France, invalid in France and Switzerland).


For decisions to the contrary see supra n. 106.

116 Trib. civ. Seine (June 2, 1930) Clunet 1931, 1078.

117 See supra pp. 444-447.

118 For Russian subjects of Armenian origin and faith, the Rumanian Cassation Court recognized a divorce rendered by the Bishop of the Gregorian
not usually allowed to grant divorces; apparently, the only exception was contained in the German-Russian Treaty of October 12, 1925, which permitted Russians married before a Russian consulate in Germany to divorce by mutual agreement in accordance with Soviet lack of formalities but with recordation thereof at the same or another Russian consulate in Germany.\(^\text{119}\)

Domestic law also defines the wording of a divorce decree. German courts have often considered, however, whether they should insert in a decree divorcing foreign parties the statement required by the German Civil Code declaring which party is in fault. The Reichsgericht finally decided that the judgment should omit this statement only when it is either prohibited by or would be of no significance under the personal law.\(^\text{120}\)

3. Validity of the Marriage Prerequisite

Apart from some confusion between divorce and annulment,\(^\text{121}\) a universal prerequisite for divorce is that the marriage be considered valid at the forum or, if voidable, at least provisionally valid. When, in the eyes of the court, the marriage never existed or has already been dissolved, there is no

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\(^{119}\) See Final Protocol of the German Russian Treaty of Oct. 12, 1925, German RGBI. 1926. II 60 at 82.

\(^{120}\) RG. (April 18, 1918) Warn. Rspr. 1918, no. 189; RG. (Feb. 24, 1928) Warn. Rspr. 1928, no. 64. KG. (March 13, 1931) IPRspr. 1931, no. 81; KG. (June 27, 1932) IPRspr. 1932, no. 86, etc., confirmed as steady practice, KG. (May 30, 1938) JW. 1938, 2750; and after the Matrimonial Law of 1938 went into effect, see KG. (Aug. 11, 1938) referred to in JW. 1938, 2750 n. 1. Cf. for Dutchmen, KG. (April 9, 1934) IPRspr. 1934, no. 47, but also OLG. Düsseldorf (Nov. 21, 1933) JW. 1934, 437, IPRspr. 1934, no. 48. Correspondingly, Switzerland: BG. (June 13, 1912) 38 BGE. II 43 advised Swiss courts to state culpability in the case of German spouses, and OG. Solothurn (June 27, 1949) Schw. Jahrb. 1950, 278, omitted the time limited prohibition of remarriage against the spouse guilty of adultery.

\(^{121}\) See \textit{infra} p. 576.
subject matter for the proceeding to dissolve the marriage tie. On the other hand, if the marriage is recognized in the forum, it is immaterial whether it is recognized in the country to which the parties belong.

A significant application of the principle is the case of a so-called *matrimonium claudicans* (limping marriage) celebrated either at the forum or abroad under circumstances warranting its recognition as valid at the forum, which is considered invalid under the personal law because of formal or intrinsic defects. If, for instance, without a religious ceremony a Greek married a French woman in Paris before a civil official, the marriage, valid and dissoluble in France, would be null and therefore indissoluble in Greece. In such cases, the countries that ordinarily take the personal law into consideration disregard it. When the parties marry within the forum, consistency and dignity of the jurisdiction require that the forum stand upon the validity of the marriage.

Thus, a marriage annulable in the home country of the party involved may be dissolved in the country of its celebration, each court taking the only way available for the termination of the marriage ties.

The German courts have made it clear that in these cases

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122 Cf. J. Donnedieu de Vabres 450.
Germany: RG. (Dec. 17, 1908) 70 RGZ. 139, 143; RG. (Nov. 16, 1922) 105 RGZ. 363 (Czarist Russians married in conformance with temporal formalities in Germany); RG. (Oct. 1, 1925) JW. 1926, 375, Warn. Rspr. 1926, no. 15 (Orthodox Greek married to a Norwegian girl in Norway, the marriage being recognized in Germany under the law of the place of celebration, E.G. art. 11 par. 1 sentence 2); OLG. Dresden (Nov. 9, 1933) JW. 1934, 1740, IPRspr. 1934, no. 46; RG. (Nov. 7, 1935) Warn. Rspr. 1935, no. 192; KG. (Jan. 14, 1937) JW. 1937, 961; LG. Berlin (Nov. 2, 1937) JW. 1938, 395, Clunet 1938, 824; and other decisions, see infra n. 124.
the law of the forum alone is to be applied and the personal law entirely ignored.\textsuperscript{124} It is not feasible, for instance, to apply to the divorce by analogy foreign rules of separation. The cases also have required adjustment of the ordinary jurisdictional rules \textsuperscript{125} to meet the needs of the party interested in dissolution rather than annulment of the marriage.

In this latter respect, an analogous doctrine developed in England in cases \textit{ex misericordia}. In \textit{Stathatos v. Stathatos},\textsuperscript{126} a Greek, having married an Englishwoman at a registry office in London and taken her to Athens, sent her back to England; at his instance, the marriage was declared null in Athens, while it was undoubtedly valid in England. In this and another case,\textsuperscript{127} English courts affirmed their divorce jurisdiction despite the lack of an English marital domicil.

\textsuperscript{124} RG. (Dec. 17, 1908) 70 RGZ. 144, cited \textit{supra} n. 123; RG. (May 4, 1933) JW. 1933, 2582 (the decisive passage was published by Lewald, Revue Crit. 1934, 663); KG. (Dec. 11, 1933) JW. 1934, 619, IPRspr. 1934, no. 50; KG. (April 20, 1936) JW. 1936, 2464; LG. Berlin (Nov. 1, 1937) JW. 1938, 395; LG. Berlin (Feb. 3, 1938) JW. 1938, 1273; OLG. Königsberg (Feb. 1, 1937) Recht 1938, 22 no. 194; LG. Frankfurt/Main (Dec. 6, 1950) IPRspr. 1945-1950 no. 66; LG. Berlin (March 15, 1954) JR. 1955, 60. This theory was advocated by Lewald III no. 158, and Revue Crit. 1934, 661; Schöndorf, 75 Jherings Jahrb. 53, 74; Ê Frankenstein 233 n. 189, 3 ibid. 425. \textit{Contra:} Raape 401 and IPR. 285; also Hans. OLG. (Oct. 25, 1933) JW. 1934, 242, 16 Hans. RGZ. (1933) B. col. 683, Revue Crit. 1934, 661. See on the broader problem of “limping marriages,” \textit{supra} pp. 251-252.


\textsuperscript{125} According to the Hague Convention on Divorce, art. 5 no. 2 \textit{in fine}, the foreign jurisdiction exists (even in the case of an exclusive jurisdiction claimed by the national courts) over a marriage with respect to which action for divorce or separation cannot be brought before the competent court of the national state.

Sweden: Int. Fam. Law of 1904 with subsequent amendments, c. 3 § 1 par. 2 final words. German OLG. Karlsruhe (June 13, 1933) JW. 1933, 1669.

\textsuperscript{126} [1913] P. 46.

\textsuperscript{127} Montaigu v. Montaigu [1913] P. 154.
This doctrine was later overruled in England. The main remedy to free the parties from a marriage void in the homeland was then usually found in the recognition extended by English courts to any annulment decree that might be granted by the competent authority of the husband's domicile. The same attitude has been recommended to the courts of Canada, and a similar position was taken in a Scotch case, in which a marriage with a Hindu was held valid in Scotland, though invalid in India. The Scotch court denied the application of the wife, who was living in Scotland, on the ground of lack of jurisdiction, although the court knew that she would be unable to prosecute litigation in India. This unsatisfactory proposition, where at the instance of the foreign party a foreign annulment is recognized to the disadvantage of the wife while she is denied on a purely formal ground the right to divorce, has been remedied recently by legislation. An exceptional domicile of the wife for the purpose of divorce is now recognized in England, Scotland, Australia, and New Zealand.

IV. CHOICE OF LAW

1. Lex Fori

United States. The principle in the United States is that a divorce court applies the law of the forum to determine

129 Unanimous opinion following the Salvesen case, infra p. 585.
132 England: Matrimonial Causes Act, 1950, s. 18 (1) (b); Scotland: Law Reform (Miscellaneous Provisions) Act, 1949, s. 2. Australia and New Zealand, supra, n. 38.
whether divorce is admissible, as well as whether the party's conduct or other event complained of constitutes a ground for divorce.¹³⁴

This system was shared, a century ago, by general European theory and practice. Savigny¹³⁵ supported the system by the belief that divorce law is imperative in nature, because it expresses moral conceptions purporting to be of absolute value. Many writers and courts advocated the same idea.¹³⁶ This doctrine slowly disappeared, however, until at the Hague Conference, it was found to have almost no proponents.¹³⁷

In this country, application of the *lex fori* seems to have been justified by the merely statutory nature of divorce, the effect of statutes being believed to be necessarily territorial—a theory going clearly back to such fathers of territorialism as D'Argentre and Ulricus Huber. It has also been advanced that divorce remedies are special or equitable and therefore cannot be exercised except by the courts of the state establishing the remedy. Sometimes there is invoked the general motivation for territorialism that, "*res*" being located within the state, the state's interest prevails. It may be hoped that nowadays nobody cares seriously for all these artificial and worn-out assertions.

¹³⁴ Stewart v. Stewart (1919) 32 Idaho 180, 180 Pac. 165; Restatement § 135.
¹³⁵ Savigny § 379 no. 6.
¹³⁶ Burge (ed. 2), 3 Colonial and Foreign Law 923; Laurent, 5 Principes no. 185; 1 Brocher 297; Olivi, Revue 1885, 55; Asser-Cohn 67, French tr. by Rivier (1884) 116; Unger, 1 System 193 § 23 n. 126. This was the prevailing opinion in Germany before the Civil Code, see RG. (June 19, 1883) 9 RGZ. 191; Niemeyer, Positives Intern. Privatrecht §§ 99, 100, and in 1 Z.int.R. (1891) 361, 2 Z.int.R. (1892) 473, 5 Z.int.R. (1895) 167, 168 n. 3; in Austria, see OGH. (March 27, 1935) 8 Jahrb. Höchst. Entsch. nos. 1564, 1565; OGH. (May 27, 1935) 8 Jahrb. Höchst. Entsch. no. 1041; Walker 722, 728, and 1 Klang's Kommentar 324; in Czarist Russia, see Mandelstam, Clunet 1902, 490; in former Turkey, see Clunet 1903, 86, 96.
¹³⁷ The learned Norwegian delegate Beichmann, Actes de la Deuxième Conférence de la Haye (1894) 73, was the main advocate of the *lex fori*, but presented it as identical with the law of the domicile. Likewise, 1 Bar § 173.
Neither are we any better served, when it is argued, especially in the Restatement, that "the law of the forum governs the right to divorce not because it is the place where the action is brought but because it is the domicil of one or both of the parties." 138 Story and his contemporaries could properly propose such a theory with respect to the matrimonial domicil, whereby they had simply the husband's domicil in mind. To identify the law of the forum with that of the domicil is correct when divorce is rendered exclusively at the matrimonial domicil. The predication is manifestly wrong so soon as there are two domicils of the parties.

