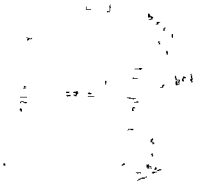
COMPARATIVE OBSERVATION OVER CERTAIN SECTIONS OF FAMILY LAW



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COMPARATIVE OBSERVATION OVER CERTAIN SECTIONS OF FAMILY LAW

Introduction

The evolution of the legal systems of the Western civilization is the result of world-wide shifts and adjustments in the socio-economic structure of the law.

Previous to the World War II the character of the literature of the Private International Law has been almost national, based on a single national law. The rise of comparative study caused the infusion of foreign elements into the national literature on Conflict of Laws problems. The similarity of the numerous major conflict problems in the countries of the Western civilization strived to reach acceptable solutions, reciprocally using comparative methods. This approach was greatly interrupted by World War II.

At the same time World War II brought forth enormous changes of population of the states concerned, thus increasing the sphere of the Conflict of Laws. These circumstances have in some sections, such as Law of Property, Succession upon Death, Law of Persons, and Family Law,

greatly enlarged the scope of Private International Law. The latter is the special interest of the following thesis. Millions of persons and families were legally affected through the war, in their residence, domicile, marital status, etc.. Countries which at present time have an unusual number of foreigners within their borders, as refugees, immigrants, and so called displaced persons, such countries (United States of America, Canada, Australia, France, Belgium, Great Brittain, etc.), are faced in numerous cases with several problems. Let us take only one of these -- the legal relationship between probably deceased spouse and his wife, where it is doubtful whether a person is dead or still living, and the question of burden of proof arises. This question has been answered differently by various legal systems. Very few precedent cases guide the way of the legal conditions of these persons affected through World War II.

It is in pursuance of these ends that the present observation on one sector of Private International Law has been worked out, with a preference to the problems concerning the conceptions on presumption of death.

CHAPTER I MARRIAGE

A- REQUISITES OF MARRIAGE

1) Status

The status of an individual means the legal position of the individual in regard to the remainder of a community. There is certainly a status of marriage and a status of celibacy, defined not by contract or agreement but by law.

The law of England says that marriage is a contract resulting in status[1]. Status does not depend upon the will of the citizen, but upon the will of the State. One cannot, without the State's consent, choose a status; one cannot, without the State's consent, vary it.

The status of an individual is determined by his personal law, as a matter of principle: the law of the country to which by birth or domicile he owes obedience[2]. The status of marriage is the legal position of the married person as such in the community, creating certain privileges and certain duties under legal protection and sanction. The definition of marriage as given in the Institutes of Justinian: NUPTIA AUTEM, SIVE MATRIMONIUM EST VERI ET MULIERIS CONJUNCTIO, INDIVIDUAM VITAE CONSUETUDINEM CONTINENS - has not been much improved by later definitions.

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1 Apted v. Apted, (1930) P. at p. 260.

2 Niboyet v. Niboyet (1878), 4 P.D.I., at pp. 11-13.

The Catholic Church gives a definition: marriage is a contract resulting in a relationship[1]. That relationship differs from status in this, that it is a God-made matter, which neither man nor the Church can alter.

2) Capacity, incapacity, and restricted capacity

Status is the basis of capacity, incapacity, and restricted capacity. Capacity designates the faculty of a person to produce legal effects by his own act, whether by contracts, wills, transfers of rights, or marriages or adoptions[2]. Full capacity corresponds to the normal status of man. Where certain disabilities arise (minority, lunacy, etc.), a person concerned has no capacity or only a restricted capacity. A married woman has sometimes full capacity (English system), sometimes a restricted capacity (French system[3]). As capacity in the strict sense of the term results from status, the law governing the status of a person governs his capacity.

Which is the most appropriate law for determining the status of a person and his capacity, and for regulating his marriage, divorce, and other points of his personal situation? Is it the law of his domicile or of his nationality? It must be universally admitted that marriage is an institution which closely concerns public policy and the social morality of a State. The community cannot ignore an open

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1 F.J.Sheed, Nullity of Marriage, (1931) p. 2.
2 Martin Wolff, Private International Law, (1945) p. 282.
3 Code civil francais, art. 215.

infraction of its recognized code of morals which are clearly reflected in the legislation of the country. For instance -- the age at which persons may intermarry is a matter of public concern, and each State has an interest in preventing those who settle within its borders and who have not reached the prescribed age from living together as man and wife.

Capacity to marry is generally determined by two legal systems: principle of nationality and of 'lex domicilii'. To illustrate this point, five countries of each group have been chosen: France, Belgium, Sweden, Germany and Brazil representing the principle of nationality and United States of America, England, Canada, Australia, and Argentina representing the principle of 'lex domicilii'. Each of these countries are at present most concerned with tremendous post-war problems: immigration, refugees, displaced persons. According to the report of M. Paul Ruegger, president of the International Red Cross Committee, Geneva, at the first of April 1950, the world contained more refugees now than at any time in human history. The estimated world's refugees total more than 60,000,000 persons. As an incessant stream from country to country, these persons in marrying, educating their children, in making their wills, etc., have to be subject to the legal system of the country of residence or domicile.

The French Civil Code introduced in its original text (1804) the principle of nationality[1]. It is based on

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1 P. Lerebworg-Pigeonnière (1948) p. 35, 41 et seq..

the idea that man is deeply rooted in his nation. Nationality or political status[1] depends upon the place of birth or upon parentage. Thus the status, capacity and family relations of a person are governed by the law of the nation to which he belongs[2]. The French Civil Code had a considerable influence and many states followed this model. Belgium simply accepted the French Code: Sweden adopted the principle of nationality 1912[3], Germany 1896[4] and Brazil 1916[5] also.

The principle of nationality has many merits and according to Martin Wolff, 460 million men are living in countries governed by nationality system[6]. Its main merit is that nationality and change of nationality can always be verified by official documents, the other way around, domicile is often hard to prove and deliberate change of domicile always remains possible.

Its main demerit in connection with this thesis seems to be the unreasonableness to subject millions of refugees to the law of a state from which and to the legal system of which they fled. Immigration countries governed by the system of nationality are faced with the pressing necessity to apply a different law to practically every case[7]. This seems to be intolerable.

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1 Udny v. Udny (1869).
2 André Weiss, Droit International Privé (1890) p. 319 et seq.
3 Juridisk Upplagsbok (1944) Band I p. 10.
4 Das Einführungsgesetz zum Bürgerlichen Gesetzbuche, art 7 bis 31.
5 Martin Wolff, p. 43.
6 Martin Wolff, p. 104.
7 May v. May (1943).

The domicile system, governing the status of a person, his capa cities and personal rights, is connected with his home as a center of his life. It is difficult to give an absolute definition of domicile. Defined on countless occasions since Roman times, Dr. Cheshire[1] prefers as the most accurate definition, the one given by Chitty J. in the Craignish v. Craignish case, where he says:

> "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom".

As a general rule, no one shall be without a domicile[2], and secondly, a person cannot have two domiciles. An essential of the legal conception of domicile is a connexion between the person and a definite territorial unit[3]. Be it a place in a country or the country in general, for the purpose of Private International Law, it makes no difference. It is unimportant whether a domiciled person is resident in Ottawa or in Winipeg, his domicile is in Canada.

As mentioned hereupon, in immigration countries, such as United States of America, England, Canada, Australia, and Argentina, personal status, capacity and personal rights

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1 G.C.Cheshire, Private International Law, p. 207 et seq..

2 Udny v. Udny (1869).

3 G.C.Cheshire, P.I.L., p. 210 et seq..

are tested by domicile[1]. In this thesis arises the question about the existing domicile of immigrants, refugees and displaced persons.

According to this system, there are three main types of domicile: 1) domicile of origin, 2) domicile of choice, and 3) domicile by operation of law.

Domicile of origin is acquired by birth and it is that of the country in which the father is domiciled at the time of the child's birth, (illegitimate child's domicile follows that of the mother)[2].

Domicile of choice arises when an existing domicile is abandoned and replaced by a new one. There are three requisites for aquisition of a domicile of choice: capacity, residence and intention.

