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RECOGNITION OF STATUS IN FAMILY LAW

A Proposal for Simplification

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I

The purpose of this essay is to examine French law and the common law on the recognition of status in regard to marriage, divorce, annulment of marriage, legitimacy, legitimation and adoption. It is not intended to make a detailed comparison of the laws of the two systems. The study of a legal problem by a comparative method should not be a catalogue of variations, but a chance to see fundamental questions from the point of view of more than one system—a means of preventing the mind from entering a mould formed by the positive law of a single jurisdiction. The intention is to compare the lines of approach of French law and of the common law systems, having regard to the underlying nature of the problems, and the direction in which improved solutions may lie.

Is it useful at the present time to think of new ways of dealing with these matters in either system—or are the existing laws so fixed as to make proposals for modification an academic exercise? In England, recent statutory alterations in the principles of divorce jurisdiction have contributed to a more liberal attitude on recognition, although the boundaries of some of these developments are

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still uncertain.[1] The effect of foreign adoptions has been canvassed in the English courts and in the Commonwealth. The decisions have been controversial. A Royal Commission on Marriage and Divorce in Britain has presented a report containing recommendations for reform affecting recognition.[2] There has been dissatisfaction with some of the old rules and changes have been made.[3]

With one or two exceptions, French private international law is not governed by code. It is moulded by court decisions, textbooks and periodical articles. The result is notable neither for simplicity nor certainty. There have been signs of a desire for a more systematic structure and a draft code of private international law has been prepared.[4]

Because of interest in improving the law on recognition of status, the time would seem opportune for a comparison of the problems and thinking involved, and for an attempt to formulate suggestions as to the bases on which a modern theory of recognition of status might be constructed. In both French law and the common law, the existing rules are often uncertain and are a patchwork collection.

The scheme of this article is: (a) a discussion of the general approach to recognition; (b) a more detailed examination of different kinds of recognition; (c) suggestions towards a modern theory of recognition of status.

II. *General Discussion.*

In English law and in the appropriate Commonwealth systems, a distinction is made between questions relating to capacity, which are governed by the personal law, and formalities, to which the maxim *locus regit actum* is applied. But in the United States there is a tendency towards one solution with *locus regit actum* determining the applicable law for the whole validity of the mar-

[1] Matrimonial Causes Act, 1950, 14 Geo. 6, c. 20, s. 18 (1). The Matrimonial Causes (War Marriages) Act, 1944, 7 & 8 Geo. 6, c. 43, gave additional jurisdiction based on residence but these provisions have now expired. *Cf.* Divorce Jurisdiction Act, S. C., 1930, c. 15, s. 2; *Travers* v. *Holley*, [1953] P. 246.

[2] Cmd. 9678.

[3] For instance in Ontario, The Child Welfare Act, R.S.O., 1960, c. 53, Part IV.

[4] See Travaux de la Commission de Réforme du Code Civil (1951), pp. 801-820; de la Morandière, (1952), 1 Am. J. of Comp. L. 404; Loussouarn, (1956), 5 Int. & Comp. L.Q. 378; Delaume, (1951), 29 Can. Bar Rev. 721. See also discussions by the Comité Français de Droit International Privé on the Avant-projet de la Commission de Réforme du Code Civil (Droit international privé).

riage. French law divides marriage validity into "conditions de fond" and "conditions de forme", the first governed by the personal law, and the second by *locus regit actum.*[5] Recognition of foreign divorce is dealt with on different lines in the two systems. The Anglo-Saxon systems base their recognition of divorce on jurisdiction, and it may not satisfy the court which is asked to recognize, that the granting court had jurisdiction by its own law. In English law, the basis of jurisdiction for recognition purposes is domicile within the country of the granting court,[6] and domicile, at least in the sense in which the term is used by the *lex fori*, may not be the basis of the local jurisdiction. If the *forum* is satisfied that the foreign court had jurisdiction according to the standards of the *forum*, it will recognize the divorce irrespective of the grounds upon which it was granted or whether the foreign court applied its own or some other system of law. French law requires, in general, that the foreign court had jurisdiction by its own law, and that the divorce was granted in accordance with the personal law of the parties. Also, if the ground of divorce by the personal law is in substance outside the range of grounds on which divorces are granted in France, "l'ordre public" may prevent the court from recognizing the divorce. In both systems the positive laws on legitimacy and on the recognition of foreign legitimation speak with an uncertain voice. Adoption is a comparatively recent innovation and recognition of foreign adoptions, and the interpretation of wills in relation to claims of adopted children is a new problem. The difficulty is one of choice of law—and generally, the selection is between one personal law and another, for instance, that of the child or that of the child's father. Where a choice of law problem is involved and *locus regit actum* is not applied, the personal law of the parties (or perhaps one of them) will usually be selected. In French law, this is the law of the nationality (or exceptionally the domicile) and in the Anglo-Saxon systems it is the law of the domicile.

The difference between nationality and domicile has been expressed thus: "La nationalité est un élément de répartition *spirituel* de l'individu tandis que le domicile est un élément temporel de répartition."[7] In Roman times, the two ideas were not clearly separated. The relationship of a person to the laws of a community

[5] See for instance, Batiffol, Traité élémentaire de droit international privé (3rd ed., 1959), p. 483. *Cf.* the Greek Civil Code of 1940, *e.g.*, art. 13; Nicoletopoulos, (1949), 23 Tul. L. Rev. 452.

[6] Subject to some developments mentioned later.

[7] Niboyet, Cours de droit international privé (1949), p. 203. *Cf.* Rigaud, Cours de droit international privé (2nd ed., 1943), p. 249.

could be regarded from the point of view of his domestic hearth being located within the community or from the point of view of political ties binding him in common with other members of the community.[8] An important factor causing certain countries to derive personal law from nationality and others to derive it from domicile has been the development of federation.[9] The Romans did not regard domicile as unitary in the sense that a person could only be domiciled in one jurisdiction at a given time. This idea was introduced later so that the personal law could be uniquely determined.[10] There are three forms of domicile in English law: (1) domicile of origin, which is fixed at birth, and in the case of a legitimate child, is the same as that of the child's father at the date of birth, (2) domicile of dependence, whereby a married woman has the domicile of her husband and a child generally has the domicile of its father and (3) domicile of choice. A person who has not a domicile of dependence may acquire a domicile of choice, *animo et facto* that is by intending to make a permanent home in a certain country and by taking up residence there.[11] Nationality in French law may be considered under (a) "nationalité d'origine", for which a basic rule is "Est Français l'enfant légitime né d'un père français",[12] and (b) naturalization or nationality acquired by decree after birth, a period of residence being required as a qualification.[13]

In private international law, both nationality and domicile are used to link, for certain purposes, an individual and a system of law. Attempts have been made to justify this, mainly on two grounds: (a) that there is an association between a person's nationality or domicile and the system of law which should govern his affairs in certain respects, and (b) a desire to continue the influence of a legal system even when a person has left the country in which the system operates.[14] Point (a) is sometimes stated in the form that the law imputes to an individual an intention that the law

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[8] Niboyet, *ibid.*, p. 204; Lerebours-Pigeonnière, Droit international privé (ed. Loussouarn, 1959), art. 89 *et seq.* The Roman idea of *domicilium* was defined as "*ubi quis larem rerumque ac fortunarum summam constituit; unde rursus non sit discessurus si nihil advocet: unde cum profectus est, peregrinari videtur: quo si rediit perigrinari iam destitit.*"

[9] *Cf.* Cook, The Logical and Legal Bases of the Conflict of Laws (1942), Ch. 8.

[10] See Story, Conflict of Laws (8th ed., 1883), Ch. 3.

[11] Story, *ibid.*, attributes the inclusion of the element of *animus* to the Dutch and French jurists, for instance Voet, Argentré.

[12] See for instance Lerebours-Pigeonnière, *op. cit., supra,* footnote 8, s. 116.

[13] Batiffol, *op. cit., supra,* footnote 5, s. 59 *et seq.*

[14] *Cf.* Beale, Conflict of Laws (1935), vol. 1, p. 467 *et seq.*

of the nationality or domicile (as the case may be) should be applied to certain aspects of his status.[15] This argument can only apply where a person has acquired a nationality or a domicile by choice. In this situation, an individual may be said to have selected his personal law by his own behaviour, although in this case questions similar to the vexed problem of whether parties can select the law governing their contract do not seem to have arisen.[16] A system of private international law based on the thesis that law is made for persons not for things, and applying a purely personalist approach to choice of law would give rise to many practical difficulties.[17]

It has long been customary for a community to continue the influence of its laws in regard to members of the community who are separated from it. Suárez mentions that a subject travelling outside the boundaries of a state remains a subject and that the law "binds all subjects and all parts of the community".[18] A French court will apply French law to the status and capacity of a French national even when he is not resident in France.[19] This result is said to be derived from the ideas of the "personalist" school of private international law.[20] In the English theory of recognition of divorce, which is based on jurisdiction, the effect is rather different and the member of the community is not, as it were, followed by his own law in the eyes of the country of his nationality. The local jurisdictional concepts of English law have been substantially applied by the English courts to the recognition of foreign divorces.

Attempts have been made to generalize the operations of local policy in private international law. It has been said that, "The status of every individual, in the present state of the world, must necessarily, to use a mathematical phrase, be susceptible of different polarities according as it is referred to the decision of one national tribunal or another. In declaring that the personal law of an individual of whatever nationality is the law of his domicile, English law does no more than regulate the capacity of

[15] *Cf.* Wharton, Conflict of Laws (3rd ed., 1905), vol. 2, p. 1469.

[16] On the contracts problem see, for example Nussbaum, (1942), 51 Yale L.J., 893; Morris and Cheshire, (1950), 56 L.Q. Rev. 320; Yntema, (1952), 1 Am. J. of Comp. L. 341; Batiffol, Aspects philosophiques du droit international privé (1956), s. 30.

[17] *Cf.* Batiffol, *ibid.*, s. 90 on the theories of Mancini.

[18] As to persons being bound by Islamic law wherever they may be, see Maspétial, [1953-54] Archives de Philosophie du Droit 245; Bousquet, Précis de droit musulman (3rd. ed., 1954), vol. 1, Ch. 3.

[19] Art. 3, Code civ.

[20] Donnedieu de Vabres, L'évolution de la jurisprudence française en matière de conflits de lois (1938), Ch. 4.

foreigners in their English polarity."[21] In the English and French systems, the principles of recognition of foreign status (as well as other conflicts principles) have an "international" flavour in that their application is not restricted to nationals or domiciliaries of the *forum*.

Some reforms in the law of domicile have been proposed in England by the First Report of the Private International Law Committee.[22] The existing law is criticized by the Committee (a) because excessive importance is attached to the domicile of origin, and (b) because of the difficulty of proving intention to acquire a domicile of choice. The domicile of origin is an artificial concept, which may make a person subject to the laws of a community with which he has little or no connection. The domicile of origin may revive if a domicile of choice has been abandoned without a new domicile of choice being acquired *facto et animo*, and this may have the effect of returning the person (and those whose domiciles depend on his, such as his wife or children) to a domicile which he has long abandoned and has shown no desire to regain. The difficulty of proving intention to acquire a domicile of choice may be very great and the court is often driven to make a speculation on meagre evidence, sometimes years after the death of the person concerned. The Committee has suggested that the law should be amended to provide that where A has his principal residence in country X, it should be presumed that he intends to make his home there.

Different countries place different interpretations on the concept of domicile. In some, it is equivalent to ordinary residence.[23] Since domicile is defined and determined by the *lex fori*,[24] it is not a concept with an internationally unique meaning. In countries which use domicile as the personal law, apart from Great Britain and the common-law countries of the British Commonwealth, there seems to be a tendency for domicile to mean the principal, non-transitory location of the individual—his geographical "centre of gravity". Nationality may be regarded as his political "centre

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[21] Baty, Polarized Law (1914), p. 29.

[22] Cmd. 9068. *Cf.* draft statute on domicile by the Conference of Commissioners on Uniformity of Legislation in Canada (1961), 39 Can. Bar Rev. 124.

[23] Report of the Royal Commission on Marriage and Divorce, Cmd. 9678, s. 790. At s. 816 it is stated that in "most European countries" domicile is "equivalent to habitual residence" (art. 5). See Meijers, Recueil de lois modernes concernant le droit international privé (1947).

[24] Falconbridge, Conflict of Laws (2nd ed., 1954), pp. 130-131. See Niboyet, *op. cit.*, *supra*, footnote 7, to the effect that a French court should determine nationality and domicile by French law.

of gravity". Nationality is unsatisfactory as a choice of law determinant where a selection has to be made among the legal systems of a federation, and difficulties also arise where a person has more than one nationality.[25]

In property questions, where there is a conflict of laws, it is common to use the *situs* of the property to determine the choice of law. When dealing with relations such as contracts, or status factors such as marriage or divorce, the determinant may be a "centre of gravity" type of concept, such as the proper law in contracts, or nationality or domicile in status.[26] The idea is to find the legal system with which the contract or the person seems most closely associated—and this association provides a reason (more or less) intellectually satisfying for preferring one system as the applicable system.

In one sense, almost any law may be described as the outcome of public policy.[27] Positive law, no doubt, is the expression of principles related to community life and reflects the policies, the views and the prejudices of the community. Almost any code, statute or court decision may, in this way, be thought of as an act of policy. But in both the French and the common-law systems, the phrase public policy is used in a more restricted sense. In French law, "ordre public" is applied in private international law to prevent undesirable results from a too objective and "international" approach. The starting point is a system (more or less clearly defined) of choice of law and other conflicts principles. But this system is liable to be checked by public policy.[28] The effect of the check is to prevent the application of foreign law and to substitute French law.[29] It has been said that: "l'ordre public . . . intervient toujours techniquement de la même façon; il justifie une dérogation à des règles établies."[30] Public policy may be said to operate in

[25] The Hague Convention on Conflict of Nationality Laws, 1930, attempts to deal with the second difficulty—providing that where a person has more than one nationality, a third state should select the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected. See also Rabel, The Conflict of Laws (vol. 1, 1945), pp. 121-2; (1959), 48 Revue Critique 395.

[26] As to the theory of centre of gravity in contracts see *Auten* v. *Auten* (1954), 308 N.Y. 155, 124 N.E. 2d. 99, at p. 101; (1955), 40 Cornell L.Q. 772.

[27] See F. S. Cohen, (1950), 59 Yale L.J. 238. On public policy generally see Nussbaum, (1940), 49 Yale L.J. 1027.

[28] Batiffol, *op. cit, supra,* footnote 17, s. 73 and footnote 5, p. 409 *et seq.*

[29] *Cf.* the restriction on choice of law in contracts by art. 6, Code civ., "On ne peut déroger, par les conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs."