The reasonableness of the rule appears never to have been questioned. This alone, the unvarying application of the local statute in every American court, makes it clear that the principle of territorialism with its strong roots in the past common law has in fact here found one more expression. The spirit of independence and the need to sever an immigrant or settler from his former associations may have contributed to perpetuate this indifference to the outside world. As the story goes, 140 it was almost half a century before the potentialities of the Nevada statute of 1861, with six months' residence, for affording easy divorces on a large scale was grasped by a former New York attorney. These early legislations were simple documents of pioneers. If so, we may wonder why under changed circumstances the application of foreign divorce law never has been taken into consideration, while the choice of law problem is so prominent in Europe and while also in this country the main purpose of conflicts law is perfectly acknowledged as being the achievement of uniformity in establishing the solution of a legal question.

138 Restatement § 135 comment a.
139 STORY § 229 a.
irrespective of the forum. There may be, indeed, no positive reason at all but only a negative explanation for this result. At any rate, we cannot overlook the fact that the actual doctrine has no clear conceptual basis and that this lack of foundation has greatly contributed to the much deplored confusion and anarchy in this field.

Other countries. The law of the forum is openly applied to any person in Soviet Russia and in some Latin American countries, upon the basis of the territorial principle. Also in Denmark, Norway, and Iceland, traditionally the law of the forum is applied, although the writers doubt whether it is not rather the law of the domicil that is applied, because usually divorce is not granted unless both parties are domiciled within the forum or both parties had their last domicil and one continues to live, within the country. It might be advisable to construe soberly all these rules on the basis of territorialism and lex fori rather than in terms of the principle of domicil. The manner in which specific

141 See supra p. 94.
142 MAKAROV, Précis 396 attests a uniform doctrine; LUNZ 304.
143 E.g., see the declaration of the Colombian delegation in signing the Código Bustamante, 86 League of Nations Treaty Series (1929) 374; Venezuela: Cass. (June 15, 1914) Memoria 1915, 171, 172; Cass. (Feb. 21, 1921) Memoria 1922, 162, 163. Uruguay: By virtue of art 2401 C. C. a court has jurisdiction only if Uruguayan law is applicable; this is the case if one of the spouses is domiciled within the country, ALFONSIN, Régimen Internacional del Divorcio (1953) 133 ff. The recent law of Brazil (1942) does not mention separation in Brazil, but includes it in the "domiciliary" law applicable according to Lei de Introdução art. 7. ESPINOLA, 8-B Tratado 1066 asserts that in the case of different domicils, both laws must be attended concerning permissibility and causes of separation.
144 Denmark: BORUM, 122; BORUM and MEYER, 6 Répert. 214 no. 8; ibid. at 220 nos. 48 ff.; MUNCH-PETERSEN, 4 Leske-Loewenfeld I 747.
   Norway: CHRISTIANSEN, 6 Répert. 575 no. 118.
   Iceland: EYJÓLFSSON, 4 Leske-Loewenfeld I 762; LÖNING in 9 Zausl.PR. (1935) 407; see also German RG. (April 6, 1936) 151 RGZ. 103.
   The Scandinavian Convention arts. 7, 9 starts from a primary rule that divorce is rendered at the matrimonial domicil, but states exceptions, and finally declares the law of the forum applicable.
145 But for intrastate conflicts Australia has designated the law of the domicil rather than the lex fori of the residence, cf. (Commonwealth) Matrimonial Causes Act, 1945-1955, s. 11. FALCONBRIDGE, Annotation [1932] 4
problems are solved by prevailing practice is more in accordance with the *lex fori* principle. Also, the application of the American rule by Continental courts, resulting from the nationality principle and renvoi, is much simplified, if we understand it as based on the law of the forum.\textsuperscript{146}

*Latin American treaties.* On the other hand, the Treaty of Montevideo has unequivocally declared domiciliary law to determine not only jurisdiction for divorce\textsuperscript{147} but also, in a provision correctly separated,\textsuperscript{148} the right to divorce. The problem, it is true, appeared in its simplest form, since jurisdiction is exclusive for the court of the present or last matrimonial domicil.

In the same way, the *Código Bustamante* clearly isolates the choice of law question and with one exception subjects the right to divorce to the law of the marital domicil.\textsuperscript{149} This is a remarkable victory for the domiciliary principle, as usually the Havana Code does not decide which is the personal law.

2. Diverse Contacts

As an aftereffect of former conceptions,\textsuperscript{150} divorce sometimes has been assimilated to the dissolution of ordinary contracts; as a matter of fact, all requisites of marriage in this country are considered governed by the law of the place of celebration, indicated by the historic rule for contracts. This idea has also played a role in determining the dissolution of marriage\textsuperscript{151} and continues to do so in a few countries. In

D. L. R. 36 prefers the domiciliary angle but concedes doubts on this point; in Essays 727, 728, he adheres to the *lex fori* conception.

\textsuperscript{146} *Infra* pp. 480 ff.

\textsuperscript{147} Treaty on international civil law, text of 1889, art. 62; text of 1940, art. 59. On restrictions of the principle, see *supra* n. 46.

\textsuperscript{148} Treaty of Montevideo, text of 1889, art. 13b; text of 1940, art. 15b.

\textsuperscript{149} *Código Bustamante* art. 52 (for the exception of art. 54, see *infra* p. 462).

\textsuperscript{150} See *supra* p. 425.

\textsuperscript{151} PÜTTER, 3 Rechtsfälle, part 1, 80, 85, quoted by 1 Bar 486 § 173 n. 6, tr.
particular, the Marriage Law of Argentina provides, in a section known for the incessant complications and doubts it has provoked in the world, that a foreign divorce of a marriage celebrated in the Argentine Republic does not entitle either of the spouses to remarry, if the divorce is inconsistent with the Code.\textsuperscript{152} This means, in the prevailing though contested opinion, that a foreign, e.g., Uruguayan, divorce of a marriage celebrated in Argentina is invalid in Argentina.\textsuperscript{152a} The Treaty of Montevideo of 1889 implying this interpretation\textsuperscript{153} invalidates such a divorce in all member states,\textsuperscript{154} although Uruguay departs from this rule on the ground of public policy.\textsuperscript{155} It is a fortunate concession to international needs that, in the new 1940 draft of Montevideo, Argentina acquiesced in the elimination of this extraterritorial effect by Gillespie 384 § 173 n. 10; Austrian Imperial Decree of Oct. 23, 1801, Justizgesetzsammlung no. 542; cf. Walker 727 n. 14; D'Olivecrona in Clunet 1883, 343 at 359. For criticism of this theory, see Story § 230a, and Weiss, 3 Traité 682. But it is the basis on which Bartín, 2 Principes 323 § 318 advocates application of the national law of the husband at the time of the marriage.

Peru: The Supreme Court of Peru, in a series of decisions declared that a foreign marriage could not be dissolved for causes not recognized in the country of celebration. See Ej. (July 2, 1929) 25 Anales Jud. (1929) 78 (Japanese marriage) and cases cited by Aparicio y Sánchez, 8 Código Civil, Concordancias 70. Contra Ej. (June 20, 1936) 32 Anales Jud. (1936) 100 (consent divorce). The C. C. of Aug. 30, 1936, art. V par. 2, seems to eliminate this practice.

Bolivia: The dissolubility of a marriage depends on the law of the place of celebration (art. 24 of the Divorce Law of April 15, 1932).

\textsuperscript{152} Argentine Civil Marriage Law of 1888, art. 7, cf. art. 82. Divorces of Argentine marriages and foreign marriages must be distinguished, apart from the ordinary distinction of domestic and foreign divorces. Cf. the clear survey by Romero del Prado, Der. Int. Priv. 313–320. A related provision of the Chilean C. C. art. 120 was adopted also by Ecuador: C. C. art. 105; El Salvador: C. C. art. 170; Uruguay: C. C. art. 103, and refers to all divorces granted abroad which the municipal law would not permit.

See infra n. 178.

\textsuperscript{152a} According to Goldschmidt, 2 Sistema 392–402 the effects of this provision are limited to denying the capacity of remarriage, within or outside Argentina; a further relaxation may be expected after the introduction of divorce into Argentine law by the statute of Dec. 14, 1954.

\textsuperscript{153} 2 Vico nos. 107, 108.

\textsuperscript{154} Treaty on international civil law, art. 13b.

\textsuperscript{155} See infra p. 518.
of the law of the place of celebration; the proviso was changed into a mere reservation allowing the state of celebration to deny recognition to foreign divorces.\textsuperscript{158}

The Polish Supreme Court resorted to the law of the place of celebration to solve the problem arising from interprovincial conflicts,\textsuperscript{157} while the Rumanian Supreme Court rejected this test.\textsuperscript{158} The Supreme Court of Czechoslovakia seemed to have returned to the idea.\textsuperscript{159}

Any reference to the place where the offense to marital duties was committed has long been abandoned in all countries.\textsuperscript{160} But reference to the law of the place where the cause for divorce accrued is found in America in sporadic attempts to limit jurisdiction for divorce.\textsuperscript{161}

3. National Law Cumulatively Applied with the \textit{Lex Fori}

In most civil law countries, the two questions of jurisdiction and applicable law are distinguished as a matter of course, and, with respect to the latter, consideration is given to the \textit{lex fori} in conjunction with the \textit{lex patriae}. However, the approach varies.

\textit{France and others.} In France and the majority of other countries following the French Code,\textsuperscript{162} grant of divorce must accord with the national law of the parties and not contravene the forum's public policy understood in its broad-

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\textsuperscript{156} Art. 15b.
\textsuperscript{159} See Sup. Ct. (Feb. 28, 1929) no. 8745 and (March 1, 1934) no. 13328, 10 Z.ausi.PR. (1936) 171; I BERGMANN (ed. 2) 746.
\textsuperscript{160} Story § 230a; I BAR 487 § 173 n. 9a, tr. by Gillespie 385 § 173 n. 16.
\textsuperscript{161} See infra p. 488.
\textsuperscript{162} France, Belgium, Luxemburg, Rumania, Portugal, also Poland, Czechoslovakia, and Bulgaria; and with respect to separation from bed and board, Brazil (until 1942), Italy and Spain and the more recent enactments of French and Spanish Morocco. See subsequent footnotes for cases. This system has been adopted by numerous Latin American writers, e.g., Matos no. 258, cf. also no. 264.
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est sense. The observance of the national law is the rule, and public policy intervenes as a basis for exceptions, the determination of which is left to the discretion of the courts and which therefore remain measurably uncertain. In fact, they cover many, if not most, cases.