Persons under disability, such as married women[3], infants or lunatics are unable to acquire a domicile of choice. There are hundreds of thousands married women, recently arrived into immigration countries, who have abandoned their domicile of origin, but are unable to acquire a domicile of choice. There is no doubt that they have abandoned the domicile of origin, especially in cases where the country of domicile has undergone a change of sovereignity,

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1 Martin Wolff, p. 101 et seq..

2 Udny v. Udny, Restatement of the Law of the Conflict of Laws §14.

3 Attorney-general for Alberta v. Cook, (1926).

either by cession of the territory to another state or by the foundation of a new state. Thus a married woman from Eastern Poland (cession to U.S.S.R.), or from Palestine (foundation of a new state), has lost her domicile of origin and is unable to acquire a domicile of choice in the case where her husband has disappeared during the war. Which law is applicable in such cases? It is suggested, according to the English[1] and American[2] law, that the rule of fictitious home as legal domicile is correct. On the other hand Argentina, according to the Conventions of Montevideo, has a most correct solution, whereby the factual residence of a person who abandons her domicile of origin, is treated as her domicile until a new domicile has been created[3].

A similarly delicate problem arises in connection with a married woman from the annexed Baltic countries, who has left her home country during the war without having knowledge over her husband. Entering as an immigrant in the countries which have de facto and de jure recognized the annexations, there is no doubt that such a person has lost her domicile of origin. Entering, for instance, as an immigrant into the United States of America, which has not recognized the annexations de jure, she still has her domicile

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1 Udny v. Udny, loc. cit..

2 Restatement, §11.

3 Montevideo Convention of Private International Law, s. 9.

of origin and it seems to be possible for her to acquire a new domicile of choice according to the American law[1]. English law does not allow her a domicile of choice until her marriage is dissolved.

A further element of domicile of choice -- residence may be defined as the habitual physical presence in a place[2]. Residence brings forth a presumption of intention to acquire domicile. The longer the residence lasts, the stronger becomes the presumption, but time alone is not the only criterion of domicile. A person must intend to reside in a new country for ever[3]. The fact of the physical presence in a country and the intention of staying there indefinitely are the main requisites of the domicile of choice according to the English Law. Furthermore, the intention must be present and voluntary.

The normal case which arises in the question of a change of domicile is that of a person who, being at liberty to go where he chooses, deliberately, of his own free will takes up his residence in another country. But occasions arise where this liberty of action is to a lesser or greater degree absent, as for example the case of socalled displaced persons from different parts of Europe.

The problem that arises in such cases is whether the intention that is necessary for a change of domicile

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1 Restatement, §§ 28,29.

2 Martin Wolff, p. 101.

3 Dr. Cheshire p. 216 et seq..

imports freedom of choice. As a known fact, these persons were against their will removed from their home country by nazis to Germany and after capitulation of the Nazi-regime, special camps were arranged for them in Germany by the occupation powers, and the economical, social and political care over them were entrusted to UNRRA. This international organization recommended to the displaced persons either to go back to their Russian ruled home countries or to sign a labor contract for one year with an immigration country. If he refused to go back to his home country, he was examined by special immigration commissions from several countries. Finally, if one of such commissions found his weight, height, teeth, musculature, breast and loins satisfactory, the person signed the contract and sailed to a new country. Was he free for a choice of domicile? Was his sailing an intention? The answer could be yes and no. He was selected by a commission and his intention was a necessity more or less pressing. Arriving to a new country he was not free to choose a residence within one year.

Is he able to acquire a domicile of choice? Both Martin Wolff and G.C.Cheshire give interesting answers to a case closely related to that of displaced persons. Wolff's answer is favorable, Cheshire's undecisive.

According to Martin Wolff:[1]

Whether the German refugee from Nazi oppression, resident in this country, acquires a domicile here, depends on similar considerations[2]. If he intends never to return to Germany, whatever her future government may be[3] and not to settle in a third country, he has undoubtly established an English domicile. If he hopes (i.e. wishes and believes) that he may be able to return to a changed Germany, he certainly retains his German domicile. If finally he fears that this will not happen, his intention is permanently to live in England though he would prefer living in Germany: wish and will point different ways.

According to G.C.Cheshire[4]:

A Russian, with the strongest antipathy for Bolshevism, leaves the U.S.S.R. and takes up his residence in England. He may have done this out of abhorrence for Bolshevist regime or through fear for his own personal safety. But even if it is evident that he was influenced by these motives

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1 Martin Wolff, p. 115

2 De Bonneval v. De Bonneval (1838).

3 May v. May (1943).

4 G.C.Cheshire, p. 222.

> if it scarcely safe to assert that therefore he retains his Russian domicile. It is true that his intention may be to return to the U.S.S.R. at the favorable opportunity, but it is also conceivable that his determination is never to return, despite the change that a regime more welcome to him may some day be instituted. Something more is required tovestablish his intention than evidence of his motives. In short, most of the facts which are said to deprive a man of freedom of choice so as to render his residence voluntary are really only indicia, though very strong indicia, of his intention. They must be baren into consideration along with other facts and given due weight, but by themselves they can seldom be decisive. The choice of a new residence must assuredly be voluntary but what this means is that there must have existed sufficient freedom for the formation of an intention.

On preceeding pages, the points of contact of status and capacity in connection to certain persons have been given. Capacity to marry depends upon the law of a person's domicile. The law of the domicile of each party decides his or her capacity to marry the other party[1].

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1 A.V.Dicey, The Conflict of Laws (4th ed.) p. 704, Cooper v. Cooper (1888).

Capacity must be existent at the time of the marriage. A marriage validly concluded does not become void when one party later acquires a domicile under which they would not have been able to marry. Conversely an invalid marriage does not become valid through a change of domicile although under the new domicile the marriage would have been validly concluded.

There are two kinds of incapacity: 1) absolute incapacity, derived from a certain status owing to which the incapable is unable to conclude any valid marriage (for instance, nonage), 2) restricted capacity, independent of the status and existing only between certain persons (consanguinity within the prohibited degrees). The Hague Conventions which came into force, are governing the interdiction of incapable persons, valid in eight countries, namely: Germany, Italy, Netherlands, Poland, Portugal, Roumania, Sweden and Hungary[1].

3) Form, place

A marriage, celebrated in the form, or according to the rites or ceremonies, held requisite by the law of the country where the marriage takes place, is valid[2]. The form of a marriage is governed by the law of the place in which it is concluded -- principle of `locus regit actum'.

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1 G.C.Cheshire, p. 16.

2 Dicey, p. 689.

In many countries `locus regit actum' has an imperative character, in others it is sufficient but not necessary to observe the forms prescribed by the `lex loci celebrationis'. The first view was clearly followed in the case Berthiaume v. Dastons (1930):

> If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceedings or ceremony which constitutes marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or the other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceedings if conducted in the place of the parties' domicile would be considered a good marriage.

This is the view of the English and American laws. The most serious objection to the imperative character of the rule lies in the lack of consideration it shows for the couples belonging to the Roman Catholic or the Orthodox Church. Both churches treat a marriage between Christians concluded without the assistance of a priest as a nullity, as a mere concubinate. In their views the religious ceremony is not a mere form but belongs to the essence, to the

soul of the sacrement[1].

In other countries the rule of `locus regit actum' became imperative only for marriages concluded within its own territory but remained optional for marriages concluded abroad. Proclaiming civil marriage as the compulsory form of marriage, they excluded on their own territory any religious form of marriage. This conception was based on the doctrine of `ordre public' and is still the law prevailing on the continent.

This peculiar difference between the two groups of countries in their fundamental attitude to questions of morality or `ordre public' are causing a grave injustice and are resulting in so-called limping marriages, valid in one country and void in others.

