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## THE FRENCH RULES OF THE CONFLICT OF LAWS\*

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### MARRIAGE

#### 1. *Essentials.* (a) *Marriage of French citizens abroad.*

Two articles of the Civil Code, Article 3, par. 3, and Article 170, contain express provisions applicable to the marriage of French citizens abroad. Article 3, par. 3, provides:

"Laws relating to status and capacity of persons apply to French people even residing in foreign countries."

Article 170, as modified by the laws of November 29, 1901, and June 21, 1907, provides as follows:

"A marriage contracted in a foreign country between French citizens or between a French citizen and a foreigner is valid if it has been celebrated in the manner followed in such country, provided it has been preceded by the publication required by Article 63, under the Title 'Certificates of Civil Status,' and provided the French citizen has not violated the provisions contained in the preceding chapter."

The chapter referred to contains the rules relating to age, parental consent, prohibition to marry on account of relationship, etc.

It is apparent from the above provisions that a marriage between French citizens abroad is governed, so far as the French courts are concerned, by French law in all matters not relating to the mode of celebration. The consent of parents is regarded as belonging to the essentials of marriage and not as relating to matters of form, and hence is controlled by French law.<sup>1</sup>

If a French citizen marries a citizen of some other country abroad, the marriage, in order to be valid as regards essentials,

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<sup>1</sup> Veil-Picard v. Veil-Picard, App. Besançon, Jan. 4, 1888, D. 1889, 2, 69; M. v. M., Trib. civ. Seine, Jan. 10, 1917, 17 REV. DE DR. INT. PR. 80; Jan. 30, 1923, 18 REV. DE DR. INT. PR. 494.

must satisfy not only the French law but also the national law of the other spouse. An exception is made where the disability is regarded as in violation of the French rules of public policy.<sup>2</sup>

(b) *Marriage of foreigners in France.* Article 3, par. 3, of the Civil Code has been given an extensive interpretation, so that the validity of a marriage contracted by foreigners in France will depend, as regards essentials, upon the national law.<sup>3</sup> A circular issued by the Minister of Justice on March 4th, 1831, recommended to the Officers of the Civil Status that before uniting foreigners in marriage, they should require an official certificate to the effect that they could validly contract the marriage according to their national law. As no such certificate could be provided by citizens of the United States, considerable difficulty was experienced by the latter in meeting the requirements of the French law. Through the good offices of the United States Embassy, however, some substitute arrangements were at last made. Since August 1st, 1911, by virtue of a new order of the French Minister of Justice, the Officers of the Civil Status are directed no longer to require proof of capacity to marry according to the national law.<sup>4</sup>

The application of renvoi was treated in a previous article by the author.<sup>5</sup>

The rule that the national law of the parties governs their capacity to contract a marriage in France is set aside when it would violate the French rules of public order. A Turk, for example, would not be allowed to marry a second wife in France. A woman, according to Article 228 of the French Civil Code, cannot marry again until the expiration of a certain time after the dissolution of a prior marriage. It has been held that a foreign woman is not allowed to remarry in France during that period, although there is no corresponding provision in her national law.<sup>6</sup> On the other hand, French courts have declined to give effect to a disability to marry imposed by the national laws when such disability was regarded as opposed to the rules of

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<sup>2</sup> On this ground it was held that a marriage entered into in Louisiana between a French citizen and a negro woman could not be annulled in France, although a marriage between a white person and a negro was void under the law of Louisiana. *Roger v. Roger*, Trib. civ. Pontoise, July and Aug., 1884, 12 Clunet 296.

<sup>3</sup> *Moselli & Costa v. Moselli*, Trib. civ. Seine, Jan. 10, 1917, 45 Clunet 1192; *In re Montefusco*, Trib. civ. Seine, March 8, 1920, 47 Clunet 206.

<sup>4</sup> SURVILLE, *COURS ELÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* (7th ed. 1925) 419-420.

<sup>5</sup> Lorenzen, *The French Rules of the Conflict of Laws* (1927) 36 YALE LAW JOURNAL 731, 735.

<sup>6</sup> *Borie des Renaudes v. Maire du 8. Arrondissement de Paris*, App. Paris, Feb. 13, 1872, 1 Clunet 31.