The Dutch courts, which started with this basis, seem now to apply exclusively Dutch divorce law, disregarding the personal law where they are not bound by the Hague Convention to consider it. For the Netherlands, this is extraordinary.

In the German legislation, and those following its lead, viz., those of Austria, Albania, Yugoslavia, Sweden, China, and Japan, and by the unwritten law of Greece, divorce depends directly and concurrently upon conformity with the national law and the law of the forum. This system of

163 See NIBOYET 746 and 5 Traité 422, 428; BATIFFOL, Traité no. 459, 462; POULET 446 ff. no. 379; KOLLEWIJN, Het beginsel der openbare orde (1917) 90.
164 NIBOYET, Notions Sommaires (1937) 187 no. 310 bis, even formulates a simple principle of cumulative application of the personal and the French laws, parallel to the German system.
165 The decision of the Hooge Raad (Dec. 13, 1907) W. 8636, Clunet 1911, 1334 had attracted attention, as it applied Dutch law to American citizens domiciled in the Netherlands, not by renvoi but as the lex fori. Cf., for instance, the criticism by KOLLEWIJN, Het beginsel der openbare orde 87. See the later decisions Rb. Amsterdam (Jan. 11, 1924) Clunet 1925, 1120; Hof den Haag (April 7, 1932) W. 12661; Hof den Haag (June 22, 1933) W. 12715; Hof Amsterdam (June 27, 1935) W. 12956; Rb. Almelo (Jan. 22, 1936) W. 1937, no. 54 (Lithuanians); Hof den Haag (June 5, 1936) W. 1936, no. 1052 (Germans, after Germany had left the Hague Convention); Hof den Haag (June 16, 1949) N. J. 1950 no. 578; Hof den Haag (Oct. 24, 1956) N. J. 1957 no. 467.
166 Germany: EG. art. 17 par. 4. Divorce cannot be pronounced in this country upon the ground of a foreign law, unless it is permissible according to both the foreign law and the German laws.
Albania: Marriage Law of 1948, art. 84.
Yugoslavia: Family Law of 1946, art. 86.
China: Law of 1918, art. 11.
Japan: Law of 1898, art. 16.
Also the Benelux-Draft, art 6.
cumulation was adopted by the Hague Convention.\textsuperscript{167} Although in this group the domestic divorce law does not operate merely by way of exception, the rule refers, here too, to the national law in the first place, with the internal law controlling permissibility and causes for divorce. Hence, also under these statutes, the divorce decree is founded on the foreign law.

Under the Swiss statute, however, the roles are reversed; if both laws consent, divorce is "pronounced according to Swiss law."\textsuperscript{168} The courts have concluded from this provision that Swiss law must be applied to all legal effects of divorce, such as alimentary obligations and guardianship over children.\textsuperscript{169}

V. Application of the Nationality Principle

1. Permissibility of Divorce and Grounds for Divorce Distinguished.

The disposition of the Hague Convention relating to Divorce and Separation, that the granting of divorce or separation must conform with the national law of the parties as well as with the law of the forum, is in two parts:

"Art. 1. Married persons may apply for a divorce provided the law of the state to which they belong (national law) and the law of the place where the application is made both permit divorce.

"The same applies to separation from bed and board.

"Art. 2. Divorce may be granted only if obtainable in the particular case under both the national law of the spouses

\textsuperscript{167} Hague Convention on Divorce of 1902, art. 1: "... provided their national law and the law of the place where the application is made both admit divorce."

\textsuperscript{168} Swiss NAG. art. 7th last paragraph. Similarly, Belgian Congo: C. C. book I art. 13 par. 2.

\textsuperscript{169} BG. (June 13, 1912) 38 BGE. II 43, 49; BG. (May 28, 1914) 40 BGE. II 305, 308; BG. (Nov. 27, 1918) 44 BGE. II 453, 454; BG. (Feb. 2, 1921) 47 BGE. II 6; BG. (Dec. 10, 1936) 62 BGE. II 265.
and the law of the place where the application is made, though on different grounds.

"The same applies to separation from bed and board."

There is nothing in the Convention to justify such a division of the rules, but this division had been established by the discussions of the Institute of International Law and during the Hague Conference for the purpose of a differentiated regulation. The distinction has regained significance in the Código Bustamante; under article 52, the right to separation or divorce is governed by the law of the matrimonial domicile, while under article 54 the causes for divorce or separation are subject to the law of the place of suit, provided that the parties are domiciled in the forum. It is difficult to understand this provision.

Generally, such distinctions are made for the purpose of analytical discussion but without any intended contrast.

2. Permissibility of Divorce

(a) Under the law of the forum. Complete dissolution of the marriage bond is at present prohibited in Brazil, Chile, Colombia, Ireland, Italy, Paraguay, and since 1938 again in Spain; also for Catholics under the Austrian Civil Code in Liechtenstein and for marriages celebrated before a Catholic priest in Portugal.

Although legislators generally do not envisage persons...
other than subjects of the forum, a divorce not granted to domiciliaries or nationals is not granted to foreigners. Religious and ethical reasons, as well as respect for the judicial institutions of the forum, motivate this rule. The rule, which was observed in France until divorce was reintroduced in 1884, is in force in Spain, Italy (with short interruption, however, much noticed during the preparation for the Hague Convention), Brazil, Argentina (though with considerable opposition), and probably everywhere in the countries mentioned in the previous paragraph.

By an analogous rule, foreigners cannot obtain any form of limited divorce unknown to the forum. Whatever type of judicial separation short of complete dissolution of the marriage ties may be prescribed by the national law, no form of

173 Weiss, 3 Traité 689 ff.
174 Trías de Bes, 6 Répert. 255 no. 111; Goldschmidt, 2 Sistema 313.
175 Following the contemporary trend toward permitting divorce of foreigners whose national law did not oppose it, divorces were granted to foreigners by App. Ancona (March 22, 1884) Monitore 1884, 365, Giur. Ital. 1884, II, 247; App. Genova (June 7, 1894) Monitore 1894, 784, Giur. Ital. 1894, I, 2, 554, Clunet 1898, 412; Trib. Milano (June 2, 1897) Monitore 1897, 514 and (June 30, 1898) Giur. Ital. 1898, I, 2, 765, aff'd App. Milano (Nov. 24, 1898) Monitore 1899, 64. But the last-mentioned decision was reversed by Cass. Torino (Nov. 21, 1900) Monitore 1900, 981; similarly, Cass. Firenze (Dec. 6, 1902) Clunet 1903, 910, and all later decisions, applauded by the writers; see Bosco, 22 Rivista (1930) 461, 500; Fedozzi 466 n. 3. On the sensation caused at the Hague meetings by this temporary liberalism, see Kahn, 2 Abhandl. 313 ff. Among the other literature see 2 Fiore no. 689, generally followed in Latin America; see, eg., Matos, no. 564.

In order to correct the more liberal attitude of some Northern Italian Appellate Courts (e.g. Turin, April 13, 1951, Foro padano 1951 I 471) the law of July 30, 1950 amended art. 72 of the Code of Civil Procedure so as to give the state procurators a wider power to contest sentences in matrimonial matters; the Supreme Court firmly declines to divorce foreigners: Cass. (May 17, 1952) Foro Ital. 1952 I 1188, reversing the above-mentioned decision of Turin.

177 Argentine Civil Marriage Law of 1888, arts. 81, 82. There is opposition now to the rigidity of excluding divorce for foreigners; cf. ROMERO DEL PRADO, Der. Int. Priv. 314.
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separation not provided by the law of the forum is granted. Where, for instance, no divorce other than absolute divorce is allowed, it is not possible to obtain any limited kind of separation. These principles, not so natural as they sound, as we shall see, may create real hardship. Nevertheless, the maxim is universal and fully adopted by the Hague Convention on Divorce (art. 1).

(b) Under the national law. By virtue of the nationality principle, divorce a vinculo is denied if the national law does not permit dissolution of a marriage during the lifetime of both spouses. If, for instance, formerly an Italian subject were married to an Argentine bride in Argentina, divorce cannot be obtained in Germany, because the husband's national law forbids it, nor in France because neither national law allowed it.

The question has been raised, however, whether, in a country having the institution of divorce, the public policy that regards the institution as based on morality and social sanity is so strong that it must oppose foreign prohibitions.

178 Case of Trib. civ. Seine (May 11, 1933) Revue Crit. 1934, 129. It is disputed in Argentine literature whether under the Argentine Civil Marriage Law of 1888, art. 82, a marriage celebrated in Argentina can be dissolved in a foreign country that has not signed the Montevideo Treaty, so that remarriage abroad is legal. The negative answer, presented by the decision in 100 Gac. del Foro (1932) 78 col. 2, and ROMERO DEL PRADO, Der Int. Priv. 319 (with CALANDRELLI, WEISS-ZEBALLOS, LLERENA, GOLDSCHMIDT) has been approved also by the Cámara civil de Apelaciones de la Capital (March 14, 1935) 49 J.A. 505, Clunet 1937, 124; see also SCHLEGELBERGER, 4 Z.ausl.PR. (1930) 756. The opposite view (GONZALEZ, MACHADO, LAFAILLE, ALCORTA, VICO, REBORA) has been said to be the prevailing opinion by a mistaken German author GOTTSCHICK in JW. 1930, 1827, who has been followed by numerous German decisions, such as those enumerated by 2 BERGMANN 8 n. 1 and KG. Berlin (Feb. 9, 1931) IPRspr. 1931, no. 68.

179 EG. art. 17 par. 4. It makes no difference whether the marriage was celebrated in Germany, OLG. Hamburg (Sept. 2, 1936) Hans.RGZ. 1936, B 486 no. 171.

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When the temporary Spanish Republic had solemnly introduced dissolution of marriage, it seemed unbearable to refuse its benefits to any category of persons, even foreigners.\textsuperscript{181} Analogous decisions have occasionally occurred elsewhere.\textsuperscript{182} But prevailing opinions have preferred strict application of divorce prohibitions imposed on the parties by their national law.\textsuperscript{183} It must be admitted that by this strict application the policy of permitting the dissolution of marriage appears weaker than its counterpart, the policy of inseparability of spouses.