[30] Lagarde, Recherches sur l'ordre public en droit international privé

two ways in private international law: (a) it may ignore foreign prohibitions and so on, which are distasteful to the *lex fori;* (b) it may introduce objections and prohibitions not contained in the foreign law.[31] In practice, cases before the French courts may be decided by French law, even if the personal law is another system. The foreign solution may shock French conceptions of morality or justice: for example, a foreign law which permitted the marriage of a brother and sister, or recognized slavery as a legal status. But public policy may arise in less striking situations. It may involve a comparison of the foreign law and French law to see if the foreign solution is sufficiently compatible with French social or religious principles, to be applied by a French court or recognized in France.[32] The result seems to be that the French system has, *prima facie*, the objectivity and reciprocity of an international system (of French construction), but by using the overriding powers of public policy, the courts may, and frequently do apply the law of the *forum*. The intervention of public policy may be "pour des raisons morales, philosophiques ou politiques au sens large de ce mot".[33]

The French courts have been criticized for too liberal use of public policy, especially on recognition of foreign status. There has, no doubt, been a tendency to apply French law in such matters and to justify the choice by referring to public policy—which may enable a court to reject foreign law, without explaining very precisely why it has done so.[34] It has been suggested that public policy should be an *ultimum remedium*.[35] It is by the combined operation of the conflicts rules and public policy (where applicable) that the courts determine choice of law problems, and make a compromise between nationalism and internationalism. The conflicts rule gives

(1959), who says (p. 3) that the position may be that the conflicts rule has excluded the *lex fori* "au profit de la loi étrangère, elle-même condamnée par le mécanisme de l'ordre public". *Cf.* Rigaux, La théorie des qualifications en droit international privé (1956), p. 425 *et seq.;* Savatier, Cours de droit international privé (2nd. ed., 1953), s. 314 *et seq.* Maury, Droit international privé (1952), p. 114 *et seq.*

[31] See Niboyet, Traité de droit international privé français (vol. V, 1948), s. 1492; *Cf.* as to (a) *Sottomayer* v. *De Barros* (*No. 2*) (1879), 5 P.D. 94, Falconbridge, *op. cit., supra*, footnote 24, p. 709.

[32] Lagarde, *op. cit., supra*, footnote 30, p. 121.

[33] Largarde, *ibid.*, p. 8. Religious reasons are not so explicit in France today as in some countries, for instance, confessional marriage in Spanish or Greek law: See also Valls, (1950), 3 Int. & Comp. L.Q. 267.

[34] The brevity of French judgments may facilitate this, although where an American or English court refers to public policy it is not usually explicit as to which feelings have been offended by the foreign law solution, and what damage to the community might have occurred if the foreign solution had been allowed to prevail.

[35] Lagarde, *op. cit., supra*, footnote 30, p. 123.

an *a priori* selection—only final where public policy acquiesces, for public policy is not "une notion a priori, mais la constatation expérimentale d'une insuffisance d'équivalence juridique".[36] Public policy ensures that the solutions of conflicts problems are not seriously out of line with the thinking behind the domestic law.[37] Is a choice of law rule merely a legal mechanism? If so, then the test of a good choice of law system would be simply its ability to "shunt" each legal "train" smoothly and efficiently on to one set of "tracks"—without evaluation of the relative desirability of the possible end solutions. But an approach on the basis of mechanical efficiency (or one that is quasi-scientific, such as a theory of circumstantial connection between a party and a community)—is not always sufficient.[38]

In the common-law systems, public policy has a more limited role. There is no choice of law problem in regard to divorce. Also there has not been, on the whole, so much emphasis on methodology as in French law (and some other European systems)—involving a division of the problem into (a) the application of the conflicts rules, (b) the effects of public policy. The choice of law determinants—other than the *lex fori*—which affect recognition problems—are the personal law and the rule *locus regit actum*. The former enters into questions of capacity to marry in many jurisdictions, and the usual attitude of the courts is to reject a foreign law solution indicated by the personal law, only where the solution is considered to be inconsistent with fundamental moral or social concepts.[39] Public policy is an *ultimum remedium*, and there have been few cases in which it has been raised explicitly.[40] It is not certain how public policy might operate to reject foreign law in

[36] Niboyet, *op. cit., supra*, footnote 31, s. 1513.

[37] *Cf.* Lerebours-Pigeonnière, *op. cit., supra*, footnote 8, p. 455, "L'exception d'ordre public protège la vie interne et l'ordre juridique interne, dans le cadre desquels interviennent la vie internationale et l'ordre juridique international, contre les inconvenients de l'intrusion des lois étrangères, lorsque nos intérêts vitaux pourraient être compromis." See Johnson, The Conflict of Laws (vol. 1, 1933), p. 312 to similar effect.

[38] It has been said that the reason for preferring one system of law to another is that: "On protège . . . l'intérêt prépondérant." Niboyet in Travaux du Comité de Droit International Privé (1934), p. 43. Professor Lorenzen in a book review criticized Professor Nussbaum for being attached "to the traditional point of view, according to which the conflict of laws merely purports to solve preliminary questions and does not deal with substantive justice". (1943), 57 Harv. L. Rev. 124.

[39] *Cf.* Restatement of the Law of Conflict Laws (1934), s. 134 by which a state may refuse to recognize a marriage which is valid by the laws of another state, if it is deemed "sufficiently offensive to the policy" of the state asked to recognize.

[40] See for instance, *Pugh* v. *Pugh*, [1951] P. 482; *In re Paine*, [1940] Ch. 46; *Brook* v. *Brook* (1861), 9 H.L.C. 193; *Mette* v. *Mette* (1859), 1 Sw. and Tr. 416; Falconbridge, *op. cit., supra*, footnote 24, p. 704 *et seq.*

legitimacy, legitimation or adoption, but presumably, if it intervened, it would be only in extreme cases. The rule *locus regit actum* applies mainly to the celebration of marriage (but in the United States it may also apply to capacity). Does this mean that the common-law systems consider the content of the foreign law only in exceptional circumstances, where the foreign law might offend some of the most deeply held policies of the forum?[41] Is the function of conflict of laws simply to determine the applicable law or to discover which courts have jurisdiction—leaving questions of justice to the system selected by the conflicts rules? The main concern of conflicts rules in the common-law systems is to provide a *modus operandi* whereby a problem is transferred into the sphere of this or that law or jurisdiction. The *modus operandi* may have been made in the image of the domestic law—for instance domicile in divorce recognition.

Fraud on the law (fraude à la loi) is a subject very closely related to public policy, and indeed it might be described as a special aspect of public policy.[42] It has been said that: "La théorie de la fraude à la loi n'est plus guère invoquée. Cas-limite, en quelque sorte, de la notion d'ordre public, elle s'est comme resorbée en celle-ci, et n'a plus guère d'existence propre. Ceci explique d'ailleurs que, comme la notion d'ordre public avec laquelle elle tend à se confondre, elle ne joue qu'en faveur de la seule loi française."[43] There is a mental element involved—an intention on the part of a Frenchman, for instance, to evade provisions of French law disadvantageous to him, by acquiring a nationality in another country with laws which are more to his liking.[44] The leading case in France on this subject is *Bauffremont*.[45] Fraud on the law has been defined as: " . . . les manoeuvres par lesquelles les parties, soumises à une obligation ou à une prohibition légale,

[41] *Cf.* Tötterman, (1953), 2 Int. & Comp. L.Q. 27; Drucker quotes from a book on private international law by Professor Lund of Moscow University published in 1949 to the effect that in the Anglo-American jurisdictions private international law is: "One of the means of legal technique directed to restrict the applicability of foreign laws, and to widen the sphere of municipal law . . . ." (1955), 4 Int. & Comp. L.Q. 386.

[42] For a comparative discussion see Verplaetse, La fraude à la loi (1938). See Avant-projet de la Commission de Réforme du Code Civil, *op. cit.*, *supra*, footnote 4, art. 102. See also Batiffol, *op. cit.*, *supra*, footnote 5, p. 426 *et seq.*

[43] Le droit international privé de la famille en France et en Allemagne (1954), *per* Holleaux, p. 136 (published by La Société de Législation Comparée).

[44] This mental element has been described as "psychologique ou moral." Maury, *op. cit.*, *supra*, footnote 30, p. 118.

[45] Cass. civ., 18th March 1878; Niboyet, *op. cit.*, *supra*, footnote 31 s. 1489, footnote 7, ss. 533-540.

cherchent à y échapper, au moyen d'autres règles de droit, dépendant de leur libre initiative, mais qu'elles détournent de leur vrai sens." [46] Fraud on the law may involve the use of lawful means to achieve an unlawful result, and in private international law this will usually consist in a person doing a lawful act to make himself subject to a more favourable legal system. A practical difficulty is to decide whether *animus* existed or not, for instance, whether a change of nationality was made for the purpose of evading the law of the old nationality.[47] The French doctrine of "fraude à la loi" has been criticized as being illogical and over-nationalistic.[48] The American Restatement provides that a marriage will not be invalid merely because the parties went to a particular state to marry in order to evade the requirements of the laws of their domicile.[49] On the other hand there are various rules in common-law jurisdictions showing the influence of thinking at least analogous to fraud on the law.[50] The purpose behind the doctrine of fraud on the law is to protect the influence of a certain legal system. This is really a matter of public policy.[51]

III. *Validity of Marriage.*

French law, like most common-law systems, has two sets of requirements for the validity of a marriage—"conditions de fond" (capacity or essential validity)—and "conditions de forme" (celebration or formal validity), the first being governed by the personal law and the second by the law of the place of celebration.[52] In the

[46] Savatier, *op. cit., supra*, footnote 30, s. 324.

[47] Donnedieu de Vabres, *op. cit., supra*, footnote 20, p. 373 *et seq.*

[48] *Cf.* Rabel, *op. cit., supra*, footnote 25, p. 507.

[49] Restatement, *op. cit., supra*, footnote 39, s. 129.

[50] For instance, legislation limiting freedom of remarriage after divorce. Verplaetse, *op. cit., supra*, footnote 42, p. 1951 contends that the common law is more territorialist than the civil-law systems. *Cf.* Lorenzen, Essays on the Conflict of Laws (1947), p. 162; Story, *op. cit., supra*, footnote 10, Ch. 4; *Re Stull's Estate* (1898), 183 Pa. 625, 39 A. 16.

[51] *Cf.* Johnson, *op. cit., supra*, footnote 37, p. 312, "Public policy may have to shut both eyes to mere processes of logic. We are entitled to our own view of our public policy, part of which is that we must guard our civilisation against insidious and noxious infiltrations from societies functioning on a lower plane." Regarding the problem of a person who rearranges his affairs by lawful means but with the intention of reducing his liability to tax, it has been said that the taxpayer is "entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue," and no one is under an obligation so to arrange his affairs "as to enable the Inland Revenue to put the largest possible shovel into his stores". *Ayrshire Pullman Motor Services and Ritchie* v. *C.I.R.* (1929), 8 A.T.C. 531, at p. 537.

[52] Rabel, *op. cit., supra*, footnote 25, p. 205 *et seq.;* Le droit international privé de la famille en France et en Allemagne (1954), *per* Ponsard, p. 3; Batiffol *op. cit., supra*, footnote 5, p. 483; Avant-projet de la Commission de Réforme du Code Civil, *supra*, footnote 4, art. 62. It is suggested by Ni-

codification of private international law proposed by the Commission for reform of the French Civil Code, it is provided that the status and capacity of foreign nationals who have had their domiciles in France for more than five years should be governed by French law.[53] This proposal is interesting as an attempt to bring within the group having French law as their personal law, both those who have political ties with France, in the form of nationality, and those who have made their homes within the community, without having acquired French nationality. An analogous trend can be detected in the idea of the proper law of a contract—aiming to produce a more complete association of the parties, the contract, and a legal system, than would be obtained if the transaction were governed by a limited concept such as the *lex loci contractus*. Concepts such as "nationality", "domicile" and "residence" each denote only *certain* aspects of the relations between a person and a community.

In English law, the rule that capacity to marry is governed by the personal law seems to have been derived from a supposed general rule in contracts. It was said in *Sottomayer* v. *De Barros*, that it was "a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile" and also that "as in other contracts, so in that of marriage, personal capacity must depend on that of the law of the domicile".[54] The contention of counsel for the Queen's Proctor had been that, in general, capacity to marry was determined by the *lex loci* contractus. The prevailing view in English contract law is that the applicable law is the proper law of the contract.[55] In regard to capacity to marry, however, most authorities support the law of the domicile.[56]

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boyet, *op. cit., supra*, footnote 31, Ch. 2, that even in a confessional marriage there is an element of "fond", although in such a marriage the difference between "fond" and "forme" is less distinct. Polygamous marriages are contrary to "ordre public" in France in the sense that further marriages are forbidden. But foreign polygamous marriages may for instance be the subject of proceedings in regard to property. See Batiffol, *ibid.*, s. 432. See also case comment by Francescakis in (1960), 49 Revue Critique 370.

[53] Avant-projet, de la Commission de Reforme du Code Civil, *op. cit., supra*, footnote 4, art. 59, This is opposed by the Comité Français de Droit International Privé; Loussouarn, *op. cit., supra*, footnote 4.

[54] (1877), 3 P.D. 1, at p. 5. Beale, *op. cit., supra*, footnote 14, p. 673, contends that capacity to contract was not then governed by the personal law.

[55] See for instance, Falconbridge, *op. cit., supra*, footnote 24, pp. 384-385; Cheshire, Private International Law (5th ed., 1957), p. 214, Wolff, Private International Law (2nd ed., 1950), pp. 283-285 considers that capacity to contract should be governed by the *lex loci contractus* or the domiciliary laws of the parties.

[56] Falconbridge, *ibid.*, pp. 704 *et seq.*; Dicey, Conflict of Laws (7th

The determination of capacity by the personal law presents difficulties where the pre-nuptial personal laws are different. One possible solution is that each party must have capacity by his or her own personal law. This may be the rule in English law.[57] It has been suggested that it should apply in French law.[58] The solution is a logical application of the principle that each party to a contract must have capacity, but it has the effect of increasing the risk of marriages being invalid, when compared with a solution based on one law. Savigny has suggested that the capacity of both parties should depend on the personal law of the husband immediately prior to marriage, on the basis that he will become the head of the family and that after marriage the woman's domicile will depend on his domicile.[59] A weakness in this reasoning is that the question at issue is *whether* the parties are married. There is no reason *a priori* to apply a personal law pattern which might be reasonable if they *were* married.[60] Another proposed solution is the "intended matrimonial domicile". This theory has possibly received more support from legal writers than from decided cases.[61] It has been said that: "where the intention of the parties is debatable the *lex domicilii* of the husband at the time of the marriage must prevail."[62] Also, in most cases, the intended domicile will be the country in which the husband was working at the time of the marriage, and, therefore, might not differ much in practice from the husband's domicile rule proposed by Savigny. The intended matrimonial domicile is analogous to the idea of the proper law of a contract. Both intended matrimonial domicile and proper law relate capacity to the circumstances of a particular marriage or contract. But the problem may be whether *in general*, by the laws of A, X has the capacity to marry or to contract. Any advantages possessed by the theories of husband's domicile or of intended matrimonial domicile are related to convenience and policy. There is a greater ease of application and a smaller risk of

ed., 1958), p. 266; Cheshire, *ibid.*, p. 300 *et seq.*; Wolff, *ibid.*, p. 335 *et seq.*; Savigny, Private International Law ((1869) Trans. Guthrie), p. 243; Von Bar, Private International Law ((1892), Trans. Gillespie), s. 157.