The dream of the academic lawyer is for an international law of marriage, but the differences between the existing legal systems of the various great commonwealths of the world are much to great to make a universal law, on the subject, practicable. In one country, only the civil marriage is legal, and in another only the ecclesiastical alliance is valid; and the difference in religion between the parties is another impediment to marriage. Even in the matters of capacity and age the greatest variableness exists, whereby the minimum of age for marriage does not derive from

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1 Cod. inr. can., s. 188, no.5.

circumstances of climate, religion or culture, but are mainly historical and arbitrary.

In the following pages we shall take under consideration the possitive marriage laws existing on the one hand, in France, Belgium, Germany, Sweden and Brazil, and on the other hand, United States of America, England, Canada, Australia and Argentina. All these ten countries, as said in the preceeding pages, have as a result of World War II special problems concerning mixed population.

France[1]:

Age man 18 years, woman 15 years.

Consent of parents: man until 25 years of age, woman 21.

Impediments: 1) prohibition in the direct line and also between persons connected by marriage and related in the same degree.
2) uncle and niece, aunt and nephew.
3) brother-in-law and sister-in-law.

Formalities: 1) celebration before the civil status officer[2] of the civil domicile of

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1 Paul Lerebourgs-Pigeonnière, p. 413 et seq.; Decret-Loi de 1938, Code Civile art. 144 et seq..

2 André Weiss, p. 438 et seq..

one of the parties, contracted with the free will of the parties.

2) publishing the banns[1].

3) certificate of the marriage celebration.

Foreign marriages: valid if celebrated in a foreign country[2] between French citizens or between a French citizen and a foreigner, according to the laws of the such country and provided always that the marriage has been preceeded by the publication of the banns pursuant to the civil code. The record of a marriage contracted in a foreign country must be transcribed within three months of the return of the French citizen to the territory of the Republic, in the public marriage registers of his civil domicile.

Principle:

1) principle of nationality, determining capacity.

2) principle of 'locus regit actum' determining the concluding of marriages celebrated in foreign countries.

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1 Code civile, art. 166 et seq..

2 Code civile, art. 170.

Belgium[1]:

Age: man 18 years, woman 15 years.

Consent of parents: until 21 years of age. Parents and grandparents have the right to oppose a marriage of a child or grandchild who has not reached the age of twenty-five years (here is the difference between the French and the Belgium rules).

Impediments:
1) marriage is forbidden in direct line between all legitimate or illegitimate ascendants and descendants and their spouces.
2) between brother and sister and their spouces of the same degree.
3) between uncle and niece and aunt and nephew.

Formalities:
1) marriage must be celebrated publicly before a civil officer of the State and in the commune where one of the contracting parties has his or her residence.
2) publishing the banns.
3) the mutual consent of the parties must

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1 Code Civil Belge, art. 12, 134, 144, 164.

be expressed.

Foreign marriages: A marriage celebrated in a foreign country is valid, if celebrated according to the rules in such a country, provided that the banns are published.

Principles: 1) principle of nationality determining capacity.

2) principle of `locus regit actum' and `ordre public'[2] determining the concluding of marriages celebrated in foreign countries.

Germany:

According to the German Civil Code[3], marriage is treated as a civil contract to which the State is always an added party. Religious definitions, dogmas, and obligations respecting marriage are not affected or considered by the German Code.

Age; man 21 years, woman 16 years.

Consent of parents: until 21 years of age.

Impediments: 1) A marriage cannot be concluded between relatives by blood in the direct line nor between brothers and sisters of full blood or half-blood, nor between persons one of

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2 André Weiss, p. 302, 458.

3 Bürgerliches Gesetzbuch für das Deutsche Reich (1896) §§1303,1343.

whom has had sexual intercourse with the pa rents, grandparents or descendants of the other.

2) Persons in military service, aliens and officials whom by law, require special permission to become married cannot conclude a marriage without the permission[1].

Formalities: A marriage is concluded by the parties appearing together and declaring before a registrar, their intention to become husband and wife; also in the presence of two witnesses.

Foreign marriages: A marriage between a citizen and a foreigner is valid according to the personal law of each party[2].

Principles: 1) of nationality, determining capacity.

2) of 'locus regit actum' determining the concluding of marriages celebrated in foreign countries.

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1 Gusta v Walker, Internationalis Privatrecht (1926), p. 507 et seq..

2 Das Einführunggesetz zum Bürgerlichen Gesetz Buch, art, 11, 13.

Sweden[1]:

'Spoucalia de futuro' marriages which are to take effect in the future are recognised by Swedish Law. The existence of a betrothal that has been entered into the presence of witnesses or the exchange of the engagement rings carries with it the obligation of a final fulfilment of the marriage promise.

Age: Man 21 years, woman 18 years.

Consent of parents: no requirement for male, female until 21 years.

Impediements:

1) marriage is prohibited between relatives by blood in the direct line or between two relatives by blood in the collateral line, one or both of whom are descended in the first degree from the common ancestor.
2) between relatives by affinity in the direct line.
3) lack of free consent.
4) epilepsy.
5) a heathen or a person who does not belong to any recognized religious creed cannot contract a lawful marriage.

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1 Svensk Lagbok (1944) Giftermals Balken, Kap. 1 et seq..

6) a guilty divorced person without the consent of the innocent party.

7) a widower within six months after the death of his wife, nor a widow within one year after the death of her husband.

Formalities: Religious ceremony is the usual form of marriage. If the parties do not belong to the same religious sect, a civil marriage has to be performed. Banns are published three successive Sundays.

Foreign marriages:

1) Swedish citizen abroad is subject to Swedish marriage law. If he or she will choose a foreign form, their intention to be married must be published in advance[1] and his capacity certified by a Swedish official.

2) Marriage concluded abroad according to the form of the place, between a Swedish citizen and a foreigner is recognized by the Swedish law.

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1 Swedish Law of 8th of July 1904, § 1, 3, 6.

3) capacity to marry of a foreigner in Sweden is governed by his personal law[1].

4) Marriage between foreigners from different countries concluded abroad is recognized, if the law of each party recognizes it.

Principles involved: 1) of na tionality, determining the capacity.

2) of 'locus regit actum' determining the concluding of marriages celebrated in foreign countries.

Brazil:

Ninety-eight percent of the people of Brazil are Roman Catholics and consider ma rriage as a religious sacrament, but the law of the land[2] considers it simply as a civil contract between two persons of different sex, to live together and establish a legitimate family. Therefore a civil celebration of marriage is compulsory for all persons, irrespective of race or creed. If the parties desire after the civil marriage to satisfy their consciences and mandates of their church or sect, there is no legal objection to solemnize it once more in a religious form.

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1 Svenssk Juristtidning (1946), p. 299 et seq..

2 Brazilian Civil Code 1916.

Age: man over 14 years, woman over 12.

Parental consent: required until 21 years.

Impediments: Marriage is prohibited between:

1) ascendants and descendants.
2) persons related collaterally in the second degree.
3) persons of adult age who are incapable of properly governing themselves or their estates, without the authorization of their legal representatives.
4) a divorced woman adjudged guilty of adultery cannot contract a new marriage with her accomplice.
5) a wife or widow who has been condemned as the principal or accomplice of the crime of homicide with a principal or accomplice in the same crime.
6) a person bound by solemn vows of religion to a life of chastity.

The canon law of the Roman Catholic Church is accepted as defining the religious rules and spiritual effects of marriage, but the civil law defines the status and temporal effects of marriage contracts.

Formalities: The parties must present themselves in person before the registrar and produce certificates showing:

1) names, ages, occupations and domiciles.
2) the same for their parents.
3) consents, if required.
4) declaration of two witnesses of full age, certifying the absence of prohibited relationship.
5) widows and widowers must present the proof of the death of the former spouce.

The registrar must post a notice of the proposed marriage in a conspicuous place in his office for fifteen days. If at the end of this period no valid objection to the marriage has been formulated, the civil officer proceeds to the celebration of the marriage.

Foreign marriages: 1) Marriage between two foreigners concluded in foreign country is recognized, provided that such marriage is monogamous, is not between ascendants or descendants or between persons related collaterally in the second degree and

if such marriage was regularly concluded according to the law of the country of celebration.

2) Marriage abroad of a citizen of Brazil must be conform not only to the law of the place of celebration, but also it must be in strict accordance with the law of Brazil.