(c) Separation. A further consequence of the nationality principle is that separation from bed and board, or judicial or administrative separation of any other kind, except provisional measures, depends upon the approval of such an institution by the national law of the parties.\textsuperscript{184} Since, according to present general opinion,\textsuperscript{185} the kind of separation granted must also conform with the law of the forum, doubts arise when each law has a form of limited divorce, but the forms are not identical. The varieties are numerous indeed.\textsuperscript{186} But, apart from the very complicated problems caused in

\textsuperscript{181} Republican Spain: Trib. Supr. (Jan. 27, 1933) 207 Sent. 56; cf. Revue 1933, 533, 24 Rivista (1932) 567.

\textsuperscript{182} Rumania: PLASTARA, 7 Repert. 68 no. 192 notes decisions both ways.

Belgium: Divorce to two Catholic Austrians was granted by App. Liège (Nov. 2, 1937) J. d. Tr. 1937, col. 672 no. 3512, 23 Bull. Inst. Belge (1937) 76; 24 \textit{ibid.} (1938) 52; this decision joins several other Belgian manifestations of a liberal policy stronger than the usual; \textit{cf. infra} ns. 217–219, 222.


\textsuperscript{185} Under the former pure theory of national law, the Trib. civ. Bruxelles (May 8, 1908) Pand. Pé. 1908.604 granted a separation on the mutual agreement of the parties according to the foreign law unsupported by the Belgian law.

\textsuperscript{186} See for comparative legislation, ROCUIN, 1 Traité de droit civil comparé, le Mariage (1904) 237; BERGMANN, 2 Rechtsvergl. Handwörterb 723.
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Germany by the creation of a particular type of "dissolution of the marital union" in the Civil Code of 1896,\(^\text{187}\) problems which disappeared in 1938 with the abolition of this unfortunate institution, few difficulties seem to have been encountered.\(^\text{188}\)

A much deplored result\(^\text{189}\) of the double legal requirements concerning separation occurs in the numerous international situations where one of the legislations involved provides only for absolute divorce and the other only for separation, or where the spouses loyal to their faith or to their national legislation do not want the absolute divorce available at the forum. In these cases, neither form of relief can be conferred under the system of nationality.\(^\text{190}\) The consequences are apt to include special inconveniences, espe-

\(^{187}\) Cf. RAAPE 381; 3 FRANKENSTEIN 474; cf. also 3 FRANKENSTEIN 468. See LEWALD, 57 Recueil 1936 III 313 on the decisions of the highest Dutch and Swiss courts.

\(^{188}\) Italians are separated in Switzerland; see decisions in 6 Z.ausl.PR. (1932) 836; 7 ibid. (1933) 644; II ibid. (1937) 656. The effects of such a separation are governed by Swiss law (SCHNITZER 379); but alimony is generally not given under art. 160 C. C. as in case of a Swiss separation but according to art. 152 C. C. as in case of a divorce, BG. (Feb. 16, 1926) 52 BGE. II 2, contra: OG. Zürich (March 23, 1950) 8 Schwz. Jahrb. (1951) 292. In France, it was decided that the effect of a French separation of Italians should be determined by Italian law rather than French; see Cour Dijon (March 28, 1939) Clunet 1939, 634. Portuguese nationals before 1931 could be separated but not divorced in France; see Trib. civ. Seine (June 12, 1888) Gaz. Pal. 1888.1.902. Nationals of countries recognizing judicial separation may likewise obtain separation in Portugal; see CUNHA GONÇALVES, Direito Civil 696 (where also conversion of separation into divorce is treated).

A judicial separation under South African law was not recognized as basis for a conversion into divorce under Danish law, Østre Landsret (Feb. 19, 1952) 20 Z.ausl.PR. (1955) 514; but see BORUM 123 n. 4.

\(^{189}\) Cf. especially KAHN, 2 Abhandl. 330, 339, 342 (more violently than is justified by his strong position against the law of the forum) and WALKER 702.

\(^{190}\) OLG. Kiel (May 16, 1934) JW. 1934, 2349, IPRspr. 1934, no. 59 (Danish law); RG. (Nov. 4, 1937) 156 RGZ. 106. Austrian separations from bed and board have been transformed, according to the Law of July 6, 1938, § 175 by a simple procedure and without instituting a new suit, into full German divorces between persons who have become German subjects, RG. (Dec. 15, 1938) 159 RGZ. 76.
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cially when the parties, faced with barred doors at their domicil, are refused jurisdiction even in their homeland. A court having only absolute divorce, besides merely provisional orders, at its disposal, such as the Rumanian or the German tribunals, is unable to give any relief to parties for whom Italian, Brazilian, etc., law is considered applicable, although these legislations allow separation from bed and board. Inversely, Italian courts deny such separation to Rumanian or German nationals, because the parties’ national law does not provide separation. For the latter case, it was suggested that this hardship should be alleviated on the ground that the larger remedy is agreeable to the personal law, and some Brazilian courts have proceeded in consequence, while others have been opposed. Yet at the Hague Conference, it was answered that limited divorce is

191 Compare, for instance, Rumanian C. C. art. 216, and KAHN, 2 Abhandl. 339. But see WALKER 703.
192 Since 1938, no limited divorce has existed in Germany, but the situation was materially the same before, according to the opinion prevailing in the court decisions. See OLG. Breslau (Sept. 8, 1933) JW. 1933, 2400, IPRspr. 1933, no. 33.
193 Compare PLASTARA, 7 Répert. 68 no. 195, and FEDOZZI 461.
194a However, the Trib. Rome (Feb. 18, 1950) Foro Ital. 1950, 488, has admitted the separation of Greeks; MORELLI, Elementi 117.
194b The Benelux-Draft, art. 7 sentence 2, has apparently proceeded on a related theory admitting separation according to the lex fori though the national law only admits divorce.
196 The Appellate Court of Paraná in Plenary Meeting of its chambers (June 6, 1941) 34 Paraná Jud. (1941) 59 adopting the nationality principle denied separation by consent to German parties. São Paulo (1941) 133 Rev. dos Trib. 152 (German husband, Russian wife; no desquite in Brazil, as both German and Russian law, in case she should have retained Russian nationality, do not provide separation).
not a "minus" which may be subtracted from absolute divorce, but a different thing.\textsuperscript{197}

The Brazilian practice, previous to the law of 1942, was interesting. The courts in principle required agreement of the national laws of both parties for granting separation by mutual consent (\textit{desquite amigavel}) but granted it also in three exceptional cases, viz., the case just mentioned of the national law allowing absolute divorce, the case of renvoi,\textsuperscript{198} and the case where one party is of Brazilian nationality.\textsuperscript{199} These decisions seem to retain authority in cases where foreigners are not domiciled in Brazil.

3. Grounds for Divorce

Under the principle of \textit{lex fori} or \textit{lex domicilii} as well as under that of nationality, applied exclusively, the right to divorce is governed by one law. The English courts demonstrate how seriously they accept this doctrine by applying, on the one hand, only English law in any divorce suit in England and, on the other hand, by recognizing foreign divorce decrees of the matrimonial domicil without inquiring into what law was applied in the case. Similarly, when French courts adhered to the pure nationality rule, they granted divorce for reasons found in the national law but not in French law.\textsuperscript{200} This point of view still exists in some countries.\textsuperscript{201} Of course, causes repugnant to the public policy of the forum are always excepted.

\textsuperscript{197} See documentation in OLG. Kiel (May 16, 1934) JW. 1934, 2349, IPRspr. 1934, no. 59.
\textsuperscript{198} Sup. Fed. Ct. (1937) 112 Rev. dos Trib. 334 (obiter dictum); Ap. civ. São Paulo (1938) 118 \textit{ibid.} 715; Ap. civ. São Paulo (1939) 123 Rev. dos Trib. 597 (Czechoslovakian law of husband applied as the German law of the wife refers also to that law).
\textsuperscript{199} See \textit{infra} n. 236.
\textsuperscript{200} See \\textit{SURVILLE} 440.
\textsuperscript{201} The Polish Law of 1926 on private international law, art. 17 par. 1 declares the national law applicable without any qualifications; likewise the Czechoslovakian law on private international law of 1948, § 18, the Bul-
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At present, however, courts in France and many other countries are disinclined to apply a foreign ground for divorce, unless it corresponds with a ground acknowledged in the forum.\textsuperscript{202} Absolute identity, it is true, is not demanded. For instance, in the relations among the countries following the Code Napoléon, divorce for injuries graves is granted without regard to the varying meanings of this term, which term is also held to correspond to gross insults, cruelty, or desertion, constituting grounds for divorce under American statutes,\textsuperscript{203} and even covers adultery as a foreign requisite.\textsuperscript{204}

The result of this system is, of course, that divorce is denied, if the personal law includes no ground to support the action. Englishmen (except where renvoi was applied) were refused divorce in most cases because of the narrow limits of the right to divorce in the English matrimonial law before the reforms.\textsuperscript{205} The same is still true of citizens of New

garian Family Law of 1949, art. 58, and in case of foreigners, the Egyptian C. C. (1948) arts. 13 par. 2, 14 as well as the Syrian C. C. (1949) arts. 14 par. 2, 15.

Greece: Court of Athens (1937) no. 1952, 49 Thémis 473; Clunet 1939, 463 granting separation from bed and board to Italian nationals according to Italian law on a ground unknown in Greek law.

In Portugal: CUNHA GONÇALVES, 1 Direito Civil 692 thinks that outside of the Hague Convention a cause of the national law unknown to the Portuguese law suffices in principle.

\textsuperscript{202} Belgium: Trib. civ. Verviers (March 7, 1932) 19 Bull. Inst. Belge (1933) 74 (Swiss parties; grave injury required by Belgian law must be proved, as well as disruption of the marriage by a lesser injury, ground for divorce under Swiss law).

France: Trib. civ. Seine (April 27, 1933) Clunet 1934, 900, Revue Crit. 1935, 759 requires identity of grounds in both laws, while LEREBOURS-PIGEONNIÈRE 394 ff. no. 336 suggests that equivalence should suffice.\textsuperscript{206}

The Netherlands: Cf. VAN DER FLIER, Grotius 1937, 155.

\textsuperscript{203} E.g., Trib. civ. Seine (April 6, 1922) Clunet 1922, 674 (equation with gross insults under California law); Trib. civ. Seine (Jan. 19, 1926) Clunet 1926, 663 (equation with desertion under the Indiana statute).

\textsuperscript{204} POULLET, no. 379; NIBOYET 746. Adultery may be defined very differently (cf. SATTER, 5 Giur. Comp. DIP. 11), but the differences are not considered material.

York, domiciled in New York. But the internal conceptions of what are sufficient grounds for divorce also play a large role, although a certain elasticity in their application rests in the discretion of the court.

A more definite position is taken by the German Code, the Hague Convention, and the codifications following them. Divorce must be supported in this system by the lex fori as well as by the national law.