French public policy;<sup>7</sup> for example, a marriage between a white person and a negro, prohibited by the national law,<sup>8</sup> or a marriage between a Christian and a non-Christian, prohibited by the national law.<sup>9</sup>

(c) *Marriage of foreigners abroad.* The general rule that the national law of each party controls is applicable also in this situation.

2. *Formalities.* (a) *Marriage of French citizens abroad.* As stated above, Article 170 of the French Civil Code provides that a marriage celebrated abroad shall be valid (1) "if it has been celebrated in the manner followed in such country," and (2) "provided it has been preceded by the publication required by Article 63, under the Title 'Certificates of Civil Status.'" Article 171 adds as a third requirement that the marriage celebrated abroad shall be registered in France within three months after the return of the parties to France.

A legal transaction executed in the form prescribed by the local law is generally regarded as valid from the continental point of view. In the matter of marriage, however, there are in addition specific requirements that the French law must be satisfied in the publication of bans and the registration of the marriage. Is a marriage celebrated abroad and otherwise satisfying the French law invalid solely because the bans were not published in France or the marriage was not registered there? There is much difference of opinion with respect to this matter among the French writers and courts. The opinion that has finally prevailed in the courts is that the marriage will be annulled if the parties went to the foreign country for the purpose of evading the requirements of the French law, *i. e.*, with a view of keeping their marriage secret, but not otherwise.<sup>10</sup> In the absence of an evasion of the French law the marriage is valid, as regards the mode of celebration, if it satisfies the law of the place where the marriage was entered into.<sup>11</sup> A common law marriage entered into in another country in conformity with the local law will be recognized by the French courts.<sup>12</sup>

<sup>7</sup> See Note (1923) 18 REV. DE DR. INT. PR. 443-444.

<sup>8</sup> *Roger v. Roger*, *supra* note 2.

<sup>9</sup> *Roitstein v. Roitstein*, Trib. civ. Seine, Jan. 7, 1922, 50 Clunet 85; 9 REV. DE DR. INT. PR. 134, and note.

<sup>10</sup> *In re Ruel*, Trib. civ. Seine, Oct. 27, 1921, 48 Clunet 940; *L. v. L.*, App. Aix, Dec. 20, 1900, 30 Clunet 639.

<sup>11</sup> The findings of the trial judge as to whether the parties "intended to evade the law and the publicity required by it" are conclusive. *Brienz v. Fourment d'Aguisy*, Cass. (req.), Jan. 3, 1906, 33 Clunet 1149; *Bolo-Soumaïlle v. Bolo-Muller*, App. Paris, Feb. 11, 1920, 47 Clunet 205.

<sup>12</sup> *Peyrot v. Tronchon*, Trib. civ. Seine, Aug. 3, 1894, 22 Clunet 374; *Mouquin v. Berlet*, App. Besançon, July 17, 1895, 22 Clunet 1051; *Lottin v. Liébaux*, Trib. civ. Seine, Apr. 20, 1891, 18 Clunet 932.

*Diplomatic and consular marriages.* French citizens desiring to marry in a foreign country in which there is a French diplomatic agent or consul may be married before such official in accordance with the provisions of the French law, if they cannot comply with the local provisions as to form, or do not desire to do so.<sup>13</sup> If only one of the parties is a French citizen, this can be done, in the absence of treaty, only in certain countries designated by decree, and then only if the husband is a French citizen so that the wife would acquire the French nationality.<sup>14</sup>

(b) *Marriage of foreigners in France.* Foreigners marrying in France must comply with the provisions of the French local law. The only kind of marriage recognized in France is the "civil" marriage, contracted before an officer of the civil status of the commune where one of the spouses has his or her domicile or residence.<sup>15</sup> A common law marriage contracted in France by citizens of the United States, in accordance with the law of the state in which they are domiciled, is therefore null and void.<sup>16</sup> The French law recognizes only one exception to this rule, namely, where two citizens of a foreign country are married in France by a diplomatic agent or consul of their country. In this case, a marriage celebrated in the mode customary at home will be recognized as valid in France.<sup>17</sup> The exception does not extend, however, to a marriage by diplomatic agents or consuls if the spouses have different nationalities.<sup>18</sup> So far as citizens of the United States are concerned, the exception referred to is of no practical importance, as our diplomatic representatives and consular agents are not authorized to marry American citizens.<sup>19</sup>

<sup>13</sup> Rouzier v. Carteron, App. Paris, Dec. 27, 1910, 38 Clunet 877.