Principles involved: 1) of nationality, determining the capacity.

2) of 'locus regit actum' and 'ordre public' determining the concluding of marriages celebrated in foreign countries.

United States of America:

The United States, in its federal capacity, has no simple system of marriage laws applicable to all the States. Only 'The Uniform Marriage Evasion Act' of 1912 (accepted by a small number of States) provides a uniform rule, that no marriage shall be concluded in the State, to which the Act applies, by a couple domiciled elsewhere, if such marriage would be void or voidable under the law of domicile[1].

The laws of marriage in the several States

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1 Vernier, American Family Laws, I. 3 et seq..

originate from the rules on that subject as it existed in England at the time of the adoption of the Federal constitution and modified by State legislation and local judicial interpretations.

Comparing the marriage laws of each of the States there are three uniform requisites for a lawful marrying[1]:

1) marriage must be monogamous.

2) the parties' capacity to marry is governed by 'lex loci celebrationis' (modified by the Uniform Marriage Evasion Act).

3) there must be free consent on the part of both of the contracting parties.

Further, by an Act of Congress applicable to all the States marriage within third degree of consanguinity, computed according to the civil law, is forbidden. This rule is adopted by each of the States with only a slight variations.

Age:

1) No minimum age for males or females has been set by statute in 12 States -- Alaska, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New-Jersey, Pennsylvania, Rhode Island, South-Carolina and Vermont.

2) 14 years for male and 12 years for female as minimum age to conclude marriage in Kentucky, Louisiana, Utah and Virginia.

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1 O.E.Koegel, Common Law Marriages and its Development in the United States, (1922), p. 19 et seq..

3) 14 years for male and 13 years for female as minimum age to conclude marriage in New-Hampshire.
4) 15 years for male, 12 for female in Missouri.
5) 16 years for male, 14 for female in Columbia, Iowa, North-Carolina, Tennessee and Texas.
6) 17 years for male, 14 for female in Alabama, Arkansas, Florida, Georgia, Mississippi.
7) 17 years for male, 15 for female in Kansas.
8) 18 years for male, 14 for female in Arizona.
9) 18 years for male, 15 for female in California, Minnesota, New-Mexico, Oregon, South-Dakota, Wisconsin.
10) 18 years for male, 16 for female in Illinois, Indiana, Michigan, Montana, Nebraska, Nevada, Ohio, West-Virginia and Wyoming.
11) 18 years for male, 18 for female in Idaho, and New-York.
12) 21 years for male, 18 for female in Washington.

Legal thinking and analysis cannot find any logical facts to uphold such a difference between the minimum ages in various and neighbouring States. The only reason seems to be that too little legislative attention has been given to this problem.

The same kind of variety exists in the question of parental consent. As an example, in New-Hampshire, there is nocstatuory requirement for parental consent, in Michigan consent is necessary only for females under 18 years, and in Virginia both parties under 21 years must present the consent.

Most typical in this meaning is the marriage law of South-Carolina, where no age is fixed by the law for the marriage of minors, nor parental consent is necessary. Thus such a party married in South-Carolina at the age of 12 years entering into a country governed by the principle of 'ordre public', could be looked upon as an undesirable alien according to the local moral conceptions, and their marriage would be considered void. This is the greatest disadvantage of the system of 'lex loci celebrationis', that it induces persons to marry in a country where the impediments established by the law of their domicile do not operate, and thus evade domestic prohibitions[1].

Impediments: 1) marriages between white and colored race[2] are prohibited in Alabama, Arizona, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kentucky, Maryland, Mississippi, Missouri, S.Carolina, Tennessee, Texas, Utah and Virginia.

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1 Martin Wolff, p. 328.

2 Martin Wolff, p. 343.

2) as stated before consanguinity and affinity,

3) Colorado marriage law prohibits marriage for divorced persons within one year after divorce. The State of New-York is prohibiting marriage for guilty divorced person during the lifetime of the successful party.

Formalities: The State of New-York by the Act of Marriage licences (1907) provided that marriage may be solemnized by a clergyman or minister of any religion. Also by justices and judges of courts of record, judges of county courts, justices of the peace, mayors, recorders and aldermen of cities. It is unlawful for a clergyman, judge or magistrate to solemnize a marriage without having a licence presented. This is with slight variation the rule adopted by each of the States.

Foreign marriages: according to Restatement § 122 `lex loci celebrationis' is recognized. Marriage concluded abroad between U.S.A. citizen and a foreigner is valid, if solemnized according to the law of the place of celebration.

England:

Marriages in England[1] are governed by the Marriage Act 1835, 1907, 1921, 1937 (Matrimonial Causes Act 1937), the Royal Marriage Act 1772, Foreign Marriage Act 1892 and Marriage with Foreigners Act 1906.

Age: the legal age for marriage in England and Wales is 14 years for males, 12 years for females.

Consent of parents: until 21 years for each party.

Impediments: Marriage is prohibited between ascendants and descendants in the direct line and between persons connected by marriage and related in the same degree, also niece and nephew by affinity.

Formalities:

1) marriage by registrar's licence, it may take place either at his office or at a Roman Catholic or Non-conformist place of worship. One of the parties must be residing in the district at least 15 days.
2) No licence is necessary if banns are duly published.

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[1] 1 Dicey, p. 592 et seq..

3) hours of marriage are only between 8 am. and 3 pm..

Foreign marriages: a marriage solemnized abroad between two British subjects or a British subject and a foreigner, according to the local form, is regarded by the English law as formally valid. English authorities have for many years, though without statutory authority, issued certificates of no impediments[1], as most foreign countries require it from a non-national party. At least 12 countries accept such certificates.

Principles involved: 1) of 'lex domicilii' governing the capacity to marry.

2) of 'lex loci celebrationis' governing the formalities.

Canada:

Legislation concerning the formal requirements and solemnization of marriage is within the exclusive authority of the Provinces[2].

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1 G.C.Cheshire, p. 415.

2 M.Selly Millstone, The Laws of Marriage and Divorce in Ontario, p. 7 et seq..

Age:

1) 14 years for male, 12 for female are the legal ages for marriage in British Columbia, Manitoba, New-Brunswick, Nova-Scotia, Prince Edward Island, Quebec, Northwest Territories and Newfoundland, Alberta and Saskatchewan.
2) 14 years for both, male and female in Ontario.

Parental consent:

1) In all Provinces, except New-Brunswick and Ontario, parental consent is necessary until 21 years.
2) In New-Brunswick and Ontario, parental consent is required under eighteen years od age.

Impediments:

Concerning impediments, the law throughout Canada is in agreement with the law of England, except in the Province of Quebec, where qualities and contracting necessities are governed by the Civil Code of Lower Canada (1866), Title V, Chapter I.

Formalities:

1) marriage may be solemnized only by qualified clergymen of every religious

denomination or by a judge justice of the peace or other magistrate.

2) unless banns are published, a license must be produced for each marriage, and can only be obtained from a proper local authority, upon showing that no legal impediment exists and that the proper consents have been obtained. Concerning the Province of Quebec, formalities and solemnization of marriages are governed by the Civil Code of Lower Canada, Title V, Chapter II.

Foreign marriages: marriages abroad between Canadians or a Canadian citizen and a foreigner are in agreement with the English rules[1].

Principles involved: 1) capacity to marry by 'lex domicilii'.

2) formalities governed by 'lex loci celebrationis'.

Australia:

The laws describing the qualifications of marriage impediments, celebrations and regulations concerning marriage are governed by the respective States in the Federation[2].

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1 J.D.Falconbridge, Essays on the Conflict of Laws (1947) p.646 et se

2 Dicey, p. 61, 183 et seq..

Age: man 14 years, woman 12 years, throughout Australia.

Parental consent: in all the States, the consent of the parents is required for each party under 21 years,

Impediments and formalities:

Each State has followed the lines of the English law. Only ministers of religion, the registrar general and specially appointed officers are authorized for the solemnization of marriages. A license or the publishing of banns is required.