This group, however, divides on the following point. In some of the texts involved, it has been made clear that, although divorce must be justified by some ground under each of the two laws, the ground need not be the same in both. Hence, the Swiss Federal Tribunal declared it sufficient if the facts of a case supported, at the same time, disruption of the marriage according to Swiss law and injures graves within the French meaning or disruption in the Swiss sense.

(1937) 656 no. 2 (facts insufficient to constitute "injures graves" under French law, C. C. art. 231).

207 A Dutch observer, KOLLEWIJN, Het beginsel der openbare orde 90, thinks Belgian courts are more inclined than French judges to recognize foreign divorce grounds unknown to the lex fori; the most authoritative writer on Belgian conflicts law, POULET, no. 379 makes no such distinction, but he seems to favor a liberal interpretation of the similar ground theory.

208 Hague Convention on Divorce, art. 2.

Germany: EG. art. 17 par. 4.
Austria: Decree of Oct. 15, 1941, § 8 par. 4.
Sweden: Law of July 8, 1904, with subsequent amendments, c. 3, § 2.
Switzerland: NAG. art. 7th par. 1.
Albania: Marriage Law of 1948, art. 84.
Yugoslavia: Family Law of 1946, art. 86.
Japan: Law of 1898, art. 16.
China: Law of 1918, art. 11.


210 Swiss BG. (May 26, 1932) 58 BGE. II 183, 188.
and violation of the marital duties under the then unmodified German Code. Conversely, the disruption of the Swiss, German, and Austrian law being excluded by French and Belgian courts as contrary to public policy, a Belgian court found in the facts a violation of the marital duties. Conversely, the disruption of the Swiss, German, and Austrian law being excluded by French and Belgian courts as contrary to public policy, a Belgian court found in the facts a violation of the marital duties. And if the national law of Polish Jews allowed divorce by mutual agreement, German courts granted it, provided that in addition, to satisfy the lex fori, a valid reason, such as adultery or fault in disrupting the marriage existed. The case of mutual agreement of Soviet Russian nationals has been treated in the same way. The statutes of Japan and China by their wording seem to exclude such interpretation and hence to require in fact that the same or a similar ground exist in both laws.

Cumulative application of two laws of any sort results in dismissal of a divorce suit when, according to only one of the two legislations, such events as condonation, recrimination (compensation of causes), or lapse of time negates the right to divorce.

Moreover, the double requirement opens a strange gap when divorce cannot be granted according to the national

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211 Swiss BG. (June 13, 1912) 38 BGE. II 43, Erw. 3, 4.
211b Cour Bruxelles (March 1, 1952) Pasicrisie 1952 II 58.
212 OLG. Frankfurt (July 11, 1929) JW. 1929, 3507 (supra n. 209) and constant practice, despite some controversy in the literature whether divorce by agreement is opposed to German public policy and, if so, whether it may be taken as a basis for a German divorce decree; the dominant opinion interprets EG. art. 17 par. 4, which is less well drafted than art. 2 of the Hague Convention on Divorce, as satisfying all the exigencies of German public policy, irrespective of logical relation to par. 1 of art. 17. Cf. Pretzel in JW. 1928, 3030; Lutterloh, JW. 1929, 419; Holländer, JW. 1929, 1863.
214 China and Japan, supra n. 208.
215 Cour Paris (July 7, 1920) Clunet 1921, 518 states that evidence is lacking for compensation of grounds according to the American law; cf. Bartin, 2 Principes 305 § 314.
law, because the forum would grant another type of relief. Laws that leave the right to divorce without any limitation, like formerly the Soviet Russian law, or which broaden the right, like the Belgian law, may eliminate or closely limit, respectively, the right to sue for annulment of the marriage. For instance, a marriage may be annulled under German law, because the husband was ignorant of an incurable serious illness of the wife at the time of the marriage, but it would not be voidable under Russian or Belgian law, as divorce takes the place of annulment there. Couples of these nationalities married in their respective countries and coming to live in Germany would not obtain either relief at their new domicil. 216

Permissive policy. Divorce laws are sometimes quaint, even if they do not equal the Chinese rules before 1931, under which the husband could divorce his wife because of her garrulity and the wife had no right of divorce. The tribunal of Brussels, in fact, reacted against the latter provision 217 and recently also reacted against barring divorce to Catholics of the former Polish kingdom, 218 as well as against the religious distinctions of the law of Iran. 219 The basis for its opposition is that it is contrary to the Belgian public order to investigate the religious denomination of the parties. In all these cases, Belgian divorce law was substituted.

But German courts have not considered the wife’s definitely inferior position in suing for divorce under the legisla-

216 Annulment was denied where the national law of the party who was in error does not regard the mistake as an impediment by RG. (Oct. 6, 1927) Warn. Rspr. 1928, no. 13, IPRspr. 1926-1927, no. 68, Revue 1930, 129; the prevailing opinion is in accord. See however, RAAPE, 2 D. IPR. (ed. 1) 179 and infra p. 584.
tion of Austria and Italy as contrary to public policy. Nor has the former English law, allowing only the husband to sue on the ground of adultery, ever been repudiated on the Continent. More doubt has been expressed about the Jewish laws prohibiting the wife from suing even on the ground of adultery or attempt on her life, but they have been applied; the wife of a Mohammedan Persian was similarly treated. Again, the court of Brussels once granted divorce in such a case. According to the prevailing opinion, it is considered undesirable to increase the number of unfortunate cases where marriage exists with geographically limited force. So even bizarre foreign institutions are admitted.

4. Different National Laws

_National law of the husband._ Upon the same historical basis of coverture as in England, the national law of the husband alone is applicable, without regard to that of the wife, in Germany, Portugal, China, and Japan; according to part of the French doctrine, the national law of the husband is said to govern the causes for divorce. Independently of the historical background, this system has been appraised as the simplest and most convenient in practice.

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220 OLG. Düsseldorf (July 6, 1911) 110 Rhein. Archiv 158; OLG. Kiel (Feb. 28, 1923) 78 Seuff. Arch. 267, Clunet 1925, 1053.
222 App. Bruxelles (June 8, 1899) Clunet 1899, 859.
223 RAPE 435.
224 German EG. art. 17 par. 1; followed by Japan: Law of 1898, art. 16 and China: Law of 1918, art. 11. This is also the rule adopted in the Treaty of Montreux, Egyptian Mixed Tribunals, Regulations of Judicial Organisation, art. 29 par. 3, publ. in U. S. Treaty Series, No. 939, now superseded by Egyptian C. C. (1948) arts. 13 par. 2, 14, followed by the Syrian C. C. (1949) arts. 14 par. 2, 15 (in both codes only for foreigners).
225 BARTIN, 2 Principes 323 § 318 states that this rule in the French system is not doubtful, but the decisions are not homogeneous; _cf. infra_ pp. 474 ff.
226 ROLIN, 2 Principes no. 591.
In the last decades, however, such preference for the husband has found less and less favor, in conformity with the increasing tendency to allow a married woman to retain or resume her original citizenship.227

_Last common nationality._ In the Hague Convention on Divorce, the law of the last common nationality of both parties was adopted.228 The Sixth Conference added in its non-ratified drafts that where the parties never had a common nationality or where they changed from one common to two different new nationalities, divorce and separation depend on both laws cumulatively. The recent Greek Code more conveniently calls in such cases for the application of the national law of the husband as of the time of the marriage celebration229 whereas Czechoslovakia and Bulgaria in this case resort to the _lex fori._229a

_Both laws cumulatively._ According to another theory, the granting of divorce must be permitted by the laws of both spouses.230

227 There is no advocate in France any longer, J. Donnedieu de Vabres 474 n. 2 asserts, in ignoring Bartin's recent book _supra_ n. 225.

The West German Supreme Court (Jan. 18, 1954) NJW. 1954, 837, Revue Crit. 1954, 805, has held, that the predominance of the husband's law is not incompatible with the constitutional principle of equality of the sexes.

228 Hague Convention on Divorce, arts. 1, 2, 8; followed by Poland: Law on international private law, art. 17 par. 1; Rumanian Preliminary Draft of C. C. art. XXIV; Czechoslovakia: Law on private international law of 1948, §18; Bulgaria: Family Law of 1949, art. 58.

229 Greek C. C. (1940) art. 16.

229a See the provisions cited _supra_ n. 228.


Siam: Law on private international law of 1939, §27 par. 1.


Italy: Udina, Elementi no. 136; Salvioli, 19 Rivista (1927) 354 (admits difficulties); and some decisions in France. Only Trib. civ. Seine (April 27, 1933) Revue Crit. 1935, 759 states that the grounds for divorce must agree with the foreign laws of both parties as well as with the French law.

Niboyet, _Note ibid._ 762 declares regard for the defendant's law unnecessary.
The law of the plaintiff. In contrast, the French courts usually pronounce divorce at the instance of a party whose national law as such permits it. Although occasionally under this system foreign law has been applied, the usual result is a resort to French law.

This conforms to a general trend. Suppose that the applicable conflicts rule calls for the municipal law of the husband, he a foreigner and the wife a national; or suppose that the last common nationality law should be applied, the wife alone having acquired the nationality of the forum during marriage,—courts are tempted to abandon the conflicts rule for the sake of the wife. The same development that has fostered favor for the wife’s separate nationality induces the courts to permit the wife such rights of divorce as the law of the forum, which is also her national law, permits. Hence, early examples of exceptions made for nationals in some European and particularly in Latin American jurisdictions, have been multiplied in recent times.

From about 1906, French courts have granted divorce according to French law to the French wife of a mixed marriage. If the husband were of Italian nationality, however, they were bound by article 8 of the Hague Convention on Divorce to observe the last common national law of the parties. But precisely for this reason, France renounced her participation in the Convention in 1913, and in 1927 a French woman marrying a foreigner was allowed to retain her French nationality. These two events reinforced the
trend of the French tribunals. In the outstanding case of the *Marquis de Ferrari*, a French woman who, by marrying an Italian, had become an Italian national and had been judicially separated from her husband in Italy, recovered French citizenship. She was granted a divorce *a vinculo* in spite of the prohibition of Italian law which had controlled her marriage and was still the law of the Marquis. The basis was surprisingly simple: the Court of Cassation declared that French law is an indispensable attribute of French nationality.233 This decision attracted world-wide attention; its exact scope remains obscure, except where the application of the French law is in issue.234 Much criticism has been aroused by the inconsistency with which the foreign prohibition has been discarded in cases analogous to those in which, before dissolution of marriage was allowed in 1884, the French courts refused to recognize foreign divorces of a French national married to an alien, and the further inconsistency with the theory of fraud, which the French courts were fostering at the very time of the *Ferrari* suit.235 Nevertheless, the precedent of the *Ferrari* case has been followed for 25 years.