<sup>14</sup> Art. 170, Civ. Code, as modified by the laws of Nov. 29, 1901, and of June 21, 1907. The countries so specified may be found in 2 REV. DE DR. INT. PR. 814.

<sup>15</sup> Art. 165, Civ. Code.

<sup>16</sup> See Grandcamp v. Williamson, App. Paris, March 3, 1898, 25 Clunet 366. So a religious marriage in conformity with the national law of the parties. Abramovitch v. Abramovitch, App. Paris, Nov. 17, 1922, 18 REV. DE DR. INT. PR. 437.

<sup>17</sup> Where the marriage was celebrated in the chapel of the Greek church attached to the Greek legation, by the head of the Greek orthodox church, it was held not to be the equivalent to a marriage by a diplomatic agent. Such a marriage is invalid. Min. Pub. v. Basiliadis, App. Paris, March 1, 1922, 18 REV. DE DR. INT. PR. 310; 49 Clunet 407.

<sup>18</sup> See *Le Mariage Purement Religieux Célébré dans la Chapelle d'une Ambassade ou Légation Étrangère* (1921) 17 REV. DE DR. INT. PR. 161, 163-165.

<sup>19</sup> 2 MOORE, INT. LAW DIGEST (1906) §§ 237-240. An Act of Congress of 1860 authorized marriages before American consuls of persons who would be authorized to marry if they were in the District of Columbia. The State Department has construed the act as adding nothing to the powers of

(c) *Marriage of foreigners abroad.* If the spouses have different nationalities, it is said that the marriage must comply with the requirements as to form of the place of celebration.<sup>20</sup> If they have the same nationality, their marriage will be valid, as regards form, if they satisfy the local law. Whether the marriage will be recognized as valid also where it conforms to the national requirements, though the local law is not satisfied, is not decided.

A marriage celebrated in England between Polish subjects who were residents of France has been annulled on the ground that they went to England for the purpose of evading the publicity requirements of both the Polish and French law.<sup>21</sup>

3. *Effect of marriage.* The effect of marriage upon the status and capacity of the spouses and the rights and duties arising from marriage are governed in general by the national law of the spouses. The capacity of a married woman in France will depend, therefore, upon the national law.<sup>22</sup> That law will determine whether she needs the authorization of her husband, of the family council or of the court, before she can validly enter into a contract in France.<sup>23</sup> The same law is deemed applicable to determine the wife's capacity to sue in the French courts.<sup>24</sup>

Where a married woman of a foreign nationality is under a disability under her national law, she may nevertheless be held on a contract entered into in France, if the other party acted prudently and in good faith and she had capacity under the French law.<sup>25</sup> So far as the powers and disabilities of a married woman are affected by the matrimonial property regime under which she lives, the question will be discussed below in connection with that subject. Where husband and wife have different nationalities, the law governing the effect of the marriage upon the capacity of a married woman is not settled.<sup>26</sup>

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consuls and the Consular Instructions have been to the effect that the local law must be complied with.

<sup>20</sup> Kalvariski v. Gottreich, App. Douai, Nov. 18, 1903, 31 Clunet 394.

<sup>21</sup> Abakanowicz v. Wsciecklica, App. Paris, Aug. 3, 1898, 25 Clunet 1080.

<sup>22</sup> Digley v. Redfern, App. Paris, June 17, 1899, 27 Clunet 138.

<sup>23</sup> Where such authorization is required by the national law, it may be conferred by a French court. Balcaen v. Balcaen, Trib. civ. Seine, July 17, 1888, 16 Clunet 615; Fiocca v. Chaumier, App. Paris, Apr. 27, 1891, 18 Clunet 1199.

<sup>24</sup> Gesling v. Viditz, Cass. (civ.), July 29, 1901, 28 Clunet 971; S. 1903, 1, 73; July 20, 1909, S. 1915, 1, 165.

<sup>25</sup> The subject of "capacity" to contract will be treated more fully in a subsequent article of this series to appear in the next volume of the YALE LAW JOURNAL.