Foreign Marriages: Marriage between Australian citizens abroad or between an Australian citizen and a foreigner is governed by 'lex loci celebrationis'.

Argentina:

As a matter of law, marriage in the Republic of Argentina is a civil contract[1]: as a matter of religion the people of Argentina consider marriage as a sacrament.

Age: male, 14 years, female, 12 years.

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1 Gustav Walker, p. 566 et seq..

Consent of parents: consent is required until 21 years for each party. Also the deaf and dumb who cannot write, must have the consent of their guardian.

Impediments:

1) insanity.
2) consanguinity between ascendants and descendants, without limitation, whether legitimate or illegitimate.
3) consanguinity between brothers and sisters and half-brothers and sisters, legitimate or illegitimate.
4) affinity in the direct line, in all degrees.
5) a guardian or his descendants under his power cannot marry minors under his guardianship.
6) a woman after divorce, cannot marry again for 10 months.

Formalities:

1) parties must present themselves before the civil registrar at the domicile of one of the parties, with two witnesses.
2) a declaration of intention to marry must be presented.
3) issuing of certificates.

B- THE EFFECTS OF MARRIAGE

1) Legal systems applicable to matrimonial regime

The personal relationship between husband and wife is governed by the personal law. In countries where the personal law is the law of the domicile (and wife necessarily shares her husband's domicile) as in England, United States of America, etc., the application of this rule is easy. In countries, governed by the nationality principle, the application of the personal law is difficult in the case where the parties are of different nationality[1]. The prevailing opinion is in favor of the husband's national law.

There exists in most countries a fixed conflict rule for the applicable legal system to the matrimonial regime of a given couple. Under the English rule the parties are at liberty to determine the applicable law. If the pa rties have not choosen any law or if they are in disaccord, the legal conflict rule becomes operative, governing immovables by `lex situs' and movables by the husband's actual domicile[2]. In the United States of America, Canada , Australia and Argentina, this system is also

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1 Martin Wolff, p. 360.

2 Lashley v. Hog (1804).

prevailing. In France the will of the parties is entirely decisive and if they have not choosen any law, then their presumed intention, according to the circumstances, is decisive. The German rule applies the national law of the husband at the time of the marriage. The Swedish law[1] is following the line of the German rule in the case where the parties have not choosen the law.

The fundamental types of the legal systems governing the matrimonial property are the following:

1) the system of separation of goods is governing the British Commonwealth and most of the States of the United States of America. According to the rule, each party remains the owner of his property.
2) by the system of marital administration, prevailing for instance in Germany, each party retains his own property but the administration of the wife's property passes to the husband.
3) by the system of community of all goods, as in Brazil, the spouces become co-owners.
4) by the system of community of acquests, prevailing in Argentina and eight States of

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1 Swedish law of June 1st 1912 , §§ 1, 2.

the United States of America (Texas, New-Mexico, Arizona, Louisiana, California, Idaho, Nevada and Washington), the spouces are co-owners of the income and of the profits.

5) by the system of community of movables and acquests, prevailing in France, Belgium and in the Province of Quebec in Canada, everything belonging to the parties, except the immovables, is co-owned[1].

2) Matrimonial property agreement

The capacity to make a matrimonial property agreement depends of the 'lex situs', if concerning the rights to the land. The agreement concerning movables and liabilities of the spouces toward a third person or persons, is governed by the 'lex domicilii'. If the agreement is made before the solemnization of the marriage, the capacity of the contracting party is tested by the domicile of each of them. The change of domicile during the marriage does not curtail a change in the agreement.

The principle of 'locus regit actum' is decisive to the form of matrimonial property agreement[2].

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1 Martin Wolff, p. 363 et seq..

2 G.C.Cheshire, p. 234 et seq..

CHAPTER II AFFECTED EXISTENCE OF MARRIAGE

A- JACTATION

The term jactation is used to describe a suit brought against a person who falsely boasts that he or she is married to the petitioner. To the disputed marriage, the relief, in such a case, is granted in the form of a decree of perpetual silence[1]. The English law recognizes such a suit, applying to it the rules as to the nullity of marriage.

B- NULLITY

The term nullity means that the marriage never came into being. It is the discovery that the contract did not exist. Here is the difference between nullity a nd divorce: divorce means the breaking up of a marriage actually in being.

In any civilized society that treats of a marriage as such, there may or may not be a law of divorce, but in every civilized society there are legal rules of nullity[2]. These rules are determining the grounds of

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1 Goldstone v. Smith (1922).

2 G.C.Cheshire, p. 435.

nullity and the consequences of a defect in the marriage.

The grounds of nullity may be divided:

1) the parties had not the capacity to marry, as the parties' capacity is tested by the domicile, the law of the domicile decides whether the marriage concluded in spite of the lack of capacity is void, voidable, or non existent[1].

2) they did not agree to marry, There is the general principle that marriage will result only from a free agreement to marry. If the consent to marry is not freely given or fraudulently misled, the marriage is void[2].

3) they did not observe the necessary form, as the law of the place of celebration of the marriage governs the form and the essential validity, this includes the decision on the effects of any non-observance of these rules[3].

The relief sought in such cases is a decree of the court. A decree of nullity is a statement that the parties were never married. The court decides on the facts presented to it. Applying the rules to these facts, it

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1 Cooper v. Cooper (1888).

2 Mehta v. Mehta (1945).

3 Dicey, p. 689, Marlborough v. Attorney General (1945).

gives a decree either for nullity or for validity. In the case of the decree of nullity, the parties are now free to marry some other third person.

Unfortunately the nullity decrees of one country are not always recognized in others, especially where several legal systems have been violated. The result is `limping marriages'-- valid in one country and nulities in another. This leads to the curious phenomenon of one person being monogamously married to more than one person.

The ecclesiastical courts of the Catholic Church have from time to time, to study the question of nullity. As the impediments in a State law and a Church law are differing in detail, but the grounds of the nullity decree are not covering each other. A situation arises where a man gets a decree of nullity from the Church and not from the State, who considers him as being still married. Both decrees are pointing different distinctions -- the Church is declaring the `truth' and the State is declaring the `ordre public'.

C- JUDICIAL SEPARATION

Judicial separation is an intermediate status between full marriage and full celibacy, produced by divorce. In the matters of matrimonial misconduct, where an

intervention is required, the courts have to entertain the suit.

According to the doctrine, in proceedings for judicial sepa ration, [illegible] a court has jurisdiction to entertain a suit, when both parties[1], have or had, in the country:

1) their domicile or

2) their matrimonial home or

3) their common residence.

This is, however not the case of refugees and displaced persons entering into a new country. They are unable to make a petition in their old country, where they were factually separated from their spouces and the courts of their new country has no jurisdiction. Therefore, it is not the present thesis' task to elabora te the applicable law in connection with juridicial separation.

The legal effects of judicial separation are varrying in many countries. In Sweden, the judicial separation is a preliminary step toward divorce[2]. In England, the decree of the court for separation does not dissolve the marriage, but makes the spouces separate persons in their legal rights and liabilities[3].

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1 Dicey, p. 296.

2. Giftermålsbalken, 11 Kap. §§1, 3.

3 Matrimonial Causes Act 1937, s. 5.

Cannon law in the case of adultery relieves the innocent party of the obligation to re-admit the other party to the community of life. In other cases both spouces a re under the obligation to re-establish their common life as soon as the reason for the separation ceases[1].

D- DIVORCE

As said before, divorce means the breaking up of a marriage actually being. Whereby the proceedings are strictly determined by law. In most countries the divorce law is founded upon practical social science, and there is no distinction between the husband and the wife as to the grounds of divorce.

The grounds for divorce are in kind and number varying from one country to another, modified by reasons of 'ordre public'. The test of the jurisdiction of courts and the question of the applicable law in divorce proceedings are complicated as much as the conditions of recognizing the jurisdiction of a foreign court.

From these differences between the existing judicial systems determining the suits of divorce, rises the necessity to take once more under consideration the

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1. Cod. iur. can., c. 1128 et seq..

rules favored by the code civil countries, as France, Belgium, Germany, Sweden and Brazil on the one hand, and the common law countries, as United States of America England, Canada, Australia and Argentina on the other.