[57] Falconbridge, *ibid.*, p. 704.

[58] Batiffol, *op. cit.*, *supra*, footnote 5, s. 431; Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, s. 444. *Cf.* Maury, *op. cit.*, *supra*, footnote 30, p. 126; Arminjon, Précis de droit international privé (1952), Vol. 3, p. 26.

[59] Savigny, *op. cit.*, *supra*, footnote 56.

[60] But there may be a presumption in favour of the marriage being valid, and if so the argument for applying the "married" personal law pattern will have more force.

[61] Lorenzen, *op. cit.*, *supra*, footnote 50, p. 148 mentions that it was supported by Paul Voet. Cheshire, *op. cit.*, *supra*, footnote 55, p. 300 *et seq.*, lays great stress upon it.

[62] Cheshire, *ibid.*, p. 312.

invalidity where there is only one law governing capacity instead of two.

In both the French and the common-law systems, the formal validity is governed by the law of the place of celebration.[63] Some legal systems do not adhere to this principle and attempt to relate marriage to a certain type of religious ceremony, and both the French and common-law systems may be concerned with recognition problems involving for instance a foreign nullity decree based on confessional marriage laws. In *Stathatos* v. *Stathatos*[64] a woman married a Greek in England by a civil ceremony. The marriage was declared a nullity by a Greek court, since by Greek law the marriage had to be celebrated by a priest of the Greek Church in order to be valid. The English court granted a divorce on "the basis that the Court of the husband's domicile having deprived her of all claim upon her husband, and thereby relieved her of all obligation to observe the domicile of her husband, she reverted to her own domicil, and thereby acquired a right to sue in this Court...".[65] There are two ways in which a "confessional" marriage law may be regarded—(a) as introducing a different conflicts principle or (b) as being an example of strong public policy. The effect of (a) would be to exclude division into capacity and ceremony, and to refer the whole validity of the marriage to the personal law.[66] If a question of recognition of a foreign nullity decree based on a "confessional" marriage law comes before a court of a French or common-law system, the court may have to consider whether to recognize a decision based on (i) a different conflicts rule; (ii) a strongly held public policy of a kind which does not exist in the *lex fori*. Regarding (ii) a court may feel that by recognizing the foreign decree, it is assisting the foreign country to transport outside its boundaries the special views prevailing therein. A country recognizing such a nullity may be permitting the policy of the foreign country to prevail over its own view that marriage should not be linked exclusively with one religion. The dominant issue for the forum is one of policy.

A question may arise as to whether reality of consent should be classified under formal or essential validity. Lerebours-Pigeonnière states that: "Les formes extrinsèques sont les procédés que

[63] Compare Restatement, *op. cit.*, *supra*, footnote 39, ss. 121-123.

[64] [1913] P. 46. *Cf. Papadopoulos* v. *Papadopoulos*, [1930] P. 55. See Rigaux, *op. cit.*, *supra*, footnote 30, p. 391; Rabel, *op. cit.*, *supra*, footnote 25, pp. 211-212; Nicoletopoulos, *op. cit.*, *supra*, footnote 5, (as to Greek law).

[65] *Ibid.*, at p. 50.

[66] *Cf.* Rigaux, *op. cit.*, *supra*, footnote 30, s. 265.

l'on doit imposer à la manifestation extérieure des volontés tendant à des effets juridiques, dans l'intérêt des déclarants, de leurs partenaires, des tiers, afin que l'on ne risque pas de donner à une manifestation quelconque la signification inexacte d'un acte juridique." [67] On the other hand "fond" is "la volonté en soi, c'est-à-dire son interpretation, sa valeur intellectuelle et morale (vices du consentement), son objet". "Vice du consentement" exists where the consent has been given through error or "extorqué par violence ou surpris par le dol." [68] In the common-law jurisdictions the position is less definite.[69] The tendency seems to be to apply the thinking of the *lex fori*, although there may be no indication of a conscious choice of that law. Most legal systems have comparable ideas on vitiation of consent by mistake, force and fraud, and this tends to obscure the choice of law question. The application of foreign law by a court is always rather unsatisfactory in practice. The judge is applying law that is unfamiliar to him and has to rely largely on the evidence of experts. Even if the decision on foreign law is appealable, the appeal is to another court to which the foreign law is also unfamiliar.[70] This is particularly so when a civil-law judge has to apply a common-law system or *vice versa*.

The French Civil Code provides that a marriage abroad, where one of the parties is French, may be celebrated "dans les formes usitées dans le pays", provided that it has been preceded by the publication in France required by article 63 and provided that no French party has contravened any of the provisions of articles 144 to 146: "Des qualités et conditions requises pour pouvoir contracter mariage." [71] There is doubt as to whether non-compliance with article 63 would render such a marriage a complete nullity or whether failure in publication would be an "empêchment prohibitif".[72] One view is that an absolute prohibition is not created, but that failure to comply with article 63 might come within the scope of "fraude à la loi".[73] It is part of the policy of French law

[67] *Op. cit., supra*, footnote 8, s. 431.

[68] Art. 1109, Code civ.

[69] See Woodhouse, (1954), 3 Int. & Comp. L.Q. 454, who suggests that such questions should be governed by the personal laws of the parties. *Cf. Way* v. *Way*, [1949] 2 All. E.R. 959.

[70] For an examination of the judicial review of determinations of foreign law (in regard to French law), see Zajtay, La condition de la loi étrangère en droit international privé français (1958).

[71] See also art. 170 Code civ.; Batiffol, *op. cit., supra*, footnote 5, s. 439.

[72] Lerebours-Pigeonnière, *op. cit., supra*, footnote 8, s. 441; Rabel, *op. cit., supra*, footnote 25, pp. 211-212; Le droit international privé de la famille en France et en Allemagne (1954), *per* Ponsard, p. 41.

[73] On the question of whether nullity results from failure to observe a statute dealing with celebration, *Alspector* v. *Alspector*, [1957] O.R. 14 and 454; Baxter, (1958), 36 Can. Bar Rev. 299; Keyes, (1959), 1 Osgoode

to oppose clandestine marriages, and no doubt the policy of article 170 is to prevent a person of French nationality from circumventing this policy by marrying abroad.[74] Article 63 requires submission "d'un certificat médical datant de moins de deux mois, attestant, à l'exclusion de toute autre indication, que l'intéressé a été examiné en vue du mariage". If article 170 does imply nullity for non-observance of article 63 it would seem to be a harsh result where the parties had intended in good faith to contract a valid marriage and had perhaps cohabited and raised a family. If on the other hand, article 170 only affects validity where it can be proved that a party intentionally ignored it, there might be difficulty in proving such intention.[75] Only a party who is French is required to comply with article 63. A marriage between two foreigners which complies with the *lex loci celebrationis* will be valid as to form in the eyes of French law.

An exception may be made to the principle of *locus regit actum* where the parties are not living in a civilized community or where the only available local forms are such as they could not reasonably be expected to observe. In these circumstances, a marriage according to Christian religious forms may be recognized by French law,[76] and a marriage according to the requirements of the common-law forms of marriage may be recognized by the common-law systems.[77] A common-law marriage is not now possible in England.[78] Two recent cases in England have recognized marriages within a community of displaced persons who did not accept the authority of the law of the place where they were (a European Christian country) and who married neither in accordance with the *lex loci contractus* nor in accordance with their own personal law, but by

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Hall L.J. 58. The *Alspector* case raised but did not finally decide the question of whether the relevant sections of the Act were mandatory and conditions precedent *sine qua non* of a valid marriage or merely directory to the celebrant and officials, and so not creating invalidity by non-compliance. Art. 63 Code civ. is addressed to "l'officier d'état civil" and it does not state that invalidity of the marriage will result from non-compliance.

[74] See art. 191, Code civ.

[75] There might be a further problem if one party was in good faith and the other was not. Might there not be hardship, for example, if one party only was French and intentionally ignored art. 170 Code civ., while the other party was in good faith, and the marriage was treated as invalid in France? *Cf.* the discussion of a somewhat similar point in the *Alspector* case, *supra*, footnote 73.

[76] Le droit international privé de la famille en France et en Allemagne (1954), *per* Ponsard, p. 4; Batiffol, *op. cit.*, *supra*, footnote 5, s. 438.

[77] *Wolfenden* v. *Wolfenden*, [1946] P. 61; *Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274; *R.* v. *Millis* (1844), 10 Cl. & Fin. 534.

[78] It is sometimes suggested that it may be possible in parts of the United States and Canada. See the references given in footnote 73 *supra*.

a Christian religious ceremony within their own community.[79]

There is a tendency in the United States to refer the whole question of the validity of marriage to the *lex loci celebrationis*, both as to essence and as to form. This idea seems to have developed along with a general theory that contracts should be governed by *locus regit actum*—both for capacity and for other aspects.[80] Beale argues that if a marriage is valid by the law of the place of celebration it should be valid everywhere.[81] The *American Restatement* provides as a general principle that a marriage "is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with".[82] A conflicts rule whereby the validity of a marriage is submitted only to one law—instead of two or perhaps three different laws, as may be the case if essence and form are separated—has the advantage of simplicity. Public policy could exclude the operation of a *lex loci celebrationis* distasteful to the views of the country asked to recognize the marriage.[83]

The possible alternatives for a choice of law rule to govern validity of marriage (essential or formal) are (i) *lex fori*, (ii) *lex loci celebrationis*, (iii) personal law—one of these, for the whole validity, or one for essential validity and another for formal validity. As we have seen, the French and common-law systems are unanimous in favouring the *lex loci celebrationis* as governing formal validity. There is no support for the *lex fori*. As far as formalities are concerned, this is not surprising. It would not be satisfactory to test the formal validity of a marriage celebrated in country A by the marriage laws of country B, even although the validity of the marriage has become an issue in, for instance, a divorce action before the courts of B. If the *lex fori* were used, then a different law would be applied depending on what was the *forum*. There would be no unique answer to the question whether the marriage of X and Y is valid as to form. The objection to the application of the *lex fori* is not (as is sometimes suggested) that it shows an "un-international" outlook. Also there are advantages in a court applying its own law. The objection is that by using the *lex fori* there can be a plurality of possible answers (one for each

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[79] *Taczanowska* v. *Taczanowska*, [1957] P. 301, [1957] 2 All E.R. 563; *Kochanski* v. *Kochanski*, [1958] P. 147, [1957] 3 All E.R. 142.

[80] This theory was supported by Story. See Cook, *op. cit., supra*, footnote 9, Ch. 8. *Re Stull's Estate* (1898), 183 Pa. 625, 39 A. 16; *Cruickshank* v. *Cruickshank* (1948), 82 N.Y.S. (2d.) 522.

[81] *Op. cit., supra*, footnote 14, p. 673.

[82] *Op. cit., supra*, footnote 39, s. 121. See also ss. 123 and 131-132, 134.

[83] *Ibid.*, s. 134.

forum). Further it may have been impossible for X and Y to marry in country A in accordance with the marriage laws of country B. Those countries which apply the personal law to the whole validity of marriage, including formalities do not appear to do so for "international", disinterested reasons, but with the primary motive of ensuring that a certain class of persons having ties of nationality or domicile shall only be able to marry validly (according to the personal law) by the forms of marriage supported in the country concerned. The intention of a country R, of this type, is usually that its law should not recognize a national or domiciliary as validly married unless the ceremony is in the religious forms supported by the law of R—at least where such party professes the accepted religion in R. It seems logical to regard confessional marriage law as an expression of public policy crystallized into a rule. It is reasonable to refer the formal validity of a marriage to the *lex loci celebrationis*—with an overriding power of public policy where the local forms are offensive (or ineffective) in the view of the country asked to recognize the marriage.

Which is preferable—a single choice of law determinant for the whole validity of marriage—*lex loci celebrationis;* or two determinants—formal validity by *lex loci celebrationis* and essential validity by either the *lex fori* or by the personal law, with a residual power based on public policy in all the alternatives? The objections to the application of the *lex fori* in regard to essential validity, are not the same as in the case of formal validity, though from the point of view of the parties there will still be the disadvantage of a plurality of solutions, since each *forum* in which either party is able to raise the issue, will apply its own law—and whether a *forum* has jurisdiction will also be a matter for its own law. In a federal country such as the United States, application of the *lex fori* to questions of essential validity would introduce a great uncertainty into the question of whether the parties were married or not within the bounds of the federation—unless for instance it is also provided that in any given case, only one particular forum will have *jurisdiction.*[84]

IV. *Divorce.*

The main difference between the recognition of foreign divorces in French law and the common law, is that French law has not developed the idea of an "international" divorce jurisdiction, and applies the personal law (subject to public policy), while the

[84] *Cf.* the way in which English law deals with recognition of divorces.

common-law systems recognize divorces on the basis of jurisdiction, without regard to choice of law.

In French law, where both parties are of the same nationality, divorce is governed by the law of that nationality.[85] It has been said that where the nationalities are different and this difference "*remonte au mariage*, on a admis longtemps sans conteste qu'il y avait lieu de faire application distributive à chacun des époux de leurs lois respectives (en entendant cette formule en ce sens que les actions principales ou reconventionnelles étaient chacune régie au fond par la loi de celui qui y avait le rôle de demandeur), soit que l'un des époux fût français . . . ".[86] But there have been recent decisions in France, favouring the use of domicile as a choice of law determinant, where the nationalities differ. This view is supported in the *Rivière* and *Lewandowski* cases.[87] In the *Rivière* case a consent divorce was obtained in Ecuador after which the woman (French by naturalization) married a French citizen. The case concerned the validity of the second marriage.[88] The *Cour de cassation* decided that the divorce was governed by the law of Ecuador, as being the law of the domicile of the parties, which the court remarked was also the personal law of the husband, and the *lex fori*. The effect of these decisions seems to be that where the parties have different nationalities and a common domicile, the law of the common domicile may be applied. If both nationalities and domiciles are different, then the position might still be governed by the *Ferrari* decision.[89] In this case a French woman

[85] This is so "qu'il s'agisse d'une identité d'allegance remontant au mariage ou au delà, . . . ou acquise au cours du mariage, soit à partir d'une autre nationalité commune, soit à partir d'une dualité orginaire de nationalités." Le droit international privé de la famille en France et en Allemagne (1954), *per* Holleaux, p. 129.