<sup>26</sup> According to Pillet it should be governed by the national law of the husband because it is based on considerations relating to the organization of the family. 1 PILLET, TRAITÉ PRATIQUE DE DROIT INTERNATIONAL PRIVÉ

4. *Annulment of marriage.* In accordance with the general rules governing the jurisdiction of courts, the French courts claim exclusive jurisdiction to annul a marriage, if at least one of the spouses is a French citizen.<sup>27</sup> This is true although the marriage was celebrated abroad. French courts are said to have no jurisdiction to annul a marriage between foreigners, but this rule is subject to the ordinary exceptions.<sup>28</sup>

5. *Putative marriage.* The Civil Code provides as follows:

"Article 201. The marriage which has been declared to be void produces nevertheless its civil effects as well in favor of the husband and wife as of the children, when it has been contracted in good faith.

"Article 202. If only the husband or the wife acted in good faith, the marriage produces its civil effects only in favor of the spouse who has so acted and of the children born of the marriage."

These articles apply where French citizens married abroad, but the marriage was subsequently annulled,<sup>29</sup> or where a French citizen married a foreigner in France or abroad, the national law of both parties recognizing putative marriages.<sup>30</sup> Where the parties are foreigners having the same nationality, their national law will control.<sup>31</sup> If one of the parties to the marriage is a citizen of a country recognizing putative marriages and the other a citizen of a country not recognizing such marriages, the marriage may produce its civil effects with respect to the party whose national law recognizes putative marriages although it would have no such effect with respect to the other party acting in good faith.<sup>32</sup> Under Article 202 of the French Civil Code the children will have the rights of inheritance of legitimate children with respect to both parents if one of the parents was in good faith at the time of the celebration of the marriage.<sup>33</sup>

#### DIVORCE

1. *Divorce suits in France.* (a) *Jurisdiction of French courts.* It is necessary to recall here the general rules governing

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(1923) 59; 2 PILLET & NIBOYET, *MANUEL DE DROIT INTERNATIONAL PRIVÉ* (1924) 547. Surville, on the other hand, regards the marital power less a right than a duty of protection and for that reason would apply the national law of the wife. SURVILLE, *op. cit. supra* note 4, at 432.

<sup>27</sup> Lorenzen, *op. cit. supra* note 5, at 742.

<sup>28</sup> *Ibid.* 744.

<sup>29</sup> Bolo-Sommaillé v. Bolo-Muller, *supra* note 11; De Bosmelet & d'Argentré v. De Folleville, Cass. (civ.), March 25, 1889, 16 Clunet 642.

<sup>30</sup> Gélignéau v. Dussuc, Cass. (civ.), July 30, 1900, S. 1902, 1, 225, and note by Wahl.

<sup>31</sup> Abakanowicz v. Wsciecklica, *supra* note 21.

<sup>32</sup> See Note (1911) 7 REV. DE DR. INT. PR. 660-661.

<sup>33</sup> Karsenty v. Sportès, Cass. (civ.), Jan. 5, 1910, 38 Clunet 214.

the jurisdiction of French courts and the special provisions contained in Articles 14 and 15 of the Civil Code where the plaintiff or the defendant is a French citizen.<sup>34</sup> It is also necessary to recall that the French courts claim to be incompetent in suits between foreigners.<sup>35</sup> This is especially true with respect to suits affecting status. The exceptions admitted to this rule in the matter of divorce are the following: (1) where jurisdiction is conferred by treaty; (2) where the parties have an "authorized" domicile in France; (3) where a refusal to take jurisdiction would be tantamount to a denial of justice. Where the parties have lived for a considerable period in France and it does not appear that they have retained a foreign domicile, jurisdiction for purposes of divorce has frequently been taken.<sup>36</sup> In a number of cases objections to the jurisdiction have been sustained, although the parties have lived in France for years, on the ground that they have not given up their domicile of origin in their native country, it being assumed, therefore, that suit could be brought there.<sup>37</sup>

Where objection to the jurisdiction is raised in time, and it appears that the defendant has a foreign domicile where he can be sued, the French courts are under a duty to declare themselves incompetent.<sup>38</sup>

There are a good many statements in the cases to the effect that the objection to the jurisdiction of the courts because of the foreign character of the litigants must be raised *limine litis*,

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<sup>34</sup> Lorenzen, *op. cit. supra* note 5, at 742.

<sup>35</sup> *Ibid.* 744.