It will be observed that the following perusal of the positive law of these ten countries has again a special interest connected with the postwar problem.

France:

The grounds for divorce[1]:

1) either party of the marriage is entitled to a divorce on the ground of adultery of the other spouce.
2) Cruelty or serious insults of one toward the other. This includes not only such violations endangering life, but also less serious assaults. Any acts, words or writtings by which the honour and good name of the other spouse is offended.
3) sentence of one spouse to death, imprisonment, deportation, penal servitude and the loss of civil rights.

Jurisdiction: The test of the jurisdiction of the court is governed by 'lex fori', taking into

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1 Code Civil Francais, art. 231, 232, 306 et seq..

consideration the domicile of the defendant. If the court entertains the divorce, proceedings in the applicable law is the national law of the parties in connection of 'ordre public'[1].

Procedure: The petition must be presented personnally to the court. By hearing the parties, the judge has for his duty to conciliate the parties[2]. The case is then prepared, investigated, and then, the Ministre Public being heard, judged in the ordinary form. The public press is forbidden under penalty to publish the evidence in divorce trials. The custody of the children belongs to the party in whose favour the judgement of divorce has been pronounced.

Belgium:

The grounds of divorce:

1) adultery of the wife.
2) adultery of the husband, when he has brought his concubine into the home.
3) excessive ill-usage or grievous bodily injuries committed by one spouse against

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1 P. Lerebourgs-Pigeonnière, p. 433.

2 Code Civil Francais, art. 245, 248 et seq..

the other.

4) infamous offence of one spouse resulting in a conviction.

5) Mutual and persistent agreement of the parties for divorce, expressed in the manner provided by the law[1]. The age of the husband by the divorce of mutual consent must be over 25 and that of wife over 21. The marriage must have existed at least 2 years and not more than 20 years. A wife, older than 45 years, cannot be divorced by mutual consent.

Jurisdiction: In questions of jurisdiction and applicable law the Belgian rules are closely following the line of the French courts.

Germany

The grounds for divorce[2]:

1) adultery of the other spouse.

2) desertion for the period of one year.

3) incest and certain detestable crimes.

4) dishonest and immoral conduct in conjugal relations.

5) insanity persisting over a period of three

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1 Code Civil de Belgique, art. 275 et seq..

2 Gustav Walker, p. 598 et seq..

years.

Jurisdiction: The jurisdiction is tested by the husband's domicile[1]. If he has no domicile, his residence or his last domicile is decisive. If both parties are aliens, the German court has jurisdiction only according to the husband's national law.

Recognizing of a foreign decree:

A divorce decree of a foreign court is recognized only, if the grounds for such a divorce are the same as in the German law[2].

Sweden

Judicial separation is a preliminary step to an absolute divorce. It can be granted by the court for one year, if one of the spouse reports the matter to the rector of the parish and a religious conciliation has failed. After one year's separation, petitioner can take up the divorce proceedings.

The grounds of divorce:

1) malicious desertation, persisting over

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1 Bürgerlichen Gesetzbuch §§ 2246, 2247.

2 ibid, §2249.

two years[1].

2) disappearing, without any message for over three years.
3) adultery.
4) veneral diseases of infecting stage.
5) insanity of at least three year's duration and pronounced incurable by experts.
6) cruelty and attack on the life.
7) imprisonment over six months.
8) habitual drunkenness.
9) failing to provide maintenance to the other spouse.
10) proof of prodigality.
11) violent character.
12) opposition of feeling or thought between the husband and wife.

Jurisdiction: The Swedish court has jurisdiction, if the defendant is domiciled in Sweden or was domiciled in Sweden at the time of the grounds of divorce occurred. Applicable law is the national law of the parties. The divorce decree of a foreign court is recognized without exceptions, if the parties were the subjects of that country. If the parties were

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1 Giftermålsbalken, 11 Kap. §§ 1-14.

aliens of that country, the jurisdiction of the foreign court has to be tested[1].

Procedure: Where the groundsis desertation and the whereabouts of the guilty party is unknown, the court, by publication, orders him to return within one year and one day. The failure of the defendant to present himself within the time, starts the proceedings.

In each case the court can advise a reconciliation with or without the adjournment of the case.

Brazil

According to the civil code of Brazil, an absolute divorce is not permitted in Brazil. The only remedy to the affected marriage is a judicial separation of the persons and the goods, caused by adultery or sentence of one spouse to life imprisonment.

United States of America

Divorce is legally defined in the United States of America as the dissolution or suspension, by law of marital relations.

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1 Swedish law of 8th of July 1904.

The legal grounds for divorce are decided by legislative enactments in the States. The grounds, nearly common for each State, are:

1) adultery.

2) cruelty.

3) desertation.

4) habitual drunkenness.

5) neglect to provide.

Some States, as California, are using at first a decree 'nisi' and an absolute decree of divorce cannot be secured until one year after the entry of the decree 'nisi'. Some States, as Columbia and New-York, have adultery as the only one ground for a divorce.

Such differences between the enactments of the States granting divorce, has created so-called migratory divorces, whereby non-residents, shifting population, are taking advantage of the caps of law[1].

Jurisdiction: The Uniform Act, regulating Annulment of Marriage and Divorce, 1907, made jurisdiction dependent on the condition that the spouses were a bona-fide resident of the State. Unfortunately, only New-Jersey, Wisconsin and Delaware introduced this act.

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1 A.Cahen, Statistical analysis of American divorce, p. 7 et seq..

New-York State has a very wide rule of jurisdiction of courts:

1) Both parties must have been residents of the State when the offence was committed, or
2) must have been married within the State, or
3) the petitioner must have been a resident when the offence was committed and also when the action was commenced.

In connection with the applicable law, the Uniform Judicial Notice Act, 1936, adopted the principle that the Federal Courts shall take judicial notice of the law of every State of the United States of America[1]. This Act was introduced by fourteen States. The Restatement s. 135 (comment) has followed the law of the domicile.

<u>England</u>

The Matrimonial Causes Act, 1937, broadened the grounds of divorce:

1) adultery.
2) desertation of the petitioner without cause for at least three years immediately preceding the presentation of the petition.
3) cruelty.
4) incurable unsound mind, continuously

under care and treatment for at least five years.

Jurisdiction: The domicile of the husband at the time of the suit is deciding the jurisdiction of the court[1], over a British subject as well as over a foreigner. The nationality of the parties, their residence, their former domiciles or the fact that they were domiciled elsewhere when the misconduct occured -- none of these are pertinent to the existence of the jurisdiction[2]. Few exceptions only are created by the Matrimonial Causes Act 1937, s.13 and 1944, s. 4, for the relief to the deserted wife, whereby the court shall have jurisdiction, if the husband was immediately before the desertation or deportation domiciled in England or Wales.

The applicable law is exclusively the English 'lex domicilii'. The foreign divorce decrees are recognized as far as they are obtained from the court of the domicile of the parties[3]. No recognition is given to foreign extrajudicial divorces, as it is the case in China and Japan.

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1 Le Mesurier v. Le Mesurier (1895).

2 G.C.Cheshire, p. 472.

3 Bater v. Bater, (9 (1906).

But a decree of a foreign court, dissolving a marriage by mutual consent, as according to the law of Belgium, is recognized, although mutual consent creates no ground for divorce in England.

Canada

According to the Marriage and Divorce Act, 1925, and the Divorce Jurisdiction Act, 1930, adultery and desertation are the grounds of divorce in all the Provinces in Canada, except Quebec. In Alberta, British-Columbia, Manitoba, Ontario and Saskatchewan, additional grounds are rape, sodomy and bestiality. Additions in Nova-Scotia are cruelty and impotence, and in New-Brunswick and Prince Edward Island, frigidity and impotence. In the Province of Quebec, divorce is granted only by private act of Parliament[1].