In 1953, however, in recognizing a divorce decreed at the matrimonial domicil in Ecuador the Court of Cassation was satisfied that also under French rules the Equatorian law

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234 BARTIN, 2 Principes 308 concludes that these are purely French solutions, of mere French interest, which we have no reason whatsoever to apply to foreign couples; he does not even want to suggest recognition of an analogous decree of a foreign—say, a Brazilian—tribunal.

235 See PILLET, Revue 1922-1923, 464 frankly regretting the decisions as a break with international private law; AUDINET, 11 Recueil 1926 I 230; DEGAND, 5 Répert. 555 no. 83; SALVIOI, “Conflitto di leggi personali in materia di divorzio,” Rivista 1927, 354. NIBOYET, Note S.1929.1.9. As to the theory of fraud, J. DONNEDIEU DE VABRES 480 has answered that fraud is relevant only if committed against the law of the forum.
was applicable, even though the wife was a French citizen.\textsuperscript{235a} The recent Lewandowski case has confirmed, for a family living in France, the new rule, that the divorce of mixed marriages is governed by the law of the matrimonial domicile.\textsuperscript{235b} The new doctrine will certainly not exclude any special protection accorded to French wives, especially in cases where the law of the matrimonial domicile does not admit divorce. If divorce is demanded by a foreign plaintiff against his French wife and contrary to his national law, the lower courts make the plaintiff's law prevail.\textsuperscript{235c}

In addition to France, Belgium, Switzerland, Germany, and Sweden successively left the Hague Convention to avoid the divorce prohibition of the member state, Italy; in all these countries, migratory Italian workers had married and deserted native women. Except for the little influence the Convention has preserved, it has become a habit in most of the European countries to allow divorce to a national party of a mixed marriage according to the \textit{lex fori}.\textsuperscript{236} In Germany, the enacted law was adjusted to this end.\textsuperscript{237}


\textsuperscript{236} Brazil: (Before the law of 1942) Sup. Trib. Fed. (Nov. 6, 1918) Recurso Extraordinario no. 587, 20 Revista Sup. Trib. (1919) 246; Ap. civ. Rio de Janeiro (Jan. 16, 1942) no. 800, 62 Arch. Jud. 58. Cf. Ap. civ. Rio de Janeiro (Oct. 25, 1934) no. 4332, 121 Revista Dir. Civ. (1936) 322 (the constitutional provision that Brazilian law is to be applied to the dissolution of a marriage even if only one of the spouses is of Brazilian nationality applies also in cases of judicial separation if nationality is acquired by naturalization).

Albania: Marriage Law of 1948, art. 83.

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In Belgium, however, the courts have been thus far in disagreement. Their decisions are significant. In a series of cases, divorce was denied to a woman who had married an Italian and later recovered Belgian nationality, and to wives of Austrian origin and Catholic faith who had acquired Belgian nationality, on the unmodified rule that divorce must agree with the national laws of both spouses and on the consideration that at the time of the marriage both parties knew that their bond would be indissoluble. It has been argued, furthermore, that, logically, to free the party who belongs to the forum by application of his or her national law:

Revue Crit. 1938, 251, and decisions of lower courts; cf. Perroud, Clunet 1926, 24 n. 19; J. Donnedieu de Vabres 475; Note, Trib. civ. Seine (Jan. 19, 1926) Clunet 1926, 663 (through renvoi, applying French law as the personal law of an American woman domiciled in France); Trib. civ. Seine (Dec. 20, 1937) Nouv. Revue 1938, 324 (granted divorce to the wife who had resumed French nationality, while under the husband's Dutch law adultery would have been required); Cour Colmar (Jan. 7, 1938) Clunet 1938, 737. Nouv. Revue 1938, 326 (French wife granted divorce without regard to the German law of the husband).


Spain: (during republican times) Trib. Supr. (July 10, 1934) 214 Sent. 642, Clunet 1936, 210 (Spanish wife, Italian husband).

Switzerland: BG. (June 5, 1901) 27 BGE. I 80 proclaimed that a Swiss spouse could apply for divorce notwithstanding the prohibition of divorce by the national law of the other spouse; BG. (June 13, 1907) 33 BGE. I 355 (one spouse a naturalized Swiss former Austrian Catholic); BG. (July 9, 1914) 40 BGE. I 418, 428; BG. (March 2, 1922) Clunet 1922, 732 (one party a naturalized Swiss, former Orthodox Russian); BG. (May 3, 1932) 58 BGE. II 93, Clunet 1932, 1151, Revue 1932, 710 (Swiss nationality resumed by wife of an Italian after Switzerland had left the Hague Convention).

237 German EG. art. 17 par. 3.

law, would leave the other party married.\textsuperscript{239} As a matter of fact, this is the Swiss practice and the prevailing opinion in Germany,\textsuperscript{240} so far as remarriage is concerned. The Belgian authorities\textsuperscript{241} to the contrary, who admit divorce, have replied that if the non-Belgian spouse remains married under his or her national law (not by Belgian law), it should be realized that this undesirable result is due to the fact that the unity of the law governing the marriage has been broken by allowing the wife a separate nationality.\textsuperscript{242} This consequence is not strong enough "to prevail over the absolute and unconditional right that the wife derives from her national status and entitles her to break up a union the continuation of which might damage her." A Belgian writer has added that attitudes of high indifference to the misery of others are repugnant to the basic tendency of public life in Belgium.\textsuperscript{243}

The analogy of the granting of divorce by the courts of the domicil of one party in the United States is the more striking, as in these Continental cases the plaintiff is generally domiciled at the forum. Niboyet suggests, however, that a wife should not be allowed to sue for divorce under her separate national law, unless the matrimonial domicil was established in France by both parties at the marriage or later.\textsuperscript{244} This means a step toward the exclusive dominance of the domiciliary jurisdiction, desirable in all respects.

\textsuperscript{239} Thus, \textsc{Labbé}, Note in S.1878.1.195. \textit{Cf.} also \textsc{Degand}, 5 Rép. 553 no. 76, with earlier French decisions rejecting divorce; Trib. civ. Mons (April 8, 1927) Belg. Jud. 1927, 508 (applying exclusively the foreign husband's law "to avoid inextricable complications and eminently wrong situations").

\textsuperscript{240} See \textit{infra} p. 558.

\textsuperscript{241} Trib. civ. Bruxelles (June 27, 1928) Belg. Jud. 1928, 635 (despite the "bizarre and absurd" consequence that one party is not allowed to remarry); Trib. civ. Mons (May 8, 1930) and Trib. Bruxelles (May 20, 1931) J.d.Tr. 1931, cols. 462, 673 cited by \textsc{Joëf}, 22 Bull. Inst. Belg. (1936) 132; App. Liège (Feb. 2, 1931) Clunet 1932, 489. These cases are overruled by the latest decisions of the Court of Cassation, see n. 238.


\textsuperscript{243} \textsc{Joëf}, 22 Bull. Inst. Belg. (1936) 133.

\textsuperscript{244} Niboyet 749 no. 641.
VI. Renvoi

The problem of renvoi is presented when, according to the principle of nationality, the divorce law of the state to which a party belongs should be applied, while, according to the conflicts rule of the foreign state, this law is not to be applied. The Hague Convention on Divorce \(^{245}\) denied renvoi between member states, all of which followed the nationality principle, but renvoi is observed, as usual, in most countries following the principle, particularly by the French, \(^{246}\) German, \(^{247}\) Swiss, \(^{248}\) and Belgian \(^{249}\) courts. \(^{249a}\)

\(^{245}\) See RG. (Nov. 8, 1922) 105 RGZ. 340; KG. (Nov. 27, 1933) IPRspr. 1934, no. 116 and KG. (April 9, 1934) IPRspr. 1934, no. 47.


Iceland: RG. (April 6, 1936) 151 RGZ. 103.

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German and Swiss divorce courts, however, is further complicated by the provisions forbidding them, as we have seen above, to assume jurisdiction unless recognition of their jurisdiction appears fairly certain in the national country of the parties. Generally, it seems, these courts have not been aware of all the intrinsic difficulties in this matter; however, most of their decisions can probably be justified. We must here distinguish the questions of choice of law and of jurisdiction.

The problem of the law of conflicts is rather simpler in this case than in status questions generally. It is quite easily settled, if we understand the position of English, American, Danish, and Norwegian lawyers in the sense that they recognize the jurisdiction of the domicil under certain conditions and that, as they themselves apply the law of the forum at home, they are not interested in what substantive private law would be applied by a foreign divorce court. Hence, a French or German divorce court is permitted (though not directed, as was so often believed in Europe) by the national law of a British subject to apply the law of the forum. It does not matter that by another mistake

Nicaragua: KG. (March 30, 1931) IPRspr. 1931, no. 70.
248 Switzerland: BG. (June 15, 1928) 54 BGE. II 225, 231; cf. SCHNITZER 174.
249a The absurdities brought about by a legislative exclusion of renvoi are well illustrated by Trib. Cairo (March 31, 1953) Revue Egypt. 1954, 157: the divorce of British subjects, born in Cyprus, but domiciled (in the English sense) in Egypt, was submitted to English law.
250 Supra pp. 441-443.
251 Cf. supra n. 146.
252 This seems to agree with KUHN, Comp. Com. 171; it is true that KUHN concludes just contrary to the text that renvoi is particularly unsound with respect to common law countries.
253 For instance, OLG. Stuttgart (Dec. 4, 1930) JW. 1932, 601, and BERGMANN in the note ibid. assume a renvoi from the California law because the party had formerly been domiciled in California. See supra p. 144.
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European courts have often referred to the common law country where a British or American national was last domiciled instead of to the general principles of British or American law. Recently, German courts have realized that they are applying German law as the *lex fori* (and not *qua lex domicilii*) with the blessing of that national law. This was a new realization, as observers in Germany had thought that there never is a renvoi referring to the law of the forum. With national laws such as that of Argentina, the situation is theoretically different; the law governing at the domicil of the husband is applicable.

The entire problem, otherwise almost desperate, is reduced in this manner to the question of determining in which cases a Continental court may assume jurisdiction for divorce with the expectation that the decree will be recognized in the national country. As a matter of fact, the answer must be different with respect to the individual jurisdictions where recognition is sought.

It is easy to answer the question when the husband is a national of a country such as England or Argentina, where the domicil of the husband is the matrimonial domicil and the law of this domicil governs the right to divorce (possibly also after one party has deserted the matrimonial domicil). German courts have scrupulously investigated whether a British husband was domiciled within their territory, making certain that domicil at the forum exists not only in the German sense but also in the British sense.