<sup>36</sup> Klein v. Klein, Cass. (req.), July 29, 1912, 41 Clunet 207; Slater v. Slater, Cass. (civ.), Nov. 10, 1920, 50 Clunet 71; Keller v. Keller, Trib. civ. Seine, Jan. 21, 1897, 24 Clunet 362; Oberhauser v. Oberhauser, App. Paris, Dec. 5, 1890, S. 1892, 2, 233; Jasienski v. Jasienski, Trib. civ. Seine, March 22, 1890, 17 Clunet 860; S. v. S., Trib. civ. Seine, March 4, 1895, 23 Clunet 602; Stoiesco v. Stoiesco, Trib. civ. Seine, Nov. 9, 1917, 45 Clunet 656; Chance v. Chance, Trib. civ. Seine, Oct. 16, 1912, 40 Clunet 566; Leidervarger v. Leidervarger, Trib. civ. Seine, Jan. 19, 1920, 47 Clunet 198; Drouvin v. Roach, App. Douai, Jan. 29, 1924, 51 Clunet 398.

<sup>37</sup> Castello de Riso v. Castello de Riso, App. Paris, Oct. 31, 1890, 17 Clunet 878; Robertson v. Robertson, Trib. civ. Seine, June 20, 1922, 50 Clunet 75. In one case, decided by the Court of Appeals of Amiens, a very extreme position was taken. In that case the husband had lived in France for thirty-two years. It was held that the suit was not maintainable in France, because his domicile of origin was Italian and he never acquired an "authorized" domicile in France. Musa v. Musa, App. Amiens, Nov. 16, 1897, 25 Clunet 895.

<sup>38</sup> Andersson v. Seelig, Trib. civ. Seine, Dec. 21, 1893, 21 Clunet 103; see also Strauss v. Workman, Clarck & Co., App. Douai, Jan. 22, 1890, 19 Clunet 903; Gouvernement Grec v. Gouvernement Italian, App. Bordeaux, Dec. 4, 1917, 46 Clunet 736.

that is, when the parties have appeared before the President of the Tribunal for the purpose of effecting reconciliation.<sup>39</sup>

Notwithstanding the consent of the parties to the exercise of jurisdiction, the courts may declare themselves incompetent *ex officio*. They may decline to exercise jurisdiction where they feel certain that the defendant has a foreign domicile where a suit for divorce can be brought.<sup>40</sup>

In recent years the French courts have shown a marked tendency to take jurisdiction in divorce suits between foreigners and to accept the statement of the attorneys for the parties regarding the existence of domicile in France. The parties were said to be domiciled in France if they had been there in fact only for a short time, and hence had retained their foreign domicile. The publicity given to the French divorces of foreigners have caused the French courts, however, to modify their attitude of late, so that they now require proof that the parties have given up their foreign domicile and intend to stay in France permanently. In divorce cases, the district attorney is required to be present, and at the present moment the district attorneys and judges make a serious examination into the question of domicile of the parties.

(b) *Grounds for divorce.* French law differs from our law in applying the national law of the parties instead of the law of the forum. It is well settled, therefore, that if the national law of the parties does not recognize absolute divorce, no such divorce can be obtained in France.<sup>41</sup> Where the parties have different nationalities and the law of one does not recognize absolute divorce, the courts are in conflict. Some have entertained jurisdiction where the petitioner had remained French, or had become a French citizen subsequent to the marriage, al-

<sup>39</sup> *Zamoyska v. Zamoyska*, App. Paris, Feb. 26, 1891, 18 Clunet 1189; *Chance v. Chance*, *supra* note 36; *Leidervarger v. Leidervarger*, *supra* note 36; *Rampelberg v. Rampelberg*, Trib. civ. Nice., Dec. 6, 1920, 50 Clunet 71; *Drouvin v. Roach*, *supra* note 36.

<sup>40</sup> *Zamoyska v. Zamoyska*, *supra* note 39; *Andersson v. Seelig*, *supra* note 38; *Machain-Cueto v. Lopp*, App. Paris, Jan. 28, 1920, 47 Clunet 187.

<sup>41</sup> *Mosticzker v. Mosticzker*, Cass. (civ.), Oct. 30, 1905, 2 Rev. DE DR. INT. PR. 730; *Durig v. Durig*, App. Pau, Jan. 25, 1915, S. 1915, 2, 45; *Lenthé v. Lenthé*, Cass. (req.), Feb. 12, 1895, S. 1896, 1, 401; *Levinçon v. Levinçon*, Cass. (civ.), May 29, 1905, 1 Rev. DE DR. INT. PR. 518.