[86] *Ibid.*, p. 129. *Cf.* Niboyet, *op. cit.*, *supra*, footnote 31, s. 1514 who favoured the husband's domicile; Maury, *op. cit.*, *supra*, footnote 30, to the effect that "La règle de solution des conflits de loi relatifs au divorce est la règle du cumul de la loi personnelle des époux et de la loi du tribunal saisi, de la *lex fori*." p. 129. *Cf.* the Greek Civil Code (1940), art. 16.

[87] *Rivière*, Cass. civ., 17th April 1953; *Lewandowski*, Cass. civ., 15th March 1955; Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, p. 549; Batiffol, *op. cit.*, *supra*, footnote 5, ss. 449, 460; Benjamin, Le divorce et la séparation de corps (1955), p. 88 *et seq.* Travaux du Comité Français de Droit International Privé, 26th Feb. 1954, remarks by Mr. André Gavalda; (1959), 48 Revue Critique, 395; Lagarde, *op. cit.*, *supra*, footnote 30, p. 29; Batiffol, (1955), 4 Am. J. of Comp. L. 574; Francescakis, (1954), 43 Revue Critique 325.

[88] Public policy "ne s'oppose pas aux effets en France d'un divorce obtenu à l'étranger par consentement mutuel". See Batiffol, *op. cit.*, *supra*, footnote 5, s. 463.

[89] Cass. civ., 6th July 1922; Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, p. 550; Le droit international privé de la famille, en France et en Allemagne (1954), *per* Holleaux, p. 131; Niboyet, *op. cit.*, *supra*,

acquired Italian nationality by marriage. Having obtained a separation from her husband in Italy, she reverted to French nationality, and obtained a divorce in France, the court applying French law. The decision has given rise to difficulties of interpretation—for instance whether it means that each party is subject to his or her own national law and that the court will apply the national law of the plaintiff, or whether French law is applied where one party is French. As far as capacity to marry is concerned, it would be an unsatisfactory solution for the court to decide the matter by the personal law of the party who happens to bring the issue to the court. The effect would be to give a unilateral solution to what is clearly a bilateral problem. Always to apply French law to determine capacity where one party is French, would be an extreme application of public policy.[90] There does not seem to be any tendency in common-law countries to resort to a common nationality, when domiciles are different. There may, perhaps, be a greater desire in French law to seek a general association between an individual and a community as the foundation of personal law, in preference to linking the personal law with only *one* of its aspects—nationality or domicile. On the other hand, the *Ferrari* decision had for long been regarded as unsatisfactory and the French courts were anxious to find some escape from its complexities.

The law selected by French conflicts rules will not necessarily be allowed to operate as it stands, but may be affected by public policy. A French court will only grant a divorce on the application of a foreign personal law on grounds which are not "contraires à l'esprit de notre droit positif".[91] Where, however, the divorce has been granted by a foreign court, and neither public policy nor "fraude à la loi" come into play, it may be recognized, if the foreign court had jurisdiction and had applied the law which French conflicts rules would determine to be the applicable law.[92]

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footnote 31, s. 1514; Batiffol, *op. cit., supra*, footnote 5, s. 460; Rigaud, *op. cit., supra*, footnote 7, p. 731; Wolff, *op. cit., supra*, footnote 55, p. 373.

[90] *Cf.* the remarks of Falconbridge on a similar theme, *op. cit., supra*, footnote 24, p. 711 *et seq.*

[91] Lerebours-Pigeonnière, *op. cit., supra*, footnote 8, p. 543; Niboyet, *op. cit., supra*, footnote 31, s. 1513; Maury, *op. cit., supra*, footnote 30, p. 126 *et seq.* See art. 232, Code civ., as to French grounds of divorce.

[92] According to Lerebours-Pigeonnière: "l'ordre public est beaucoup moins pressant lorsque le divorce a été régulièrement prononcé à l'étranger, ainsi le divorce par consentement mutuel est alors éfficace."; *ibid.*, p. 544. In the case of "l'éfficacité de droits déjà acquis à l'étranger" public policy intervenes "avec moins de vigueur. Son effet est, dit-on, 'atténué.'" Le droit international privé de la famille, en France et en Allemagne (1954), *per* Francescakis, p. 477. Some countries refuse on grounds of

This does not mean apparently that the foreign court must have expressly or consciously applied French law, where that is the national law, but that the grounds on which the divorce was granted must have been substantially equivalent to grounds of divorce by French law.[93]

It has been said that: "Si la loi de rattachement, d'après notre règle de conflit, est la loi française, il est indubitable que son application sera la condition *sine qua non* de la reconnaissance en France de la décision étrangère en question . . . . Par exemple, une décision étrangère qui aurait appliqué la loi étrangère du mari, alors qu'une épouse française était en cause . . . serait sans aucun effet en France."[94] The limits of application of public policy in divorce are not precise and some of the decisions are difficult to reconcile. It can, however, be said that in regard to the recognition of foreign divorces "les solutions sont en général incomparablement plus liberales" as compared with divorces granted in France.[95] The reason for this difference in view is that the foreign divorce is regarded as involving the recognition in France of rights acquired abroad.

If a question should arise of enforcing in France the judgment of a foreign court, the Codes require that the judgment should be declared executory by a French court.[96] Foreign judgments affecting status do not require *exequatur* merely in order to be recognized, but in regard to "actes d'éxécution matérielle sur les biens (des saisies, par exemple), ou de coercition sur les personnes, l'exequatur sera indispensable. Mais si l'on se borne à invoquer ces décisions en France, sans procéder à aucun acte d'éxécution ou de coercition, elles y ont effet de plein droit sans la formalité de l'exequatur".[97] But whether or not the situation is one in which *exequatur* is required, the foreign judgment will not be recognized in France if it does not conform to the conditions for recognition required by French law — namely (i) jurisdiction by the foreign court, (ii) application of the governing law by French private international

public policy to recognize foreign divorces. See Valls *op. cit., supra*, footnote 33.

[93] See Grinberg-Vinaver, (1949), 43 Am. J. of Int. L. 542.

[94] Le droit international privé de la famille en France et en Allemagne (1954), *per* Holleaux, p. 135.

[95] *Ibid.*, p. 139 *et seq.*

[96] Art. 546, Code proc. civ., art. 2123, Code civ.; Le droit international privé de la famille en France et en Allemagne (1954), *per* Francescakis, p. 477; Niboyet, *op. cit., supra*, footnote 31, vol. VI, ss. 1943-1944, footnote 11, ss. 722-726; Batiffol, *op. cit., supra*, footnote 5, s. 742 *et seq;* (1960), 49 Revue Critique 223.

[97] Maury, *op. cit., supra*, footnote 30, p. 141; Savatier, *op. cit., supra*, footnote 30, s. 342 *et seq.*

law, (iii) that the foreign judgment is not rejected on grounds of French public policy or of "fraude à la loi".[98]

In both French and common-law systems, the foreign court must have had jurisdiction by its own law. There is no theory of an "international" jurisdiction,[99] but articles 14 and 15 of the Civil Code give jurisdiction to the French courts where one of the parties is French, although the other is a foreigner.[100] These articles have been interpreted as including actions relating to status and capacity. A party may expressly or impliedly renounce his right to have a question determined by a French court. The articles do not apply between foreigners. By the Code of Civil Procedure the court of the defendant's domicile has jurisdiction in matters of personal status.[101] It is stated in the Civil Code that: "Le domicile de tout Français, quant à l'exercise de ses droits civils, est au lieu où il a son principal établissement."[102] A married woman has the same domicile as her husband, except that "La femme séparée de corps cesse d'avoir pour domicile légal le domicile de son mari".[103]

Prima facie, therefore, and leaving aside the possible intervention of public policy, French law on recognition of foreign divorces is based on an objective set of rules—(a) that the foreign court should have jurisdiction and (b) that the foreign court should have applied that law which French conflict rules would consider to be the applicable personal law. The French conflict rules, for choice

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[98] "On peut, tout d'abord, poser le principe qu'un jugement étranger quelconque n'a, en France, aucune valeur s'il contrevient à certaines conditions de régularité internationale requises par le droit coutumier français.": Le droit international privé de la famille en France et en Allemagne (1954), *per* Francescakis, p. 461. For the proposals on exequatur in the draft law on private international law see Travaux de la Commission de Réforme du Code Civil, arts. 101-108.

[99] The idea of an "international" extension of the jurisdictional rules of French law in relation to divorce has not been without support, for instance by Bartin and Pillet.

[100] Art. 14: "L'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des Français."

Art. 15: "Un Français pourra être traduit devant un tribunal de France, pour des obligations par lui contractées en pays étranger, même avec un étranger.". For an analysis of these articles see for instance Castel, Jurisdiction and Money Judgments Rendered Abroad: Anglo-American and French Practice compared (1958), 4 McGill L.J. 152.

[101] Art. 59. The article also provides that if the defendant has no domicile, jurisdiction will depend on his residence.

[102] Art. 102. (Amended in certain respects not relevant here by Ordonnance No. 58-923 of 7th Oct. 1958.)

[103] Art. 108. "Le mineur non émancipé" has a domicile of dependence.

of law, in this connection, are not much different from those of various other civil-law countries.[104] It is by public policy (and fraude à la loi), and not by its conflict rules on recognition, that French law protects French ideas on marriage and divorce—although the reasons given by the courts for their decisions do not always differentiate clearly between conflicts rules and public policy. The application of public policy may differ in force and effect depending (a) on whether a French court is asked actually to determine a status or (b) whether the question is one of recognition of status rights acquired in a foreign jurisdiction. In regard to (a), in consequence of public policy, the French court applies substantially the divorce principles of the *lex fori*, although it has arrived at this position by a combination of "international" conflicts rules, corrected to French ideas on divorce by "ordre public". It would appear, that, fundamentally, what mainly offends French public policy is the possibility of a French court granting a divorce on grounds inconsistent with French ideas. Though it may not be entirely silent on the matter, public policy is not similarly offended by the prospect of a person obtaining a foreign divorce, provided the law of the nationality has been applied—or its equivalent in effect. Perhaps the chief considerations are (1) to ensure that the decisions of French courts will be consistent with the spirit of the domestic divorce law, (2) to ensure that a person of French nationality will not be able to obtain in a foreign country, a divorce valid in France, on grounds which are not consistent with the spirit of French domestic law, (3) to recognize foreign divorces between foreigners—save where public policy comes into play.[105]

The main approach of English law to recognition of foreign divorces has been to construct a system whereby the country of the parties' domicile exercises exclusive jurisdiction. Domicile is still the basic ground on which divorces are recognized at common law, although there have been modifications in the United States and within the British Commonwealth.

The theory of domicile as the basis of divorce jurisdiction is that every married person is subject to the courts of one country for purposes of divorce, and any other country which attempts to take jurisdiction is encroaching on the right of the domicile-

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[104] *Cf.* Rabel, *op. cit., supra*, footnote 25, (2nd ed., 1958), vol. 1, pp. 508 *et seq.;* McCusker, (1950), 30 Tul. L. Rev. 70, reference Italian law; Gannage, (1958), 47 Revue Critique 673, reference, Lebanon.

[105] Subject, of course, to what has been said *supra* on the problem of difference of nationality.

country to grant or refuse divorces. The grounds on which the divorce was granted are unimportant and so is the choice of law. If the divorce has been granted by the domicile-country it will be recognized. The English system seems to have been inspired by the ideas of Dutch and French jurists.[106] In *Le Mesurier* v. *Le Mesurier* it was stated by Lord Watson that "a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority".[107] In this theory, each individual is allocated to the authority of the courts of *one* country for divorce jurisdiction, an arrangement which has been described as the result of "international public law".[108]

The theory is based on a supposed right, vested in the country in which a person has made his home, to regulate his legal position in certain respects—a right which other countries ought to recognize by way of comity. It was said in *Shaw* v. *Gould* that if social relations as to marriage, for example "cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of that country prejudiced and its subjects injured, by permitting a foreign court to be invoked for the purpose of altering social rights and duties, which cannot be changed under their own laws, in their own courts of justice?"[109] In *Wilson* v. *Wilson*, it was said: . . . "that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribun-

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[106] For instance, Huber, Boullenois.

[107] [1895] A.C. 517, at p. 528. This case was an appeal to the Privy Council from Ceylon. See discussion by Cook, *op. cit., supra*, footnote 9, p. 46 *et seq.*

[108] *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55 per Lord Westbury, at p. 81. It has been argued by Cook, *ibid.*, that no such rule of international law existed at the time of *Le Mesurier* and that there were authorities to support residence as the basis of jurisdiction. It is suggested by Lorenzen that both the common law in England and the views of the Dutch schools had a pronounced territorial emphasis: *op. cit., supra*, footnote 50, p. 137.

[109] *Ibid.*, p. 82. *Cf. Harford* v. *Morris* (1776), 2 Hag. Con. Rep. 423; *Munro* v. *Munro* (1840), 7 Cl. & F. 842.

als which alone can administer these laws."[110] In the English principles of domicile-jurisdiction (including the rule that the domicile of a married woman is that of her husband) we have a set of rules capable of giving a unique solution. Also, since the grounds upon which the courts of the domicile granted the divorce, are irrelevant, the court asked to recognize will not have to apply foreign law.

If the domicile-jurisdiction theory were adopted by all countries, would there then be harmony among the recognition solutions, no "limping" marriages—and a "coordination de systèmes distincts coexistants"?[111] The determination of domicile is by the *lex fori* and "domicile" has different meanings in different jurisdictions. In some jurisdictions, (by statute or by interpretation) the law has tended to accept ordinary residence as being more or less equivalent to domicile—sometimes requiring a minimum period of residence within the jurisdiction, after which the party will be taken to be "domiciled" there. The technicalities of the English rules on domicile are not universal among common-law countries.[112] It is now usually provided, for example that a wife who has been deserted may sue for divorce in the jurisdiction in which the parties were domiciled at the time of the desertion, even where that is not the domicile of the husband at the time of the divorce.[113] Also, in England, where the husband is domiciled outside the United Kingdom, a wife may seek divorce on the basis of three years' residence.[114] A Standing Committee on Private

[110] (1872), L. R. 2 P. & D. 435, at p. 442.

[111] Batiffol, *op. cit.*, *supra*, footnote 16, p. 19.