Jurisdiction: The domicile of the husband at the time of the suit is decisive for the jurisdiction. In the case of the deserted wife a separate domicile is allowed for the purpose of obtaining matrimonial relief[2]. Decrees of a foreign court are recognized

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1 W.K.Power, The Law and Practice rela ting to Divorce (1948), p. 7 et seq..

2 G.C.Cheshire, p. 475.

after a test of validity, whether it was granted by a court with competent jurisdiction and if the husband's domicile was in that country at the time of the action.

Australia

Grounds of divorce:

1) adultery.
2) desertation.
3) habitual drunkenness (Victoria).
4) rape, sodomy, bestiality (New-South Wales).
5) cruelty (Queensland and West Australia).

Jurisdiction: In jurisdiction, applicable law, and recognition of foreign divorce decrees, Australia has followed the English law[1].

Argentina

The courts of Argentina are granting divorce, but in fact, it is a judicial separation. The grounds of the separation are: adultery, cruelty, desertation and major crimes. The divorce decrees of foreign courts are not recognized. The jurisdiction in separation cases,

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1 G.C.Cheshire, p. 475.

is governed by the domicile of the husband[1].

E- RESTITUTION OF CONJUGAL RIGHTS

The question of the restitution of the conjugal rights arises in connection with the dissolution of the former marriage[2]. The legal systems of the common law countries are giving to the parties, the right to remarry within a specified period, imposing the decree `nisi'. Some legal systems are fully disqualifying the guilty party or imposing a disability to conclude a new marriage within a certain period, as for instance in the State of New-York.

A person's capacity to remarry is governed by the law of domicile at the time of the new marriage, and not by the law under which the divorce was granted[3].

The unfortunate result of so-called `limping marriages' has not been fully eliminated from Private International Law, giving thorny cases to the courts. Furthermore, the question of remarriage has a certain actuality by cases of deserted spouses and the spouse of disappeared persons.

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1 Gustav Walker, p. 56 et seq..

2 Le Mesurier v. Le Mesurier (1895).

3 Martin Wolff, p. 385 et seq..

CHAPTER III PRESUMPTION OF DEATH

A- APPLYING OF THE CONTINENTAL SYSTEM

In the days immediately following the World War II the number of missing persons amounted to several millions. At the same time, countless number of families were unwillfully separated, having no knowledge over the whereabouts of the nearest relatives.

The urgent need of relaxation arised the most difficult legal problem, to find a speedy and satisfactory solution to the personal and family relations of the persons concerned. There is no doubt that these problems are closely connected in each State, with the moral grounds of the public interest, `ordre public', enforced by constitutional, administrative or procedural law.

From a number of European countries that have participated or were indirectly involved in the war, the problem of missing persons has spread by the immigrants and political refugees through most of the countries in the world. This unprecedented state of affairs forced a number of States to ammend the existing laws or to create new grounds of jurisdiction.

Unfortunately, after five years since the

termination of the hostilities, the problem of the missing persons has not found a solution on an international basis. Furthermore, the political situation in the world at the present time, has not been favorable to decrease the vast number of political refugees, who almost always, are bringing with them complicated legal problems from country to country.

In the following pa ges, an attempt will be made to emphasize a comparative study of some of the existing laws relating to presumption of death.

France

Code civil, art. 87[1]:

> If it has been impossible to issue a death certificate for a French national or for an alien, deceased within any of the territories under French jurisdiction, or for a French national who died abroad, the competent Minister shall, after administrative enquiry and without being bound by any special forms of procedure, issue a decision declaring the person concerned to be presumed dead.
>
> art. 90:
>
> ..... Any interested party shall

1 As amended by Act No. 46/855 of April 30, 1946.

> equally be entitled to apply for a judicial Declaration of Death to be made under the procedure laid down in Article 855 of the Code of Civil Procedure. On the Public Prosecutor's request, such application shall be submitted to the competent Minister for his opinion.
>
> .....
>
> The husband or wife of a missing person judicially declared dead shall not contract a new marriage before the expiration of a period of one year from the date at which the decree declaring the missing person to be dead was issued.

The solution, given by the Civil Code Art. 87 and 90 is limited, being applicable only to cases where the disappearamce happened on French territory. No solution was given for the petitioner whose spouse dissappeared outside of French territory.

Another weakness of the given solution is that no direct rule is stating the recognizing of similar certificates issued by foreign authority. The principle, laid down in the Civil Code Art. 47, that documents certifying death and issued by a foreign authority shall be recognized in France. But the question of the applicability of Art. 47

is doubtful, thus, such documents are not certifying death but certifying only a presumption of death.

Germany

The Act of Missing Persons, Declaration of Death and the Determination of the Time of Death[1] are laying down the following rules of interest:

Part I sect. 1

(1) A person shall be deemed missing, if nothing has been known about his whereabouts for a considerable period of time, and if no news are available as to whether he was still alive or he died during such a period, provided that the circumstances are such as to warrant serious doubts as to his survival.

(2) .....

Part. I sect. 2

(1) The Declaration of Death shall establish the presumption that the missing person died at the time determined in the decision as to the time of death.

(2) The court shall determine as the time of death, that moment which the result of the

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1 R.G.Bl. p. 1186/1, July 4th 1939.

investigation show to be the most probable time of the death.

(3) .....

Part I sect. 7

A person who was in a situation constituting a danger to his life, other than that specified in sections 4 to 6 and who has been missing since, may be declared dead after one year has elapsed since the moment when the danger to his life ended or can the circumstances be assumed to have ended.

Part III sect. 12

(1) .....

(2) If the missing person was a foreigner at the time which is under §1, he may be declared dead in Germany, under the provisions of the present act, with effect for such legal relationships as are governed by the German law, and with effect for the property situated in Germany: any object for which a record or register intended for the registration of the entitled persons is kept by any German authority, further any claim falling under the jurisdiction of a

German court, shall be deemed to be situated in Germany.

(3) .....

Furthermore, the declaration of death of a foreigner in his country of domicile of origin is not only recognized, but in the case where a foreign country has no legal rules for the declaration of death or where these rules are restrictive, the German court is entitled to give the relaxation[1].

The German Civil Code s. 1348-51 is regulating the re-marriage in the case of a declaration of death. When one spouse re-marries after the other partner having been declared dead, the new marriage is not void on the ground that the partner declared dead is still alive, if the petitioner was in good faith at the time of the proceedings for the declaration. The former marriage is dissolved by the new marriage. It remains dissolved even if the official declaration of death is annulled[2].

Sweden

In Sweden the question of the disappeared

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1 Gustav Walker, p. 193.

2 German Law of 6 July, 1938. On the contrary, the second marriage is null and void according to the French point of view, if the person declared dead returns.

person is ruled in connection with the law of succession[1]:

> Chapter 8 s.1: If a person is absent and ten years have elapsed since he was last known, or if he was over seventy-five years of age and five years have elapsed, an application can be made for such a person to be presumed dead. If the absent person was in danger of his life, at the time when he was last known to be alive, an application can be made after three years.....
>
> Chapter 8 §4 : If the absent person's death is not proved by the end of the period stated in §1, the court shall issue a Public Notice summoning the absentee to report to the court on or before a fixed date. Such date to be fixed not less than one year after the date of the issue of the notice. .....
>
> Chapter 8 §5 : If the day appointed in the Notice has come to an end and if the period laid down in §1 has expired without any notice of the absent person, the court shall make a Declaration of the Presumed Death of such a person. .....

The rules, as given above, are dealing only with the matrimonial property in connection to the succession.

p. 29.

1 Lag 9 juni 1933, 8 Kap, §§ 1-7.

In matters of competent jurisdiction, and re-marriage, no rules have been given[1].

In theory the applicable law to the recognition of a foreign declaration of death seems to be the Swedish Law of 8th of July 1904, which is giving the rules for the applicable law and the recognition of foreign divorce decrees[2]. According to that, the national law of the pa rties is applicable, if both parties are residing in Sweden. In the case of disappeared persons only one spouse is residing in Sweden and no remedy has been granted and the courts have no jurisdiction.