French courts unable to grant a divorce or judicial separation because the national law does not allow it, or for some other reason, may nevertheless retain jurisdiction for the purpose of granting provisional measures. They do this in the exercise of the police power of the state with respect to all persons within its territory. Thus they may authorize the wife to live apart from the husband, dispose of the custody of the children, and make a decree concerning the support of wife and children. *Stankiewicz v. Stankiewicz*, App. Paris, Jan. 26, 1914, 16 Rev. DE DR. INT. PR. 137; *In re Risgallah*, App. Paris, July 21, 1926, 54 Clunet 395.

though the national law of the other spouse did not recognize absolute divorce.<sup>42</sup> In most cases, it was sought to convert a judicial separation, obtained in accordance with the national law, into an absolute divorce in France, absolute divorce not being recognized under the national legislation.<sup>43</sup> The French Court of Cassation has recently pronounced itself in favor of the jurisdiction of the French courts.<sup>44</sup> Its attitude contrasts strikingly with that taken by it before 1884 when divorce was not allowed in France and French citizens, in order to obtain a divorce, became naturalized in a foreign country.<sup>45</sup> The French writers generally hold that no absolute divorce should be granted unless the national law of both spouses recognizes absolute divorce.<sup>46</sup>

The national law of the parties is held to control not only with respect to the possibility of the dissolution of the marriage by an absolute divorce, but also with respect to the grounds for which such dissolution can be granted.<sup>47</sup> A divorce will not be granted

<sup>42</sup> Rosello v. Rosello, App. Alger, Feb. 19, 1896, 23 Clunet 606; Radano Vincent v. Pellegrino Guiseppa, Court of First Instance, Tunis, Dec. 8, 1920, 17 REV. DE DR. INT. PR. 513. See also In re Rocholl, Trib. civ. Seine, Dec. 8, 1915, 44 Clunet 1020.

<sup>43</sup> To the effect that jurisdiction will be taken: Raffaële v. Raffaële, App. Paris, Apr. 8, 1903, 30 Clunet 865; Outeniente v. Outeniente, App. Alger, Dec. 2, 1893, 21 Clunet 120; Volpe v. Volpe, Trib. civ. Seine, July 7, 1914, 14 REV. DE DR. INT. PR. 95; Pero v. Pero, Trib. civ. Seine, Dec. 13, 1918, 48 Clunet 215.

Jurisdiction has been denied in the following cases: Ceretti v. Ceretti, Trib. civ. Nice, Jan. 10, 1894, 21 Clunet 120, 122; Bordes v. Bordes, App. Montpellier, Feb. 19, 1900, D. 1901, 2, 25; Carmen Fiore v. Giovannina Cardinale, Court of First Instance of Sousse, Dec. 2, 1915, 14 REV. DE DR. INT. PR. 95, 96.

<sup>44</sup> In re Ferrari, Cass. (civ.), July 6, 1922, D. 1922, 1, 137.

<sup>45</sup> See the celebrated case of in re Bauffremont, Cass. (civ.), March 18, 1878, D. 1878, 1, 201; S. 1878, 1, 193.

<sup>46</sup> AUDINET, PRINCIPES ÉLÉMENTAIRES DE DROIT INTERNATIONAL PRIVÉ (2d ed. 1906) 497-498; BARTIN, in 7 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS (5th ed. 1913) 412, n. 14; Labbé, *De la naturalisation et du divorce au point de vue des rapports internationaux* (1877) 4 Clunet 5, 22; 1 PILLET, *op. cit. supra* note 26, at 609; PILLET & NIBOYET, *op. cit. supra* note 26, at 557; 2 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (1926) 406; SURVILLE, *op. cit. supra* note 4, at 442-443; VALERY, MANUEL DE DROIT INTERNATIONAL PRIVÉ (1914) 1101. *Contra*: DESPAGNET & DE BOECK, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (5th ed. 1909) 821; 5 LAURENT, DROIT CIVIL INTERNATIONAL (1880) 343-356.