[112] As to the United States of America see Rheinstein, (1955), 22 U. of Chi. L. Rev., 775, who says that there "domicile has to all practical effects assumed the sense of residence. It simply means that state in which the person in question has established the centre of his life with an intention to keep it there for an indefinite time. The element of peculiar attachment and permanency which characterizes domicile in the English sense, as well as most of the technicalities concerning loss and reacquisition of the domicile of origin have disappeared from American Law."; *Wheat* v. *Wheat* (1958), 318 S.W. 2d., 793. In *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, (1835), 2 Sh. & M. 154, at p. 226, Lord Brougham said that "the Scottish courts have jurisdiction to divorce, when a formal domicile has been acquired by a temporary residence". Many of the English cases on this subject involved questions as to Scottish law, since Scotland had divorce for desertion and adultery prior to 1857 and after 1857, for many years, the only ground in England was adultery. See also *Shaw* v. *Gould*, *supra*, footnote 108, at p. 69; *Pitt* v. *Pitt*, 1862, 2 M. 106, at p. 115, 4 Macq. 627; *Roger* v. *Churchill*, 1850, 2 D. 307.

[113] *Cf.* Restatement, *op. cit.*, *supra*, footnote 39, s. 28; Matrimonial Causes Act, *supra*, footnote 1, s. 18(1)(a); Divorce Jurisdiction Act, *supra*, footnote 1. *Cf.* Savigny, *op. cit.*, *supra*, footnote 56, p. 243; Von Bar, *op. cit.*, *supra*, footnote 56, art. 173, *Ramsay* v. *Ramsay*, 1925, S.C. 216; *Lack* v. *Lack*, 1926, S.L.T. 656; *Crabtree* v. *Crabtree*, 1929, S.L.T. 675.

[114] Matrimonial Causes Act, *ibid.*, s. 18(1)(b).

International Law appointed in England in 1952 recommended that where a wife is separated from her husband by a court order, she should cease to have a domicile of dependence.[115] The Royal Commission on Marriage and Divorce has recommended, however: "... that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland as the case may be." [116] There are two further English developments of the domicile-jurisdiction principle. The first is the rule of *Armitage* v. *Attorney-General*, by which a divorce recognized by the courts of the husband's domicile will be recognized by the *forum*, notwithstanding that the divorce was not granted by the courts of the husband's domicile.[117] The second depends on the decision of the English Court of Appeal in *Travers* v. *Holley*.[118] The case concerned the recognition in England of a divorce granted in New South Wales, and the majority of the court considered that the husband was domiciled in this State at the material time. But all the members of the court agreed that even if the husband was not so domiciled, the divorce should still be recognized, because there was a similarity between the New South Wales statute, from which the court there obtained its jurisdiction, and a statutory provision in England. The English court attempted to bring this result within the domicile-jurisdiction principle as expressed by Lord Watson in *Le Mesurier* v. *Le Mesurier*.[119] It was considered that because of the similarity between the statutory bases of jurisdiction, even if the husband had been domiciled in England at the material time, the New South Wales court would not have been "trenching" on the jurisdiction of the English courts since these courts had a similar statutory jurisdiction. The Royal Commission on Marriage and Divorce has recommended that an English or Scottish court should recognize "as valid a divorce, obtained by judicial process or otherwise—which has been granted in circumstances substantially similar to those in which the court

[115] *Supra*, footnote 22. [116] *Supra*, footnote 2, s. 825.

[117] [1906] P. 125; (1946), 24 Can. Bar Rev. 73; (1947), 25 Can. Bar Rev. 226.

[118] *Supra*, footnote 1. The literature on this case is growing. See for instance (1958), 36 Can. Bar Rev. 311; (1959), 11 Rev. Int. de Dr. Comp. 702; (1958), 7 Int. & Comp. L.Q. 1515; (1955), 4 Int. & Comp. L.Q. 567; (1957), 35 Can. Bar Rev. 628; (1954), 32 Can. Bar Rev. 359; (1954), 17 Mod. L. Rev. 79; (1953), 67 Harv. L. Rev. 823; (1952), 68 L.Q. Rev. 88; (1954), 3 Int. & Comp. L.Q. 152; (1953), 31 Can Bar Rev. 799.

[119] *Supra*, footnote 107.

in England exercises divorce jurisdiction in respect of persons who are not domiciled in England".[120] In *Mountbatten* v. *Mountbatten*[121] the husband was domiciled in England and the wife, who was resident in New York, obtained a divorce in Mexico. The husband petitioned in England for a declaration that the divorce should be recognized as valid by English law. The husband was represented at the hearing of the Mexican divorce and submitted to the jurisdiction. The wife resided in Mexico for twenty-four hours in order to establish jurisdiction. The English court was informed that the State of New York would recognize the Mexican divorce, since the plaintiff had complied with the Mexican requirements, and the husband had been represented and had consented to the jurisdiction of the Mexican court.[122] The basis of jurisdiction in the State of New York was residence for one year, and the wife had been resident there for more than the three year period required in connection with section 18(1)(b) of the Matrimonial Causes Act, 1950. Accordingly, it was argued that the English court would have recognized the competence of the New York courts to dissolve the marriage, and so the English court should, "recognize the Mexican decree, since it is recognized by the court in whose jurisdiction the wife has resided for three years and whose competence to dissolve the marriage we would now recognize".[123] The English court did not accept this argument.

Is the theory underlying the domicile-jurisdiction principle a good theory for modern conditions? The principle is not "international" because in many countries the personal law depends on nationality.[124] Even among those countries which do purport to

[120] *Supra*, footnote 2, Draft Code, p. 395, s. 7(c). But see *Warden* v. *Warden*, 1951 S.C. 508; *Fenton* v. *Fenton*, [1957] 1 V.L.R. 17; *LaPierre* v. *Walter* (1960), 31 W.W.R. 26, 24 D.L.R. (2d.) 483. Questions of interpretation of *Travers* v. *Holley* have arisen, for instance as to whether the similarity must be between the terms of the statutes or whether it is enough if on the facts which gave the foreign court jurisdiction, had these facts occurred in relation to the forum, the forum would have had jurisdiction.

[121] [1959] P. 43, [1959] 1 All E.R. 99; (1959), 22 Mod. L. Rev. 548.

[122] See *Leviton* v. *Leviton* (1938), 6 N.Y.S. (2d) 535; *Caswell* v. *Caswell* (1952), 111 N.Y.S. (2d) 875; *Fricke* v. *Bechtold* (1957), 168 N.Y.S. (2d) 197; *Re Fleisher's Estate* (1948), 80 N.Y.S. (2d) 543 *Cf. Sherman* v. *Federal Security Agency* (1947), 70 F. Supp. 758; *Lorenzen, op. cit., supra*, footnote 50, p. 413 *et seq.*, and Ch. 17. As to the application of the "Full Faith and Credit" clause of the United States constitution to interstate divorce recognition see cases such as *Williams* v. *North Carolina* (1) (1942), 317 U.S. 287; (2) (1945), 325 U.S. 226; *Haddock* v. *Haddock* (1906), 201 U.S. 562 (overruled); Dainow, (1949), 10 La L. Rev. 54.

[123] The argument was based on an application of both *Armitage* v. *Attorney-General* and *Travers* v. *Holley*, *supra*, footnotes 117 and 1.

[124] The Royal Commission on Marriage and Divorce recommended that foreign divorces should be recognized in England and Scotland on

use it, the term "domicile" does not have a uniform meaning.[125] Thirdly, the rule that a married woman cannot have a domicile different from that of her husband is subject to various exceptions (of practical importance, because a married couple will often be living apart prior to divorce proceedings). It is clear, therefore, that in modern times, the domicile-jurisdiction principle is not an internationally recognized mode of solving recognition problems, and may give contrary solutions when applied in different countries. Under present day conditions, the supposed qualities of internationality and uniqueness of solution—which seem to have attracted lawyers in the past to the domicile-jurisdiction principle—do not exist.

Not all divorces are granted by courts of law after establishment of matrimonial fault by one party. In some countries divorce is granted after a religious or semi-religious procedure, and there are other exceptions.[126] The question has arisen in French law as to whether a French court should grant a divorce where the national law made available only a religious divorce. In the *Levinçon* case, the court refused a divorce in these circumstances in regard to Russian Jews.[127] The court appeared to consider that the "divorce confessionnel" was a procedure designed to break certain *religious* ties and obligations.[128] It is interesting to compare this attitude with the remarks of Viscount Reading in *R.* v. *Hammersmith Superintendent Registrar of Marriages*, for example, where he stated that: "Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted

the basis either of domicile or nationality. *Supra*, footnote 2, p. 395, Draft Code, s. 7 (a) and (b). To recognize such decrees would be to "promote a better understanding in the international sphere and possibly to secure wider recognition of English and Scottish decrees of divorce granted on the basis of domicile", s. 856.

[125] For instance, there is a difference between "domicile" in English law, as explained by the House of Lords in *Winans* v. *Attorney-General*, [1904] A.C. 287 and *Ramsay* v. *Liverpool Royal Infirmary*, [1930] A.C. 588 and "domicile" as generally understood in the United States for purposes of divorce jurisdiction (or in continental European countries, see France, art. 102 Civil code).

[126] Pure consent divorces seem popular after major revolutions *e.g.* in France and in the U.S.S.R. Parliamentary divorce applies in parts of Canada and presumably would be recognized. See also Kennedy, (1954), 32 Can. Bar Rev. 211.

[127] Cass. civ., 29th May 1905. The court considered "la procédure religieuse du divorce comme une règle de fond relevant du statut personnel, mais inapplicable en France parce que contraire au principe d'ordre public de laïcité." Batiffol, *supra*, footnote 5, s. 465. See also Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, s. 454; on "divorces confessionnels." Rabel, *op. cit.*, *supra*, footnote 25, vol. 1, p. 414. There seems to be a difference between the recognition of religious divorces granted in France and out of France. See two case comments, (1960), 49 Revue Critique 354.

[128] Donnedieu de Vabres, *op. cit.*, *supra*, footnote 20, p. 372 *et. seq.*

in England is dissolved according to the law of England by mere operation of the law of the religion of the husband and without decree of a court of law. The law of his religion is the applicant's personal law; it is not the general law applicable to all who are domiciled in India."[129] The case concerned a marriage in England between an Englishwoman and a Mahommedan domiciled in India. The purported dissolution of the marriage was by a declaration of divorcement or "talak", which was valid in India. The husband wished to remarry in England. It was argued that since the courts of India would recognize the divorce, it should be recognized in England on the basis of *Armitage* v. *Attorney-General*.[130] But Viscount Reading said that that decision only applied where there had been a decree of a court and in the *Hammersmith* case there was no such decree.[131] In *Har-Shefi* v. *Har-Shefi* (*No. 2*), an Englishwoman married in Israel a man domiciled there. The husband gave the wife a bill of divorcement at the Court of the Chief Rabbi in London, during a temporary residence in that country. The English court recognized the divorce on the ground that it was the only form of divorce which was "open to a Jew domiciled in Israel".[132] The Draft Code proposed by the Royal Commission on Divorce is intended to apply to divorces whether "obtained by judicial process or otherwise.[133] The *Levinçon* decision has been criticized on the ground of characterization ("qualification").[134] Rigaux suggests three grounds for the *Levinçon* decision, any one of which he contends would have been decisive. These grounds are: (a) that the "laïcisation du mariage et du divorce" in French law made it against public policy to apply provisions of the national law involving "divorce confessionnel"; (b) that at the relevant time, the Rabbinical courts in Russia had exclusive jurisdiction in divorce, and that a French court should apply "la loi confessionnelle des israélites russes jusque et y compris la prohibition de divorcer devant une autre juridiction que celle du rabbin";

[129] [1917] 1 K.B. 634, at pp. 642-643; *Maher* v. *Maher*, [1951] P. 342, [1951] 2 All E.R. 37. But as to recognition of a Moslem divorce on a Moslem marriage, see *Khan* v. *Khan*, (1959), 29 W.W.R. 181, (1960) 21 D.L.R. (2d), 171.

[130] *Supra*, footnote 117.

[131] *Ibid.*, at p. 643.

[132] [1953] P. 220, at pp. 223-224.

[133] *Supra*, footnote 2, p. 395, s. 7.

[134] Donnedieu de Vabres, *op. cit.*, *supra*, footnote 20; Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, where Loussouarn, the editor of the 7th edition, differing from Lerebours-Pigeonnière, says that: "La laïcité de l'État, la sécularisation du droit qui conduisent en France à considérer mariage, divorce et séparation de corps comme des institutions civiles, commandent de ranger le caractère civil ou religieux du mariage dans la catégorie de la forme." See the discussion of this case in Batiffol, *op. cit.*, *supra*, footnote 5, s. 465.

(c) that the Rabbinical procedure was a "répudiation" of the wife by the husband which was not a "divorce".[135]

In the common-law systems, the courts do not concern themselves with choice of law in recognition and public policy enters very little into matters characterized either as procedural or governed by the maxim *locus regit actum*, within the domain of a foreign jurisdiction.[136]

V. *Nullity.*

In French law, nullity of marriage may be "absolute" or "relative" —affecting the range of persons who may apply for the judgment —but: "Le principe du droit français, c'est en effet le caractère rétroactif de la nullité prononcée: que cette nullité soit absolue ou relative, le mariage annulé est censé n'avoir jamais eu d'existence; c'est seulement en faveur de l'époux de bonne foi et de ses enfants, et sans distinguer suivant la gravité du vice qui l'entache, que le mariage peut produire certains effets dans le passé."[137] In the common-law countries a marriage may be null *ab initio*. A marriage may also be annulled for certain reasons, even where the ceremony was correct and the marriage was not void *ab initio*.[138] The terminology "void" and "voidable" is frequently used in this connection.[139] From the point of view of internal law, the treatment of a voidable marriage may be different from a divorce, especially as to property, but ought they to be differently treated in regard to recognition of status?[140] It is suggested that the rules for *recognition* of (a) a foreign decree annulling a voidable marriage and (b) a foreign divorce, should be the same.[141] The French rules for recognition of a foreign nullity decree are those applicable to the recognition of foreign judgments. Common-law countries seem fairly willing to recognize foreign nullity judgments—if on the facts, the action would have been substantially within their own

[135] *Op. cit., supra*, footnote 30, s. 269.

[136] *Macalpine* v. *Macalpine*, [1958] P. 35, [1957] 3 All E.R. 134.

[137] Le droit international privé de la famille en France et en Allemagne (1954), *per* Ponsard, p. 13.

[138] For instance, on ground of impotence.

[139] See *De Reneville* v. *De Reneville*, [1948] P. 100. See generally Jackson, (1950), 30 Mod. L. Rev. 242.

[140] In English law, there is a difference (for historical reasons) in the basis of jurisdiction. See *Ramsay-Fairfax* v. *Ramsay-Fairfax*, [1956] P. 115; *Ross Smith* v. *Ross Smith*, [1961] 2 W.L.R. 71, [1961] 1 All E.R. 255.