B- APPLYING OF THE COMMON LAW

In England and the other common law countries:

Proceedings for a decree of presumption of death and dissolution of a marriage in England have been enacted by the Matrimonial Causes Act 1937:

Section 8:

(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it

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1 Svensk Juristtidning 1946 p. 456.

2 Ibid, p. 299.

presumed that the other party is dead and to have the marriage dissolved, and the court if satisfied that such reasonable grounds exist, may make a decree of the Presumption of Death and of the dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or more the other party to the marriage has been continually absent from the petitioner and that the petitioner has no reason to believe that the other party ha s been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) .....

The very wide meaning in section 8 (1) --" any married person .... may present a petition" leaves open the following questions:

(1) are the facilities of section 8 also open to persons domiciled abroad?

(2) to persons residing abroad?

(3) to resident wives of husbands domiciled abroad?

The answers to the third question is not an easy one and it is significant at the present times. There are

thousands of wives from continental Europe, in England, who have lost their husbands during the war. No doubt, that a positive answer is the favorable one. A negative point of view is requiring from these people to acquire at first an English domicile. As the English principle does not allow to a married woman a separate domicile[1], all the possibilities for remedy are fully excluded. Furthermore, Canada and Australia, as immigration countries, at present are following the English principle of domicile, thus, in the case of the negative answer to the question three above, are entirely excluding remedies for a large number of newly arrived immigrants.

In the United States of America, recognizing a separate domicile for a married woman[2], they are at least granting a relaxation after the acquisition of a domicile of choice.

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1 Martin Wolff, p. 120.

2 Restatement, §§ 28, 29.

CHAPTER IV CONCLUSION

In the preceeding chapter, some of the shortcomings of the existing laws of the presumption of death have been given. Many of these national laws are not applicable to aliens.

Either for legal or political-factual reasons, the courts and authorities of the disappeared person's domicile or residence are not always accessible to the person seeking a declaration of death.

Taking into account the large number of cases where the solution and the remedies are not accessible, it would be of great practicable importance to extend the scope of the existing laws of the declaration of death or to find an international basis to the problem. Many authors[1] seem to prefer the last mentioned way -- an International Convention.

A considerable attempt has been made by the Economic and Social Council of the United Nations to find a solution for the legal difficulties arising from the lack of unifying rules governing the effects of the Declaration of Death. A preliminary draft convention for the subject

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1 Wilhelm Michaeli, Svensk Juristtidning 1946: Dr.G.Weis, European Legislation on Declaration of Death 1949: Walter Breslauer, The Modern Law Review, April 1947.

was prepared. The text of the main provisions is given in the annexes.

The thesis is not the place to comment this draft. Nevertheless, it seems to be necessary to give a few indications.

1) Chapter I art. 1 : is limiting the scope of the convention to the years 1939-1945. Factually, the reasons of such disappearing have not ceased at the termination of the hostilities. The increasing number of refugees is a `prima facie' evidence that the scope of the draft is too narrow.
2) Chapter I art. 7: the communication of the applications in the preparatory stage of the proceedings, could create a heavy burden to the administration. Taking into account the large number of cases unsolved at present, a delay of the proceedings can hardly be avoided.

The most practical rules, stated in Chapter I art. 2 (1) IV and V, that the tribunal of the place of residence of the applicant and the tribunal of the `situs` of the property shall be the competent authority, are giving the best protection for the public interest, where accepted by the States concerned.

As the acceptance of the convention seems to be connected with difficulties at present time, the urgent and important legal problem could be solved by adding to the existing systems, the rules of Chapter I art. 2 para. 1 (IV and V) of the draft.

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UNITED NATIONS, ECONOMIC and SOCIAL COUNCIL

Draft Convention on the Declaration of Death of Missing Persons.

CHAPTER I

Article 1 -- Scope--

The present convention is applicable to declarations of death of persons who have disappeared in the years 1939-1945, with the exception of cases in which there are no reasonable grounds to infer that such disappearances were due to death as a consequence of events of war or racial, religious, political or national persecution.

Article 2

1) The following tribunals shall be competent to issue declarations of death:

i) the tribunal of the place of the last domicile of the missing person;

ii) the tribunal of the place of the last voluntary or involuntary residence of the missing person;

iii) the tribunal of the place of the last residence of the missing person in the country of which he is a national, or, in a case where the missing person was never

domiciled in that country, the tribunal of the capital of that country;

(iv) the tribunal of the place of residence of the applicant;

(v) the tribunal of the 'situs' of property of the missing person.

2) An applicant may apply to any competent tribunal but, having made an application, shall not be entitled to make a subsequent application to another competent tribunal, unless the first tribunal does not regard itself as competent to deal with the application.

3) If the law of any State, Party to the Convention, confers authority to issue declarations of death upon an authority other than a tribunal, references in the present Convention to tribunals shall be applicable to such other authority.

Article 3 -- Application for Declaration of Death

At the instance of any physical or juridical person having a legal interest in the matter or of an authority charged with the protection of the public interest, the competent authorities in each State Party to the present Convention shall issue a declaration of death of any missing person within the scope of the present Convention provided that a period of three years has elapsed since

the reception of the last news indicating that the person concerned was still alive.

Article 4 -- Date of Death

1) In issuing a declaration of death the competent authority shall determine the presumed date of death, taking into consideration all known circumstances.

2) In the absence of any other indications, the last day of the year in which the last news of the missing person were received, shall be adopted as the presumed date of death.

3) In all cases death shall be presumed to have occured at the last moment of the day of the presumed date of death.

Article 5 -- Effects of a Declaration of Death

1) In countries where the law provides for a declaration of death, a declaration in accordance with the present convention shall have the same legal effect as other declaration of death under that law.

2) In countries whose law does not provide for a declaration of death, a declaration of death in accordance with the present convention shall in so far as appropriate, have the same legal

as the actual death.

Article 6 -- International Bureau for Declaration of Death

1) there shall be established an International Bureau for Declarations of Death. The Secretary-General of the United Nations shall determine its seat, composition, organization and method of operation.

2) a central registry shall be established in the Bureau.

3) the expenses of the Bureau shall be allocated among the States Party to the present Convention in accordance with a scale to be established by the Secretary-General of the United Nations, in consultation with such States.

Article 7 -- Communications of Applications

1) A tribunal to which an application for declaration of death is made shall, within fifteen days of the receipt of the application, communicate to the International Bureau the following information, in so far as possible:

i) full name of the missing person.

ii) names of parents, spouce and children.

iii) place and date of birth,

iv) habitual residence.

v) last known voluntary or involuntary residence.

vi) any relevant information as to nationality.

vii) date of the last news referred to in the application.

viii) name and address of the applicant.

ix) date of institution of the proceedings.

2) If the Bureau ascertains that an application is already pending, it shall immediately notify the tribunal to which the later application has been made. Such tribunal shall suspend its proceedings, pending a final decision by the other tribunal and shall inform the applicant of the tribunal before which proceedings have already been instituted and of the name of the other applicant.

Article 8 -- Publication and Communication of Decisions

1) A tribunal issuing a decision upon an application for a declaration of death shall communicate its decision to the International Bureau within fifteen days from the date on which such decision becomes final, whether the decision is positive or negative. Such communication shall contain the date of the

decision and the date established by the declaration as the presumed date of death.

2) The International Bureau shall publish a monthly list of all applications and final decisions which are communicated to it.

3) A declaration of death shall not be issued in accordance with the present Convention until the expiration of three months from the publication of the application by the International Bureau.

Article 9 -- Mutual Assistance

The States Party to the present Convention shall afford each other mutual assistance without charge on the direct request of the authorities referred to in article 2, without the necessity of having recourse to diplomatic channels.

Article 10 -- Working Language

The working language of the International Bureau shall be English and French.

Article 11 -- Recognition of Declarations of Death

All final declarations of death issued in accordance with the present Convention shall be recognized by all States Party to the Convention, whether or not they were Parties at the time of the issuance of such

declarations, and shall be given the same effect and be subject to the same rules with respect to reconsideration as declarations issued by the competent authorities of the State.

Articles 12-20 deal with signatures, acceptances, etc, and have no interest here.

TABLE OF CASES