If one or both of the parties are of American nationality,

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254 See, e.g., KG. (March 30, 1936) JW. 1936, 3570 *in fine*.
255 *Melchior* 215 § 143.
256 This was overlooked by Lewald, 29 Recueil 1929 IV 565, who uses the Argentine law as an argument against renvoi.
257 See the detailed instructions about what a German court ought to ascertain concerning the American requirements for recognition of divorce decrees in RG. (Nov. 21, 1929) JW. 1930, 1309, and the careful statements as to the domicil under English law in KG. (March 30, 1936) JW. 1936, 3570.
the solution is simple where both have their effective domicil, common or separate, in the country of divorce. But if not, which of the approximately fifty individual American territorial laws should be considered? It is incorrect to assume that the last domicil within the United States, now abandoned, should control, and the Continental court would scarcely be justified in speculating before which court in the United States the matter could probably be brought on the grounds of the situs of property, the residence of children, etc.

The requirements of full faith and credit to divorce decrees under the Constitution as developed by the Supreme Court of the United States would not be directly decisive, since they do not include foreign nations. Recognition seems to be granted in virtually all American jurisdictions to alien decrees of divorce, however, if no party is domiciled within the forum to which such a decree is presented for recognition and one party was domiciled at the divorce forum, while the other was personally served with process or appeared and litigated on the merits. Hence, it would be safe to assume jurisdiction in such a case in Germany, Switzerland, Sweden, Hungary, et cetera. Although not certain, it is probable that these conditions have been fulfilled in most, if not all, cases of admitted renvoi. And there is no necessity of allowing more divorces to foreigners.

VII. Change of Domicil or Nationality

Conditions on which the granting of divorce depends may change in different respects, viz., (1) domicil or nationality as the foundation of the court’s jurisdiction may be altered while the lawsuit is pending; (2) domicil or nationality as determining the applicable law may be modified during the

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proceedings; and (3) the status may have been changed after the occurrence of the circumstances on which the divorce action is based.

1. Change of Factor Determining Jurisdiction

As the three questions just mentioned have sometimes been confused, it has not always been clear that the first is dependent simply on the definition and the effects which the rules of civil procedure give to the commencement of an action for divorce. Generally, so soon as the action is considered instituted according to the conception of the forum, the jurisdiction established at this moment remains fixed for the duration of the suit—*forum perpetuatur*—jurisdiction continues. That, conversely, the ground for jurisdiction can be supplemented later, is not universally affirmed.

2. Change of Factor Determining the Choice of Law After Beginning of Litigation

The second question may be illustrated by three German cases, which result in the following paradigm. An American citizen, at the time domiciled in Germany but formerly of California, instituted a divorce suit in the German court of his domicil but afterwards during the proceedings moved to Copenhagen, Denmark. There was no doubt that by American principles (or, as it was construed, by the law of California) German family law was to be applied by way of renvoi, so long as the domicil of the husband was in Germany. But did American law, after the change of domicil, refer to German or to Danish law, and was this reference still decisive for the German court? The Court of Appeals of Stuttgart thought the question solved by the principle of

\[258\] See, for instance, Restatement § 76; German C. of Civ. Proc. § 263 par. 2.
perpetuation of the forum mentioned above. But, although this reasoning may seem consonant with the conception, prevalent in this country, that the *lex fori* governs divorce, in Germany the matter is undoubtedly part of the choice of law problem and cannot be answered by procedural rules. The Reichsgericht, in another case also, in inquiring whether reference should be made to the new domicile, refused to consult the national law but based its solution on the deliberate wording of the German conflicts rule, invoking the law of the state to which the husband belonged at the time of the commencement of the action. The same rule seems to prevail in France and Belgium as a matter of course. As the question is not identical with the procedural problem, the German courts permit the choice of law to be that of the time when the defendant is served in the action or when the ground for divorce is pleaded in court; a subsequent unilateral change of status by the husband is disregarded.

The Polish statute (art. 17 par. 1) also declares applicable the law of the state to which the spouses belong at the time of the action; the Polish Supreme Court has under-

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260 EG. art. 17 par. 1; RG. (March 19, 1936) 150 RGZ. 374; RG. (April 6, 1936) 151 RGZ. 103, 108 (husband of Icelandic nationality served with process in Germany returned to Iceland; in this case the Icelandic law, investigated as to its position on the question, revealed that it did not contain any rule concerning the effect of a change of domicile upon the law applicable).

261 Lerebours-Pigeonnière 304 ff. no. 280 and 361 no. 335.

262 However, Trib. civ. Bruxelles (Dec. 6, 1939) J.d.Tr. 1940, 120 rejects the action for divorce of Spaniards, divorce having been prohibited by the government of Franco during the pendency of the trial.


264 RG. (April 21, 1902) 46 Gruchot's Beiträge (1902) 959; RG. (April 6, 1936) 151 RGZ. 103; cf. KG. (Dec. 17, 1934) IPRspr. 1934, no. 58.

265 RG. (April 6, 1936) 151 RGZ. 103, 108; against Raape 378 and IPR. 277 and 3 Frankenstein 438.

265a Also Bulgaria: Family Law of 1949, art. 58.
stood this to mean, however, the country to which the parties belong when judgment is rendered. In fact, the danger of arbitrary changes made by one party is eliminated by this statute, since it refers to the law of the common domicil.

3. Changes of Factor Determining Choice of Law Before the Divorce Suit Is Brought

To understand the problem in question, suppose that the domicil of the husband is the test in two states, X and Y, and that adultery is the only ground for divorce in X (e.g., New York), while desertion is a sufficient ground in Y (e.g., New Jersey), and suppose that:

(i) The husband changes his domicil from X to Y, suing his wife in Y on the ground that she deserted him when he resided in X; or

(ii) The husband leaves his domicil in Y, suing his wife in X, alleging that she deserted him in Y.

Three solutions have been advanced:

(a) The court should consider the ground for divorce exclusively under the law ordinarily applicable, irrespective of whether the facts occurred before or after the acquisition of the new personal law.

Hence, desertion in X in case (i) is sufficient for divorce in Y; desertion in Y in case (ii) is insufficient in X.

(b) Conversely, the facts which happened when the personal law was not yet changed should be evaluated by the personal law of the party at that time.

Hence, desertion in X is no ground; desertion in Y is a sufficient ground for both courts in both cases (i) and (ii).

(c) Divorce should be granted only if the facts warrant divorce under both laws, the former personal law of the time when the facts occurred and the present personal law.

Hence, action is dismissed in both cases (i) and (ii).

The first view—(a)—is naturally taken by courts applying the _lex fori_. Under this theory, decisions were formerly rendered by the German courts, as by the great majority of American cases. It is also applied by the French courts in determining grounds for divorce according to the _lex fori_ when the applicant is a French national; in the leading case, the _Ferrari_ case, the Court of Cassation justified the granting of divorce under French law by events preceding the renaturalization of the plaintiff wife by declaring that the action was to be based not so much on the material events as upon the harm done by them to the conjugal life. It is remarkable that this view was accepted by the Swiss Federal Tribunal in a case analogous to the _Ferrari_ case, so that the court applied only Swiss law, although for this purpose a strictly contrary statutory provision had to be daringly interpreted as referring to foreign plaintiffs only. French courts, however, seem to extend the retroactive force of the _lex fori_ to divorce actions of foreigners.

The second view—(b)—agrees with a literal construction of the Japanese statute providing that divorce is governed by the national law of the husband at the time when the facts causing divorce occurred. This method avoids in a radical way any attempt at evasion by the husband but is highly impractical.

267 Germany: RG. (June 19, 1883) 9 RGZ. 191, 193.
268 England, see Westlake § 52.
269 United States: Minor § 84; 1 Beale § 110.5.
270 BG. (May 3, 1932) 58 BGE. II 93.
271 Laurent, 3 Principes 537 ff. no. 306, and many decisions, particularly, Cass. (civ.) (May 7, 1928) 6 1929.1.9.
272 Japan, Law of 1898, art. 16.
The third opinion—(c)—goes far back and was strongly advocated by an editor of Story's work, Judge Redfield, claiming that:

"It would be an intolerable perversion that an act which by the law of the State where committed was no cause of divorce should, by the removal of the parties to another State where the law was different, become sufficient to produce a dissolution of the married relation." 272

In this assertion, the words "State where committed" are evidently a mistake. That the state where the act was committed should be of any importance was sharply denied by Story. 273 Redfield plainly meant the state where the party was formerly domiciled; an act or conduct should not warrant divorce, if insufficient in the state where the party was domiciled at the time when it occurred. 274 The rule as formulated, however, was adopted by many statutes and even by the American Uniform Draft of 1900 and 1907, that of 1900 running as follows:

"No divorce shall be granted for any cause arising prior to the residence of the complainant or the defendant in this state which was not a ground for divorce in the state where the cause arose." 275

This confusion of the time when, and the place where, the offence occurred, makes the interpretation of the various American statutes difficult.

The sanction that Story himself would have had in mind was certainly the refusal of jurisdiction. 276 Correspondingly,

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272 Redfield in Story (ed. 6) § 230c.
273 Story § 230a.
274 Redfield in Story (ed. 6) § 230c speaks of the transfer of the domicil. § 230d, however, sounds again perplexing.
275 Draft printed in 14 Harv. L. Rev. (1901) 525, sec. 1. The explanation at 526 is rather confused.
276 See Story's own quotation § 230a of Gibson, C. J., in Dorsey v. Dorsey (1838) 7 Watts (Pa.) 349; and see Wharton § 231 on the later events in Pennsylvania.
the actual statutes possess two kinds of clauses. On the one hand, jurisdiction for divorce is often denied, with or without statutory provision, when the cause of action occurred outside of the state and the spouses were domiciled at the time out of the state. On the other hand, in many statutes the required time of residence preliminary to the action is prolonged, if the cause took place outside of the state. Whatever the exact sense of these clauses may be, their tendency is to prevent or to render it difficult for a fact to be appreciated by a court under a law other than would be relevant if the party in question had stayed at his domicil. Apparently the draftsmen of the statutes have felt bound to the law of the forum, if once jurisdiction is assumed, and therefore have thought that the only remedy is to deny jurisdiction. A connected provision of the Uniform Act of 1906 277 seems to follow this conception. The wording of the draft that had preceded in 1900, 278 however, reproduced in the preceding paragraph, may possibly be understood as involving a choice of law, meaning that the divorce ground is governed by the law of the domicil as of the time when the facts complained of happened. A consequence would be, that where the alleged cause fails to agree with such foreign law, the suit ought to be dismissed as to the merits, and not only quoad instantiam.