[141] It is conceivable that there might be some difference of emphasis in the application of public policy. As to choice of law in nullity questions see Castel, Private International Law (1960), p. 110 *et seq.*; Fleming, (1949), 47 Mich. L. Rev. 574; (1949), 23 Aust. L.J. 458; Jackson, (1949), 27 Can. Bar Rev. 173; Kennedy, (1947), 25 Can. Bar Rev. 1012. The English courts appear to apply the *lex fori* in regard to voidable marriages.

jurisdictional requirements—irrespective of the grounds of the foreign decision and what law was applied. However, a problem arises in relation to the recognition of a judgment that a marriage is void *ab initio*, which does not arise in relation to divorce. Suppose H and W are married in country X, H being then domiciled in Y. By the law of Y any marriage is void *ab initio* which does not comply with certain religious conditions. The marriage of H and W did not comply with these conditions. H obtains a nullity judgment in Y. Subsequent to this judgment, are H and W still married in relation to the law of X?[142] Let us suppose that the failure to comply with the religious conditions be characterized in X as a defect in form, governed by the *lex loci celebrationis*. But the marriage was valid as to form by the law of X. Hence prior to the nullity judgment in Y, H and W were regarded by the law of X as married. Suppose that the law of X regards the court of Y as having had jurisdiction to grant the nullity judgment and that the law of X will recognize that judgment notwithstanding that the court of Y applied its own law. Then X would recognize the nullity judgment and as from the date of the judgment in Y, H and W would cease to be regarded by the law of X as married. So it is a curious consequence of applying the rules of X for recognition of a foreign nullity judgment that a marriage celebrated in X and valid by its law, later becomes invalid in X. Up to the time of the judgment in Y, the marriage was valid in X and void in Y.[143]

In the case of a foreign divorce, facts have arisen since the marriage and on these facts the foreign court has dissolved the marriage. But, in a question of validity *ab initio*, the facts are those concerning the marriage itself, which should have an immediate positive or negative legal effect as to marital status, in relation to any system of law. Where the possible invalidity of the marriage is as to form, and the law of the place of celebration applies, and provided the court which declared the marriage void *ab initio* had

[142] *Cf.* the English case of *Chapelle* v. *Chapelle*, [1950] P. 134; (1959) 11 Rev. Int. de Dr. Comp. 697; (1958), 36 Can. Bar Rev. 316 (and references therein); Cowan, (1953), 27 Aust. L.J. 19.

[143] This reasoning may be compared with a refusal—in another sphere of law—to allow "acquired rights" recognized in England to be altered by subsequent foreign legislation; *Adams* v. *National Bank of Greece S.A.*, [1960] 3 W.L.R. 8, [1960] 2 All E.R. 421. If X were England, W's domicile would be determined by English law and since by that law the marriage was valid, should she be regarded as domiciled in Y in dependence on her husband on the basis that domicile is determined by the *lex fori*? *Cf.* Dicey, *op. cit.*, *supra*, footnote 56, p. 378, rule 49; Kennedy (1957), 34 Can. Bar Rev. 647; Falconbridge, *op. cit.*, *supra*, footnote 24, p. 690 *et seq.*

jurisdiction and applied the correct law, it may be argued that another country should recognize such a declaration of status, so avoiding contrary judgments in different jurisdictions on the same facts. But even this leaves difficulties, for instance whether the events in issue should properly be governed by the *lex loci celebrationis*— and here there may be differences between the jurisdictions concerned. There may be further difficulties as to whether the country asked to recognize will consider that the court of the other country, which rendered the judgment, had jurisdiction to do so. It is clear that the whole problem is complex, and that bewildered parties and "limping" marriages can easily result. The Royal Commission on Marriage and Divorce has made certain proposals. It suggests, for example, that England and Scotland should recognize foreign annulments of marriage "in conformity with the same guiding principles" as those proposed for recognition of foreign divorces.[144] In the draft code on jurisdiction and recognition, it is proposed that an annulment should be recognized *inter alia* (i) if granted by the law of the domicile of at least one spouse, (ii) if granted by the law of the nationality of at least one spouse, (iii) if granted "on the ground that the marriage is void, in accordance with" the *lex loci celebrationis* in regard to formalities and the personal law of each spouse. "Provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out."[145]

As previously indicated, there is support in the United States for determining the whole validity of a marriage by the *lex loci celebrationis*. A set of recognition rules could be established on this basis, providing that any foreign marriage will be valid by the law of the place where it was contracted, except that a foreign marriage may be refused recognition if it offends a strong public policy of the country asked to recognize the marriage.[146] The task of persuading the layman that if A and B marry in country X, the

[144] *Supra*, footnote 2, ss. 848 and 900.

[145] *Ibid.*, pp. 395-396, arts 8 and 4(2) & (3).

[146] *Cf.* Restatement, *op. cit.*, *supra*, footnote 39, s. 132. It seems preferable that the country asked to recognize should apply its own public policy rather than the public policy of another country, even if that other country is the country of the domicile or nationality. The purpose of public policy in this case is to protect the legal and social order of the forum against the introduction of concepts fundamentally different from its own and offensive to it. *Cf.* Largarde, *op. cit.*, *supra*, footnote 30, pp. 106-107.

validity of the marriage should depend on the law of X, ought to be simpler than to persuade him of the reasonableness of the intricate rules which exist in most countries at the present time. The application to total validity of the maxim *locus regit actum*, is analogous to applying the *lex loci contractus* in the law of contract. In the common-law countries, the law governing capacity to contract is usually the "proper law", meaning thereby the law of the country with which the contract is most closely connected, or "the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed . . . ".[147] The "proper law" may frequently be the *lex loci contractus*. In French law, capacity to contract is determined by the personal law.[148] It would be possible to develop a concept of the "proper law" of marriage, taking into account for instance the place of marriage, the matrimonial home (intended or actual), the nationalities and domiciles of the parties. Although the intellectual refinements of such a theory might be attractive, the complications and uncertainties of determining the "proper law" might be just as great as those of applying either the existing French or common-law rules for marriage validity and with as great a risk of "limping" marriages. The attractiveness of referring total validity to the *lex loci celebrationis* lies in (1) its certainty as a choice of law determinant, (there will rarely be any doubt as to where the marriage took place); (2) its ability to deal with the whole matter in one operation.

VI. *Legitimacy, Legitimation and Adoption.*

According to English common law, a child is legitimate if it has been born or conceived in lawful wedlock.[149] This rule is modified by statute in various jurisdictions for instance, in favour of children born illegitimate whose parents have subsequently intermarried.[150] Due to the frequent difficulty of obtaining conclusive proof of paternity, the presumption *pater est quem nuptiae demonstrant* has been applied from early times. The French Civil Code provides

[147] Falconbridge, *op. cit., supra*, footnote 24, pp. 384-385. But see Restatement, *op. cit., supra*, footnote 39, s. 333 as to application of the *lex loci contractus*.

[148] Hamel and Lagarde, Traité de droit commercial (1954), vol. I, s. 194; Arminjon, Précis de droit International privé commercial (1948), s. 141 *et seq. Cf.* the French draft code on private international law, arts. 27 and 57; Quebec Civil Code, art. 6, Castel, *op. cit., supra*, footnote 141, p. 205 *et seq.*

[149] Compare with "filiation légitime".

[150] Compare with art. 331 *et seq.* Code civ; Quebec Civil Code, arts. 237-241.

that a child conceived during marriage is the child of the husband, although he may disown it if he proves that he could not have had intercourse with his wife during the time interval specified in the Code.[151]

By what system of law should it be determined if a person is legitimate or not? There are various possibilities: (a) the *lex fori*, (b) the personal law of the spouses, or of one spouse, (c) the personal law of the child, (d) the law or laws that determine whether the alleged parents were lawfully married at the relevant time. According to French law, if the child and the alleged parents are of the same nationality, legitimacy is governed by that law, subject to any intervention by public policy.[152] Where the child and the parents have different nationalities there is doubt as to whether the applicable law should be: (a) the personal law of the child, (b) the personal law of the father, as representing the family into which it is sought to have the child admitted, (c) the cumulative application of (a) and (b).[153] Solution (c) would be complex in operation. There is a tendency to apply French law where the status of the child or of either parent is governed by that law. This tendency has been incorporated into the draft code on private international law.[154] The draft code provides that where the status of none of the parties is governed by French law, legitimacy is determined by the foreign law applicable to the status of the child. These principles are applied also to questions of legitimation and adoption.[155] Donnedieu de Vabres points out that there are two sources of difficulty in regard to choice of law, the possibility (a) of a personal law changing as between one time and another and, (b) that the alleged parents and the child may have different personal laws.[156] In regard to (a) he suggests that the relevant time at which to ascertain a personal law should be the date of birth of the child. As to (b) there is a division of opinion between the personal law of the alleged parent and that of the child, but "la majorité des auteurs admet la compétence de la loi du parent recherché".[157] He considers that the father's personal

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[151] Art. 312 Code civ, see also arts, 313-330. *Cf.* Quebec Civil Code, art. 218 *et. seq.*

[152] Niboyet, *op. cit*, *supra*, footnote 31, s. 1519, footnote 7, s. 577; Arminjon, *op. cit.*, *supra*, footnote 58, p. 51; Le droit international privé de la famille en France et en Allemagne (1954), *per* Boyer, p. 200 *et seq.* As to public policy, see Lerebours-Pigeonnière, *op. cit.*, *supra*, footnote 8, s. 465 and references therein.

[153] Niboyet, *op. cit.*, *supra*, footnote 7, s. 578.

[154] Art. 34. [155] Art. 35.

[156] *Op. cit.*, *supra*, footnote 20, p. 380 *et seq.*

[157] *Ibid.*, p. 382.

law should govern where the acceptance of a child as a member of a family is involved.[158] In *Zand* v. *Marmonnier*,[159] a paternity case where the mother was a married woman, it was decided that in the case of different nationalities the applicable law is that of the child. The child was of Austrian nationality and the alleged father was of French nationality. The court said that: "Considérant que dans un pareil litige qui oppose un enfant de nationalité autrichienne à un homme de nationalité française, qu'il pretend être son père, la loi qui à vocation à s'appliquer est la loi autrichienne en raison de ce que dans les rapports crées par l'éventuel lien de filiation de fait ou de droit qui est susceptible de les rattacher l'un à l'autre, l'intérêt de l'enfant est prépondérant." In such a case, the theory would seem to be that the question is whether a claim can be made by the child or on his behalf for support from the defendant, so that the law of the child predominates and not the law of the family, which is normally taken to be the law of the father.[160]

It has been stated that by English law a child is legitimate who is born anywhere in lawful wedlock, and "a child not born in lawful wedlock is legitimate in England if, and only if, he is legitimate by the law of the domicile of each of his parents at the date of his birth".[161] The second part of this statement is influenced by *Re Bischoffsheim*, where it was said that if the succession to personal property depends on the legitimacy of the claimant, the status of legitimacy "conferred on him by his domicile of origin (that is the domicile of his parents at his birth) will be recognized by our courts; and if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation".[162] By the English rules of domicile a child's domicile at birth will be that of its mother, if illegitimate.

[158] "Il y a, nous semble-t-il, une raison décisive qui doit suffire à elle seule à faire prévaloir la loi du parent: c'est que les règles de la filiation sont des règles organiques du droit de la famille et qu'elles dépendent de la loi unique applicable à la famille comme telle." *Ibid.*, p. 383.

[159] Cours d'Appel de Paris, 22nd February 1957, see (1958), 47 Revue Critique 84. *Cf. Henrich* v. *Mathieu*, Cours d'Appel de Nancy, 13th January 1955, see (1955), 44 Revue Critique 525. For a Belgian decision reference "filiation adultérine" and "reconnaissance volontaire", where it was decided that the applicable law was the national law of the recognizing party, see (1960), 49 Revue Critique 577.

[160] *Cf.* the terms of the judgment of the Cour de cassation in *De Ferrery Vidal Aloy* v. *Moens*, 4th November 1958 see (1959), 48 Revue Critique 311.

[161] Dicey, *op. cit.*, *supra*, footnote 56, p. 420.

[162] [1948] Ch. 79, at p. 92. Compare *Re Jones*, *Royal Trust Company* v. *Jones* (1960), 25 D.L.R. (2d) 595. Succession to an unbarred entail seems still to be an exception—see Bromley, Family Law (1957), pp. 273-274.

The *Bischoffsheim* case has been severely criticized on the ground that where a right to succeed to property depends on legitimacy, so that the question of legitimacy at birth may be said to arise incidentally to a matter of succession, the governing law should be the *lex successionis*.[163] According to the *American Restatement of the Law of Conflict of Laws*, the status of legitimacy is created by the law of the domicile of the parent whose relationship to the child is in question.[164] An illustration is given where A, domiciled in state X, and B, domiciled in state Y, go through a marriage which they incorrectly believe to be valid. They then produce a son. The law of X regards the offspring of such a "marriage" as legitimate.[165] The law of Y regards the child as illegitimate. The solution is that the "son will be recognized everywhere as the legitimate son of A, but the illegitimate son of B" (a confusing situation for the child).[166] Let X be a state of the United States and let both alleged parents be domiciled in a European country Y, so that Y is their personal law by the law of X. A and B marry in X and the marriage is valid by the law of X both as to capacity and as to form. Suppose that the law of Y requires a religious ceremony for validity, whereas the ceremony in X was a civil ceremony. A question of legitimacy arises in X. If the personal law of the parents is applied, a court of X would find the child to be illegitimate, although the fruit of a marriage valid by the law of X.[167]

The first question for a court to consider is whether the child has been born in lawful wedlock.[168] In resolving this problem the court should apply those of its conflicts rules which are relevant to the recognition of marriage and divorce. But a distinction is made in both French and Anglo-Saxon systems between legitimacy at birth and legitimation after birth—either by subsequent marriage of the parents or by declaration. There is doubt as to choice of law in legitimation in both the French and common-law systems—

[163] See Falconbridge, *op. cit., supra*, footnote 24, Ch. 39 for a full discussion of this case. *Cf.* Welsh (1947), 63 L.Q. Rev. 65. Wolff supports the *Bischoffsheim* decision, *op. cit., supra*, footnote 55, pp. 338-389.

[164] (1934), ss. 137-138. See caveat to s. 137 expressing no opinion "whether the domicile of the child may not create the status of legitimacy, and, if so, determine the circumstances under which the status shall be created".

[165] See for instance Lerebours-Pigeonnière, *op. cit., supra*, footnote 8, s. 450; Quebec Civil Code, art. 163; and reference Scotland, *Purves Trs.* v. *Purves*, 1896, 22 R. 513; Stair, Institutions (1681), III, 3, 41. An analogous effect to a putative marriage in regard to offspring is produced by the Legitimation Act of Ontario, R.S.O., 1960, c. 210, s. 5.

[166] It might be described as a "limping bastardy."!

[167] There can also be the converse problem. *Cf.* Rabel, *op. cit., supra*, footnote 25, (2nd ed., 1958), vol. I, pp. 607-608.

[168] *Cf.* Dicey, *op. cit., supra*, footnote 56, p. 420, rule 65 (1).

with the complicating factor that there may be changes of personal law between the date of birth, and the date of the legitimation.[169] If the question whether the parents were lawfully married at the date of birth is answered in the negative, the child may still be legitimate, for instance by putative marriage, or by some form of legitimation and a second question may have to be answered. The applicable law for the second question is *a* personal law—subject to grave doubt as to *which* personal law, where child and parents have different personal laws, although at least the formal validity of the subsequent marriage, or other event on which the claim for legitimacy is based, may be determined by *locus regit actum.*

There have been recent developments in the law relating to adoption of children in the jurisdictions with which we are concerned.[170] The social value of adoption is increasingly recognized, especially as a means of fitting a neglected or an illegitimate child into a family structure. In the Anglo-Saxon countries there was no adoption at common law, and in France, adoption in the modern sense is recent. There is considerable uncertainty, in both the French and common-law systems, as to choice of law for the recognition of a foreign adoption. Niboyet proposes the national law where all interested parties have the same nationality but there seems to be doubt where there are differences of nationality—and the result may be affected by public policy.[171] It has been suggested that the most logical solution where the nationalities differ would be to apply the laws of the adopter and the adoptee.[172] The tendency in French law seems to be to analogize adoption and "filiation légitime".[173]

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[169] See for instance. Le droit international privé de la famille en France et en Allemagne (1954), *per* De la Moutte, p. 291 *et seq.*; Falconbridge, *op. cit., supra,* footnote 24, Chs. 41-42; Dicey, *ibid.*, p. 435; Restatement, *op. cit., supra,* footnote 39, ss. 139-141.

[170] In France, the provisions of the eighth title "De l'adoption et de la légitimation adoptive" have been amended by Ordonnance No. 58-1306 of 23rd December 1958. See also L'adoption dans les législations modernes (1958), p. 181; (1958), 36 Can. Bar Rev. 299; (1959), 11 Rev. Int. de Dr. Comp. 697; *Re Blackwell,* [1959] O.R. 377; *Re Clement,* [1960] O.R. 648.

[171] Niboyet, *op. cit., supra,* footnote 31, s. 1529, and footnote 7, ss. 592-596.

[172] ". . . chacune de ces lois déterminant respectivement les conditions d'aptitude personnelles à l'adoptant et à l'adopté. Ainsi se trouverait respectée cette idée que l'adoption concerne autant l'état de l'adoptant que celui de l'adopté." Le droit international privé de la famille en France et en Allemagne (1954), *per* Merle, p. 328; Batiffol, *op cit., supra,* footnote 5, s. 477, *Cf.* the Greek Civil Code, art. 23 and the Montevideo treaty on international civil law (1940), arts 23-24. See Meijers, Recueil de lois modernes concernant le droit international privé (1947).

[173] Lerebours-Pigeonnière, *op. cit., supra,* footnote 8, s. 466; L'adoption dan les législations modernes (1958), pp. 186-187.

Adoption recognition in the common-law jurisdictions is also subject to considerable doubt. The application of the personal law—the law of the domicile—is favoured, and difficulties arise where the adopting parents and adopted child have different domiciles.[174] Questions may also arise as to the meaning of words such as "child" or "issue" in the interpretation of wills or in intestacies.

In *Re Marshall*, a child was adopted in British Columbia, the succession was governed by English law, and the question was whether the child was "issue" of the adopter—the word "issue" being taken to have the *prima facie* meaning "legitimate child".[175] The court did not decide whether an adopted child is precluded from taking as a "child" of an adoptive parent because he was not born to that parent, but it stated that if such an interpretation were possible at all, "only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope

[174] *Cf.* Restatement, *op. cit.*, *supra*, footnote 39, s. 142. S. 143 provides that an adoption "will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law". See also Falconbridge, *op. cit.*, *supra*, footnote 24, Ch. 43. In *re Grace's Estate* (1949), 200 P. (2d) 189 it was said that "the status of an adopted child, is determined by the laws of the state in which the adoption was effected". This case distinguishes between "capacity" to inherit, which is determined by the law of the place of adoption and the "right" to inherit which, if the person has capacity to inherit, is then decided by the *lex successionis*. *Cf. Re Johnson's Estate* (1950), 223 P. (2d) 105; *Mutual Life Insurance Co. of N.Y.* v. *Benton* (1940), 34 F. Supp. 859; *Welch* v. *Jacobsmeyer* (1949), 43 So. (2d) 678. As to the application of public policy, see *Re Gillies Estate* (1951), 83 A. (2d) 889.

[175] [1957] 1 Ch. 507; *Re Fletcher*, [1949] 1 Ch. 473; *Re Wilson*, [1954] Ch. 733; *Re Wilby*, [1956] P. 174; *Re Milestone* (1958), 15 D.L.R. (2d) 546; *Re Blackwell*, *Re Clement*, *supra*, footnote 170; Kennedy, (1956), 34 Can. Bar Rev. 507; Inglis, (1957), 35 Can. Bar Rev. 571, 1027; Webb, (1957), 20 Mod. L. Rev. 405; Baxter, (1958), 36 Can. Bar Rev. 328, (1959), 11 Rev. Int. de Dr. Comp. 697. *Cf.* Niboyet, *op. cit.*, *supra*, footnote 31, s. 1529: "Ainsi, dans le cas d'une succession régie par la loi française, l'enfant adoptif ne pourra se prévaloir que des droits successoraux qui lui sont accordés par cette loi. Cette question, en effet, ne concerne plus l'état en lui même, mais le droit des successions."; Le droit international privé de la famille en France et en Allemagne (1954), *per* Merle, p. 337 *et seq.* In regard to *Re Clement*, one would have thought that the purpose of R.S.O., 1960, c. 53, ss. 76-77 was to introduce a new (non-retroactive) interpretation of words such as "child" appearing in a will, *etc.*, the new interpretation to take effect from the date of the sections and to apply, for example, to vesting after that date. Le Bel J. A. and Stewart J., however, in *Re Clement*, considered that the sections were meant to apply only to an adopted child alive at the time of the passing of the sections. This would have the curious result that a word such as "child" in a will might have two meanings from and after the passing of the sections, (irrespective of the date of vesting), one meaning if the child died before the sections were passed and another meaning if the child was alive at the date of the sections.

of the testator's contemplation".[176] The basic problem is to interpret the testator's intention—even where the testator's words are ambiguous and there is little or no admissible evidence to assist the court in making an interpretation. It is reasonable, therefore, to apply the *lex successionis*, at least in the first instance. In *Re Marshall* this was English law, in which it is presumed that "child" means "legitimate child"—the immediate offspring, excluding more remote descendants.[177] Can "adopted" child be equated to "legitimate child". Is the presumption wide enough to include "artificial" as well as "natural" children? As far as England is concerned, the *Marshall* case leaves this question undecided. If the presumption is wider than merely "natural" children, how wide is it: does it include for instance any child validly adopted by the *lex loci*, where the adoption sets up the fundamentals of a parent-child relationship, such as custody, financial support—but where the succession rights of a (natural) legitimate child and an adopted child may be different? These questions are in doubt, but there is a trend in most jurisdictions to assimilate very substantially the legal position of a (natural) legitimate and an adopted child. As this movement progresses, the present difficulties will be greatly reduced.

The root of these complexities is the presumption that "child" means "legitimate" child. This presumption existed long before the introduction of adoption by statute in the common-law jurisdictions. The English common law treated the illegitimate child with harshness and the presumption reflects a policy of giving preference to legitimate offspring. When created, it was intended to exclude not the adopted child (a legal category then unknown) but the illegitimate child. There is no good reason for a presumption distinguishing between (natural) legitimate children and adopted children. It would be a step forward if legislation were passed (as necessary) to the effect that a child validly adopted anywhere is presumed to be within the meaning of the word "child". The maxim *locus regit actum* could be applied to determine if the child has been validly adopted. Should not the word "child" in a will include *prima facie* all the children of the testator, legitimate,

[176] *Ibid.*, at p. 523.

[177] Compare *Ellis* v. *Henderson* (1953), 204 F. (2d) 173, at p. 174; *Re Hurry's Estate* (1948), 84 N.Y.S. (2d) 312; *Re Wolfe's Estate* (1951), 104 N.Y.S. (2d) 371; *Hall* v. *Fivecoat* (1942), 38, N.E. (2d) 905; *Morgan Plan Co.* v. *Bruce* (1955), 78 So. (2d) 650; *New York Life Ins. Co.* v. *Beebe* (1944), 57 F. Supp. 754; *Turner* v. *Metropolitan Life Ins. Co.* (1943), 133 P. (2d) 859; *Kindred* v. *Anderson* (1948), 209 S.W. (2d) 912, at p. 918.

legitimated, adopted and illegitimate? The law would then cease to presume against the illegitimate child, but it would remain open to a testator to restrict the meaning of the words in his will, either expressly or by implication, and to rebut the presumption.

VII. *Conclusion.*

Upon what fundamental principles should a modern theory of recognition of status be constructed? Such a question is speculative, but there is an active tendency towards law reform in this field. The main problem is choice of law—with an associated problem as to whether "international" requirements as to jurisdiction are desirable, for instance in regard to divorce recognition.

What are the characteristics of a good choice of law rule? Is it important which law is applied—and if so, to whom—to the parties, to the country where the proceedings have arisen, or to another country with which a party has some connection? It has been said that: "Conflicts law must presuppose equality among the particular national laws, statutes and tribunals."[178] The traditional view is that the judge "decides applicable law as a preliminary question without considering the contents of the domestic law so chosen".[179] If public policy (and "fraude à la loi") only operates in special cases and as an *ultimum remedium*, to where do these various principles lead in weighing set of rules X against set of rules Y, assuming that both X and Y are mechanically capable of referring the question uniquely to one legal system? Is there anything to choose between them? If we (a) assume that all legal systems are of equal value, and (b) blind ourselves *prima facie* to the local content of the individual systems—only permitting consideration of such systems in regard to public-policy—is choice of law largely immaterial? With this kind of approach, it is not surprising that discussion of choice of law in legal writing consists so frequently in the repetition of rather meaningless maxims, and pseudo-international theorizing. Similar considerations apply in regard to the English use of domicile as an "international" basis of jurisdiction. In fact this principle is analogous to a choice of law rule, especially in the case of countries which apply their own law in divorce, irrespective of the personal law of the parties.

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[178] Rabel, *op. cit., supra,* footnote 25, p. 630; Compare Savigny's idea that in private international law the same legal relations should produce the same decisions irrespective of where pronounced.

[179] Tötterman, *op. cit., supra,* footnote 41. See also Lorenzen (1943), 57 Harv. L. Rev. 124. For a critical examination of choice of law theories see Cavers, (1933), 47 Harv. L. Rev. 173.

Both the French and common-law rules for recognition present a complicated pattern. In regard to the validity of marriage, the problem is normally separated into essence and form, with different rules for each and sometimes doubt as to the category of a particular fact element. Choice of law as to essence is confused as to which personal law or laws should be applied. It may be difficult in any of the countries concerned for a person to know if he is married or single without court proceedings—and even when status is determined, it may be different for different jurisdictions. In proceedings for nullity, at least in common-law jurisdictions, there may be a further possibility of recognition of a foreign nullity decree (without question as to its grounds) on a jurisdictional basis comparable to the local jurisdictional rules of the forum. This is a most confusing principle, in regard to declarations of invalidity *ab initio*, since, whenever a marriage purports to take place, then by conflict rules of recognition, it is immediately valid or invalid in foreign jurisdictions. A declaration of invalidity *ab initio*, in a foreign jurisdiction, may conflict with the previous (theoretical) recognition of the marriage as valid by the law of the forum. Divorce recognition in French law involves doubt and difficulty where the parties do not have the same personal laws. The pseudo-internationalism of the English domicile-jurisdiction theory is unsatisfactory since the meaning of domicile varies and in any case, it does not operate as originally conceived—even in England.[180] Legitimacy depends on the validity of a marriage, or else on the personal law, with doubt as to which personal law. Questions of personal law enter very much into recognition of legitimation or adoption and the result is confused. Whatever intellectual attractions the French and common-law rules of recognition may have, they do not have the virtues of efficiency, simplicity of operation and precision. Indeed, a desire for simplicity hardly seems to have entered into the construction of the existing systems. One criticism, then, of the rules on recognition of status is that they are inefficient, in that they are cumbersome, uncertain, liable to produce limping marriages, limping bastardies, and so on.

Efficiency is not the only criterion of a good set of recognition rules, but it is useful to consider this aspect of the matter first and to ask how it can best be achieved. The difference between a conflicts problem and a local law problem lies in the plurality of legal systems, and so one function of a set of conflicts rules is to reduce a multi-law problem to a local law problem. Rules for choice of

[180] Changes have been made by statute.

law, and "international" jurisdiction principles are reduction mechanisms of this sort, enabling the courts of the forum to localize a problem to one system of law or to the decisions of one jurisdiction. The elements which appear in current recognition rules are: (i) the *forum*, (ii) the jurisdiction in which something has happened, (iii) the jurisdiction with which someone is connected. The weakness of (i) has already been indicated. Each *forum* reduces the problem to its own law or its own jurisdiction so that, internationally, from the parties' point of view there may be many solutions. The present recognition rules in the French and Anglo-Saxon systems involve mainly combinations of elements (ii) and (iii), and clearly, part of the complexity at least, arises from the fact that *both* elements are involved. Modern law on recognition of status represents an uneasy compromise between two schools of thought. From a functional point of view—and this is all we are concerned with at present—it is obvious that greater simplicity would be achieved by the elimination of either element (ii) or element (iii). Which of the two would provide the most efficient reduction mechanism? The connection between a person and a jurisdiction is liable to be more indefinite than the connection between an event and a jurisdiction, at least if the relationship of person and place is of a more sophisticated nature than geographical location at a given time. If the relationship is to be regarded as something which continues to attach to a person as he moves about, it may be differently conceived in different jurisdictions and difficulties of interpretation can arise. Furthermore, a great many conflicts questions involve more than one person, and so special rules are required, for instance to solve disputes between two persons each with a different personal law. The theory of the personal law is that every individual is connected with one system, which governs certain aspects of his life, such as status. Even if all countries were to use the theory in the same way—supplementary rules would be needed for disputes involving parties with different personal laws. These supplementary rules are additional sources of uncertainty. On the other hand, the connection between an event and a jurisdiction avoids these operational difficulties. In the category of "event", in regard to recognition of status, there could be included ceremony of marriage; divorce decree or statute; decree of annulment of marriage; act of legitimation; adoption decree, and so on. Such an event can be easily identified with a jurisdiction. No supplementary rules are required—the connection of event and jurisdiction remains unique, however many parties may

be involved. Suppose two countries R and S both use event-jurisdiction as the basis of their conflict reduction mechanism. Decisions as to foreign events effecting status ought to be uniform in the two countries. A lawyer in one country will be able to tell his client with confidence which system of law will determine the validity of a marriage, a divorce, a legitimation or an adoption. It is apparent, therefore, that connection of event and jurisdiction would provide a more efficient mechanism for recognition of status than would a connection between a person and a jurisdiction.