The same idea was to be found in Europe in the early nineteenth century and is now frequent. 279 Thé German statute, after providing that (EG. art. 17, par. 1) divorce is governed by the law of the husband as of the time of the commencement of the action, prescribes that (ibid., par. 2) a fact that has occurred while the husband belonged to an-


279 App. Liège (April 24, 1826) Pasicrisie 1826, 125, 127; for the practice of the Prussian courts, compare Gebhardsche Materialien 188.
other state cannot be claimed as a ground for divorce, unless the fact is ground for divorce or separation also according to the laws of that other state.

Correspondingly, the law of a former common nationality of the parties is to be consulted according to the Hague Convention and the Polish, Swedish, Swiss, Czechoslovakian, and Hungarian statutes, and the law of the former domicile is influential in the Scandinavian countries and under the Código Bustamante.

A special problem arises, if permanent conditions, such as mental deficiency, venereal disease, or habits of drunkenness, are recognized reasons for divorce under the new but not under the old statute; can desertion be said to begin only after the acquisition of the new status? The American cases are divided. Suppose a married couple was domiciled in New York, where insanity is not a cause for divorce, and

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280 Hague Convention on Divorce, art. 4.
Poland: Law of 1926 on international private law, art. 17 par. 2.
Sweden: Law of 1904 with subsequent amendments, c. 3 § 2 par. 2.
Switzerland: NAG. art. 7h par. 2; cf. BG. (May 3, 1932) 58 BGE. II 93; Schnitzer 175.
Czechoslovakia: Law on private international law of 1948, s. 19, as previously the treaties of Czechoslovakia with Yugoslavia (March 17, 1923, art. 34 par. 2), Poland (March 6, 1925, art. 7, abrogated by that of Jan. 21, 1949), and Rumania (May 7, 1925, art. 19 par. 2); cf. Svoboda, 4 Leske-Loewenfeld I 313 n. 186.
In Republican Spain Lasala Llanas 140 advocates the same principle.
281 Denmark: prevailing opinion, see Munch-Petersen, 4 Leske-Loewenfeld I 747; Borum and Meyer, 6 Répert. 221 no. 50; Hoeck, Personalstatut 33; Borum 123.
Norway: see Christiansen, 6 Répert. 575 no. 119.
Iceland: see Eyjólfsson, 4 Leske-Loewenfeld I 762.
282 Art. 52; cf. art. 54 and Bustamante, La commission des jurisconsultes de Rio 121, no. 124.
283 1 Beale 473 § 110.5. The courts of New Jersey are consistent in requiring that the two year period for desertion must have run after the deserting party became a resident of the state; see Berger v. Berger (1918) 89 N. J. Eq. 430, 105 Atl. 496, and citations at 497. The other view was taken by two old decisions of New Hampshire, see 1 Beale 474 n. 2; Batchelder v. Batchelder (1843) 14 N. H. 380; Hopkins v. Hopkins (1857) 35 N. H. 474.
later transferred their domicil to Norway, where it is, if continued through three years. Should a time of lunacy spent in New York be counted? This question ought to be affirmed, to avoid an unreasonable rule.\textsuperscript{284}

The choice of law rule just contemplated, although systematically better justified than the refusal of jurisdiction, makes the task of the judge delicate. Under the European formulas, several legislations must be simultaneously applied; if the parties have changed from a foreign nationality to two other foreign ones, this makes three, and with the law of the forum, four. No judge will like so much complication. All these rules may be questioned. Some of them seem practically superfluous. The German provision was designed to prevent the husband, whose national law alone is decisive, from changing his nationality so as to force his new law on his wife, if the new law were more favorable for obtaining divorce.\textsuperscript{285} Similar are the purposes of enactments preserving the divorce law of a former domicil. But there is no sufficient reason to complicate things where the last common nationality or domicil of the parties is chosen to govern, just for the reason that it renders a change of status of one party harmless.

As a whole, the contrast of opinions concerns the basic theory. Where the law of the domicil dominates' ideas, it is likely that this law will be regarded as determining the judicial value of the facts occurring during its reign. The European rules described above are derived in an analogous way from the personal national law. On the contrary, the majority view in this country is manifestly conceived within the sphere of territorialism.

While American courts, at least, are consistent in follow-

\textsuperscript{284} Contra, \textit{Raafe} 388 and IPR. 277.

\textsuperscript{285} Conversely, it seems that the husband is able to avoid a threatened divorce by changing to a more rigid law; \textit{Letzgus}, 145 Arch. Civ. Prax. 299.
ing the idea of a territorial law of the forum, some impor-
tant European courts inaugurating a similar theory have
rebelled against the current respect for the national law. We
have mentioned above the leading case of Ferrari; the
French Court of Cassation granted divorce to the wife who
was Italian by marriage but had recovered French nation-
ality. No new facts had arisen since the separation of the
parties from bed and board, rendered before the wife's
re-naturalization. If the French Court of Cassation granted
the divorce upon the anterior facts because the action was
based, not so much upon the material facts as upon the harm
done by them to the conjugal life, the reasoning certainly
is untenable; the different legislations determine precisely
what kind of facts should be regarded as essentially distur-
ing the marital community. However, in view of the fact
that one of the most reliable courts in the world, the Swiss
Federal Tribunal, followed the French example all the way,
in the face of the express contrary legal provision, we must
conceive that the application of the foreign law appears
unbearable to judges.

Hence, the European courts are coming back to where the
English and the American courts have remained; the case
where the plaintiff has changed to the domicil or nationality
of the forum is the really important one. Of course, there is
the evident danger of encouraging evasion of foreign laws,
and the French courts have been reproached on this ground,
the more so since they had been extremely sensitive to foreign
divorce "in fraud" of French law. English criticism of this
system emphasizes that a husband can, by transferring his
domicil to England, escape the indissolubility of marriage

286 See supra n. 268.
287 AUDINET, Note to Cass. (civ.) (Feb. 5, 1929) S.1930-I.81.83; but cf.
LEREBOURS-PIGEONNIÈRE 368.
288 See supra n. 269.
inherent in the law of his former domicil, and thus cause hardship to the wife and provoke legal difficulties, since the resulting decree, in all probability, will not be recognized in other countries involved. This case has not been covered by the Matrimonial Causes Act of 1937. That Act only helps the wife to maintain the English home, but even for this it is not clear whether the English jurisdiction is exclusive. The majority of the American statutes have tried to define the jurisdiction of the courts by those various additional requirements which we have mentioned before; these clauses are complicated and not really effective, except where the minimum residence is seriously upheld.

The case where both parties change their personal law in favor of that of the forum, has always been felt as less shocking than the circumvention of a divorce law by one of the spouses to the detriment of the other. Also the means of repression need not be necessarily the same. The German provision was intended to prevent the husband from arbitrarily changing his law, which was the governing law; but the Hague Convention avoided this peril by constituting the law of the last common national law as governing. Both cases, however, ought to be clearly envisaged in future discussions.

VIII. Conclusions

Three systems are outstanding. The first, the American method of applying the lex fori to divorce suits with foreign elements, has revealed itself as being unique. In the wide domains of the British commonwealth of nations, and under the Montevideo and the Scandinavian Treaties, the litigation takes place at the actual or, in certain cases, the last matrimonial domicil, so that the law of the forum is in harmony with the genuine domiciliary principle. The third

289 CHESHIRE (ed. 3) 479.
main solution presented by the Continental European and the Chinese and Japanese legislations has been derived from the doctrine that the national law of the parties must be respected, although the domestic law has to be consulted at the same time. The courts, in these latter countries, are open to foreigners domiciled in the state and in many cases as well to nationals domiciled abroad. Nowhere, however, in these two systems do courts accept divorce suits at the domicil of the plaintiff alone and at the same time apply exclusively the local divorce statutes, even though the plaintiff is of foreign nationality. This is literally the rule in this country in the case of an alien petitioner. But the characteristic point of comparison is that where the plaintiff, an American citizen, has by his domicil therein become a citizen of the state, this state will assume jurisdiction and apply its own statute exclusively, irrespective of the past and present legal situation of the other spouse. We have seen that no learned doctrine is able to justify this principle. We have also alluded to some of the evils to which it leads. But we have begun our comparative study for the purpose of finding out whether the methods used abroad are preferable.

The answer is, flatly, no.

The system centered around the matrimonial domicil is of tempting simplicity and offers a splendid basis for international cooperation. However, the United States and the states of the nationality principle cannot be expected to restore the idyllic conditions permitting such unity of rules.290 Again, it has never been discussed whether it would not be feasible and advisable to have a court, sitting at the domicil of one party, apply the law of the last common domicil instead of its own law, irrespective of the time when the cause occurred.

290 However, the latest development in France clearly tends into this direction.
The system of cumulative application of laws is so complicated that the difficulties connected with it seem out of proportion to its usefulness. More fateful still, the precarious balance between the foreign and the domestic law achieved in the German Code and the Hague Convention has been finally destroyed by the judicial and legislative movement characterized by the Ferrari case. Such a fervent advocate of the nationality principle as Pillet immediately perceived how incompatible with this principle it is to apply the domestic law to a foreign husband. This system is in ruins. A radical clearing up will be inevitable sooner or later.

Thus, really, it cannot be contended that the methods used outside of this country are superior to the framework of the American law of this subject.

Reforms can consist of a very simple development. The requirement of a minimum residence time is today the chief vehicle for correcting the scope of divorce jurisdiction. Uniform drafts have acknowledged its importance and insisted that the minimum should be of one or two years. This requirement ought to be freed from the wild-grown tendrils with which it is surrounded, and it should be enforced with the utmost rigidity. This method demonstrated by a century's history as being suitable to exigencies of life in America, brings us nearer to the much spoken of "interest of the state" in the married status of its domiciliaries. In the twilight under which it is hard to distinguish a freshly acquired actual domicile from a fictitious one, that is, a non-domicil, a court that must predicate its jurisdiction upon the "interest of the state" so defined is in an unenviable position. In order to compete with another state in the task of adjudging any status of a person, the state should ascertain that the person belongs to the life of the state, regularly and definitively. Such competition cannot be helped. But at least evasion among the states, and evasion by one spouse at the cost of
the other, would be eliminated. With a two years’ residence, or even a period of one year, strictly observed, any intention of obtaining divorce under the conditions is immaterial. Besides, very few individuals are able to change their local connections completely and to maintain their new center of private and business life during such a time merely to gain a divorce. Not every necessary improvement, of course, can be accomplished by such a measure alone; perhaps this is the reason why the uniform drafts have not appeared to attract sufficiently active support to accomplish a general reform. Where the parties are actually domiciled in two different states, the adequate method of dealing with the case is not to apply the statute of either state, but rather to apply that of the last common domicil. This suggestion should be appreciated by future European legislators. Whether it could be brought into the structure of the American statutory systems might be a matter of discussion.

More important, however, are reforms in the field of domestic divorce practice. They are prerequisites also of a better and sounder system of reciprocal recognition of foreign decrees.