Are there considerations other than those of functional efficiency which would entitle the personal law to a place in a good system of recognition rules despite its "mechanical" weaknesses? Personal law theory is based on the idea of a legal system attaching to an individual wherever that individual may be, subject to the possibility of the individual changing his personal law in ways permitted by the theory. Status is a relative term indicating the position of an individual in a community. The laws of the domicile-country govern status and other countries should recognize its decisions. All this has the appearance, *prima facie*, of logic, justice and good social policy. A person's status should be taken as his position relative to the community of which he is a national or in which he is domiciled. But the problem so stated is largely only a pseudo-problem and if properly put, the "logic" and "justice" take on a new aspect. A primary purpose of law is to provide machinery for the settlement of disputes. A dispute involving status, at least in family law, does not normally involve the status of only one person, but concerns two or more simultaneously. The typical question is not the determination *separately* of the status of X and the status of Y, but the existence of a legal relationship between them and the determination of status from that relationship. Will the personal law (or laws) ensure a fairer solution to such a dispute than *locus regit actum?* An application of the latter would mean that marriages, divorces, legitimations, adoptions, would be recognized if valid where celebrated or obtained. Is it unfair to apply to the validity of a marriage, the law of the place where the parties went through a voluntary ceremony?[181] The argument in contracts against the *lex loci contractus*, that a contract may not have much

[181] The situation might be different if for instance duress, or fundamental mistake were alleged, but in practice there does not seem to be much substance in this point, since the rules of invalidity in such cases are more or less the same in most countries. See *DiRollo* v. *DiRollo*, [1959] S.L.T. 278 to the effect that the question of reality of consent should be decided by the *lex loci celebrationis*.

real connection with the place where it was made—for instance having been made by agents at some temporarily convenient meeting place—would not apply with the same force in the case of a marriage.

A universally adopted system whereby formal validity is referred to *lex loci celebrationis* and essential validity to personal law would give rise to a higher rate of "limping" marriages than a universally adopted system of applying *locus regit actum* to total validity. A "limping" marriage is socially undesirable and unjust to the parties. One jurisdiction should not be indifferent to the solutions of other jurisdictions on the same problem—to the undesirability of the same persons being married here and single there; bastards here and legitimate there. But the conflict rules of a country are part of its legal system and international uniformity would involve agreement by sovereign systems. What can be done? Are countries to build their conflicts systems without regard to the operation of other systems (except for minor co-ordinations achieved in practice by international conventions, and so on), leaving the parties to adjust themselves as best they can to contrary solutions in different countries?

For historical and other reasons, the Code Napoleon and the English common law exert great influence on an important group of western legal systems. Both French and English law on recognition of status are currently under review. Thus, at the present time there is a special opportunity for co-operation in formulating better rules for the recognition of status.

It may be objected, that however appropriate *locus regit actum* may be for marriage validity—where the parties have entered into something like a contract—different considerations should apply to divorce decrees, adoptions, and so on. Might it not create injustice to recognize foreign divorce decrees automatically, enquiring merely if they are valid by the foreign law? A distinction may be made between the recognition of a foreign status and the recognition, acceptance or enforcement of the incidents of a foreign divorce judgment, for instance in regard to custody of children or financial provisions. It is not suggested that country R should automatically give effect in its own jurisdiction to the incidents by the law of S of a divorce judgment granted in S. The best principle here is for R, assuming it recognizes the foreign divorce as altering status, to deal with questions such as custody of children, alimony, maintenance, if raised in its courts, taking into consideration the existence of any foreign judgment on these matters, but not abro-

gating in its favour.[182] Might there be an injustice in the application of *locus regit actum* to divorce judgments—as in the case where the husband obtains a divorce in a country where divorce is easier than in that of the nationality or domicile? The relationship of personal law and divorce is not free from injustices of the same type.[183] The rigid application of either a personal law principle or *locus regit actum* may operate more in favour of one spouse than the other. What is the nature of this injustice? If a divorce can be obtained in state X, on a fleeting residence or perhaps by post, how might this involve a bias against one spouse—an unfair advantage to the other? *Prima facie* the courts of X are open to both husband and wife. But it may be more difficult for the wife (because of financial or other reasons) to take advantage of the law of X—assuming she wants to do so. The application of personal law does not cure this—but it may be more difficult for the husband to obtain a change of nationality or of domicile (English type) to X, than to obtain in X a divorce valid there. The difference between a personal law principle and unrestricted *locus regit actum* in regard to divorce recognition is mainly that a divorce which will be recognized, may be more easily obtained under the latter. This facility in obtaining divorce may favour the spouse who is more mobile and stronger financially, and easier in his or her views on divorce. Suppose that the personal law of A and Mrs. A is Y. A obtains a divorce in X. Mrs. A did not wish a divorce and there are no grounds upon which a divorce could have been obtained from the courts of Y. If the courts of Y recognize the divorce in X, would this be an injustice to Mrs. A.? Suppose that the A's had made their home for many years in Y, both A and Mrs. A being nationals of that country, and A had only gone to X temporarily or had dealt with X by correspondence? Mrs. A might say that she has been deprived of her status by the (recognition) laws of Y, not because of proceedings in Y or any ground of divorce by the law of that state, but because of a judgment in X, with which state Mrs. A has never had any connection physical, spiritual or otherwise. The question is whether it is desirable to employ a person-community factor as the basis of divorce recognition—for reasons of justice and public policy, and if so whether a new factor ought to be devised, having regard to the deficiencies of either domicile or nationality alone as a "linking" factor.

[182] *Cf.* the attitude of the courts in custody questions, *McKee* v. *McKee*, [1951] A.C. 352; *Heslop* v. *Heslop*, [1958] O.R. 183, 12 D.L.R. (2d) 591.

[183] Statutory exceptions to the domicile-jurisdiction rule have been found necessary in the common-law systems.

A difficulty of selection may arise between the *lex successionis* and the applicable law by the recognition rules, for a foreign status of legitimacy not based on lawful wedlock, a foreign legitimation or a foreign adoption. One approach is to say that the function of the *lex successionis* is to determine the class of person who *could* succeed; and this we may regard as the major premise of a syllogism. A minor premise is obtained by applying the rules for recognition of the foreign legitimacy, to see whether the particular individual is of the required type. Another method is to apply the *lex successionis* to the whole problem. The first method is more complicated, but apart from that, the difference between them lies in the range of operation of the *lex successionis*. Is there any good reason why a foreign putative marriage, legitimation or adoption, valid by the *lex loci*, should not be recognized by the forum as valid? This is a simple rule, with little likelihood of a "limping" status if it were generally used. It is the result which legitimating and adopting parents would normally wish and expect and it would remain open to the *forum* to deny recognition on grounds of public policy. In the putative marriage situation the birth of the child may not happen in the same country as the invalid marriage. But it is the quality of the marriage which is the governing factor, being enough to give rise to legitimacy but not to the marital status. It is suggested that in the case of legitimation by subsequent marriage or putative marriage, recognition should depend on the law of the place where the marriage was made or was attempted—it being open to the forum to refuse recognition on grounds of public policy.

If the various proposals made so far were accepted, all recognition problems would be determined simply by application of *locus regit actum*, except (a) where a succession question is involved—in which case the *lex successionis* would apply, and (b) in the case of divorce.[184] Divorce is a subject on which there are strong opinions.[185] Would *locus regit actum*, controlled by public policy, provide a reasonable basis for divorce recognition? In the other situations considered, public policy operated only as an *ultimum remedium*. In divorce, *locus regit actum* may admit too wide a range

[184] In regard to recognition, similar considerations should apply to divorce and to a voidable marriage (for instance on the English ground of wilful refusal of sexual intercourse).

[185] Rabel, *op. cit., supra*, footnote 25, p. 387 says that comparative research "in divorce legislation has revealed staggering diversity." He also says that marriage is "one of the favourite objects of tenacious local custom . . . ". A state is apt to have "the idea that its domestic rules alone are morally justified and form an indispensable gift to its own subjects." (p. 245).

of possibilities, at least to make it acceptable to more conservative jurisdictions.

A person may be connected with a community in various ways —nationality; domicile in the technical, English law sense; domicile in the sense of habitual residence; residence in different degrees of permanence. The main object is to ensure that the defendant will not lose the married status save on a ground acceptable in the community with which he or she is "connected".[186] It should be sufficient if the court has jurisdiction by the *lex fori*. It is desirable that the idea of "connection" with a community should be based on known concepts. Nationality is not satisfactory by itself. A person may not be in any real sense a part of the country of his nationality, and nationality would lead to confusion in a federal country where there is no national law of marriage. The English law theory of domicile is too artificial and not sufficiently universal. Domicile, in French law, has not been greatly used in regard to recognition problems and would have to be developed if it were to be used extensively as a choice of law determinant.[187] The simplest way of producing a reasonable "linking" factor would be to equate domicile with principal residence existing continuously over a reasonable period of time (eliminating both domicile of origin and the automatic dependence of the wife's domicile on that of the husband). Such an interpretation would be in line with the idea of ordinary residence as used in other connections (for instance in taxation). Two alternative "linking" factors could be allowed for recognition purposes, (i) nationality, and (ii) principal residence over a minimum period of time. A person would be said to have a *legal connection* with a particular country, if either basis were proved to exist. A foreign divorce (judicial or non-judicial) would be recognized if it was granted by, or would be recognized by, the courts of a country with which the defendant had a *legal connection*. This principle of recognition would form an exception to the proposed general application of *locus regit actum*—an exception introduced to create a better balance of justice between plaintiff and defendant than might be provided by

[186] *Cf.* Cmd. 9678, App. IV, Pt. 2.

[187] Niboyet has said that: "le problème du domicile dans les relations internationales n'est pas le même que le problème du domicile dans les relations internes.—Peut-on se servir d'un concept fait uniquement pour la vie interne et l'étendre purement et simplement aux relations internationales. En realité nous devrions avoir une réglementation du domicile pour les rapports internationaux," *op. cit., supra*, footnote 7, s. 222 bis, footnote 31, vol. I, s. 507. See, also, Battifol, *op. cit., supra*, footnote 5, s. 182; Lerebours-Pigeonnière, *op. cit., supra*, footnote 8, s. 230.

locus regit actum in the special circumstances of divorce (and voidable marriage).

I would suggest three criteria for a good system of recognition rules in family law: (A) the simplicity and efficiency with which the rules produce solutions; (B) the extent to which the rules are consistent with a balance of fairness and justice between the parties; (C) the operation of public policy to prevent solutions which are grossly out of harmony with the beliefs and way of life of the community of the forum, or which provide means of easy evasion of other desirable law within that community. Class (B) should override class (A) criteria; class (C) criteria should override both class (A) and class (B) criteria.

Criteria (A) tend to be underemphasised in writings on conflict of laws. In branches of law, such as merchantile law, where the influence of lay opinion has been felt, it has been exerted towards simplicity. Should similar considerations not apply in regard to a person's status? Is it not desirable that a lawyer should be able to advise a client on his status with reasonable confidence that the advice will be correct? The fact that two or three systems of law may have to be resorted to, in order to advise a client if he is living in sin, or if he is legitimate—yielding a hesitant opinion—is not a desirable result; and less so if the opinion indicates that the client may be lawfully married by the law of X but not married by the law of Y. The complicating factor has been the entry into recognition questions of both *locus regit actum*, and personal law. Whatever the merits of these theories used separately, the employment of them together in recognition problems is surely bad, leading to complicated methods and doubtful solutions.

The second set of criteria are that the rules should be likely to produce just solutions between the parties. Private international lawyers seem at times fascinated by intellectual systems, regarding as irrelevant the comparative justice of the final answers. But the formulation of recognition rules is not just an intellectual exercise. The likelihood of justice between the parties, in the final result is relevant.[188] A "limping" status involves irrationality and injustice. "What can be more embarrassing than that a person's status should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country and single, if not a felon, in another; bastard here,

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[188] *Cf.* Buckland and McNair, Roman Law and Common Law (2nd. ed., 1952), p. 21 referring to the methods of English and classical Roman lawyers.

and legitimate there?"[189] The Royal Commission on Marriage and Divorce stated that: "... the most pressing problem revealed by the evidence is the hardship occasioned by a limping marriage, that is to say, a marriage which is regarded in one country as dissolved but in another country as still in being. Not only does this situation cause serious difficulties for the parties to the marriage who, if they enter into a later marriage, may render themselves liable to criminal proceedings for bigamy in a country which does not recognize the validity of their divorce, but it may also have grave consequences for the children of the later marriage who will be regarded as illegitimate in that country."[190] A better system of recognition of status is needed for reasons of social justice.

The last element, (C) is the operation of public policy. It has been suggested that the problem of devising a good set of recognition rules involves the question of a fair balance between (i) the evil occasioned by members of a state circumventing its internal public policy by going to foreign courts, and (ii) the evil of limping marriages.[191] A relatively narrow divorce law might be rendered ineffective against foreign decrees recognized on the basis of *locus regit actum*, even if universal application of that maxim would virtually elimate "limping" marriages. A concept of "connection" between a person and a legal system is proposed in this article as a basis for the recognition of foreign divorces. If public policy is too frequently employed, either the circumstances of its use crystallize into substantive principles or else the law becomes vague—a set of individual decisions uncontrolled by principle and unpredictable in operation.

It would be difficult to conceive a greater step forward, in recognition of status, than a coming together of French and common-law thinking on new and better fundamental principles. There are possibilities for useful co-operation between the two groups of systems at the present time: the topic is under review in the main jurisdictions and reform and restatement are in active contemplation. It would seem most desirable to have an exchange of views, an examination of the roots of the recognition problems, and a genuine attempt to build a just and efficient set of principles upon which recognition law could be developed in the future. There are many strongly held points of view but much can be achieved by goodwill and a sense of the common good. The op-

[189] *Warrender* v. *Warrender, supra*, footnote 112, at p. 549 (Cl. & F.) *per* Lord Brougham; *Nachimson* v. *Nachimson*, [1930] P. 217, at p. 233.
[190] Cmd. 9678, s. 789.
[191] Martin, (1949), 9 La L. Rev. 515.

portunity which now exists for a French and common-law examination of the fundamentals of recognition, if allowed to pass, may not return for a long time, and with it may pass a real chance to get rid of the present inefficient and unjust rules.