<sup>47</sup> In the following cases the divorce was denied because no cause for divorce existed under the national law. Eastabrook v. Eastabrook, Trib. civ. Dieppe, Apr. 2, 1896, App. Rouen, June 30, 1897, 2 REV. DE DR. INT. PR. 507; Knibloë v. Knibloë, Trib. civ. Havre, Nov. 17, 1923; 51 Clunet 1000; Sandberg v. Sandberg, Trib. civ. Boulogne, Feb. 5, 1926, 53 Clunet 977.

In the following cases the divorce was granted in France for causes recognized by the national law as causes for divorce: Smith v. Smith, Trib. civ. Seine, June 24, 1910, 41 Clunet 922; Polanco v. Polanco, Trib. civ. Seine, May 23, 1900, 27 Clunet 993; N. v. N., App. Paris, Dec. 17, 1920,

for a cause recognized by the national law of the parties which is deemed contrary to the French rules of public order. On this ground a judicial separation based on mutual consent has been denied.<sup>48</sup> Pillet is of the opinion that the court went too far in invoking the doctrine of public policy in that case, but suggests that if the national law should allow a divorce because of insanity, the French courts would be justified in denying a divorce on that ground.<sup>49</sup>

Much difficulty has been experienced in France where the national law recognized only a religious divorce. The Court of Cassation has held that the French courts have no jurisdiction in this case.<sup>50</sup>

Where the parties to a divorce proceeding are either citizens of the United States or British subjects, the question arises whether the French courts apply the renvoi doctrine with respect to the grounds for divorce. In determining the causes for divorce in accordance with the national laws of the parties, do the French courts mean the causes for divorce recognized under the local English law or under the local law of the state where the parties were domiciled in the United States before taking up their domicile in France; or do they purport to apply also the conflict of laws rules governing grounds for divorce in the Anglo-American system of the conflict of laws? If they take the latter view, they would apply the French causes for divorce by reason of the fact that the national law would refer the question to the law of domicile at the time of the divorce proceedings. Pillet states that the French courts have declined to accept the renvoi with reference to the grounds for divorce. He cites in favor of that proposition only a single case, decided on appeal by the Court of Rouen.<sup>51</sup> This appears to be, however, the only case rejecting renvoi in this matter and there are a number of decisions which have accepted the doctrine with reference to grounds for divorce.<sup>52</sup>

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48 Clunet 521; In re Basiliadis, Trib. civ. Seine, Nov. 20, 1920, 48 Clunet 185; In re Gould, App. Paris, July 7, 1920; Cass. (req.), Dec. 8, 1920, 48 Clunet 518; App. Douai, Jan. 29, 1924, 19 REV. DE DR. INT. PR. 276; Frame v. Frame, Trib. civ. Boulogne, Dec. 14, 1925, 54 Clunet 70; Sciaky v. Sciaky, Cass. (req.), July 5, 1926, 54 Clunet 392.

<sup>48</sup> X. v. X., Trib. civ. Marseille, Feb. 21, 1902, 31 Clunet 188.

<sup>49</sup> 1 PILLET, *op. cit. supra* note 26, at 624. It has been said that the granting of a divorce for a cause not recognized by the local French law as a cause for divorce would of itself violate the French rules concerning public order. Schisgal v. Krijewski, Trib. civ. Blois, May 10, 1906, 4 REV. DE DR. INT. PR. 628.

<sup>50</sup> Levinçon v. Levinçon, Cass. (civ.), May 29, 1905, 32 Clunet 1006; see 1 PILLET, *op. cit. supra* note 26, at 617-620, and notes by Cluzel in (1914) 41 Clunet 175-177.

<sup>51</sup> Eastabrook v. Eastabrook, *supra* note 47.

<sup>52</sup> Grant v. Grant-Scott, App. Paris, June 16, 1904, 1 REV. DE DR. INT. PR. 146; Grivot de Grandcourt v. Grivot de Grandcourt, Trib. civ. Seine,

What law will determine the grounds for divorce when the parties have different nationalities? The answer to this question is not clear. We have seen the attitude of the French courts with respect to the question whether an absolute divorce can be granted in France when the national law of one of the parties does not recognize such divorce. A number of decisions have been given above, holding that the French courts would grant a divorce or would convert a judicial separation into an absolute divorce where the national law of the petitioner recognizes absolute divorce. But in all of these cases the petitioner was a French citizen. In these cases, therefore, the causes of divorce would in the nature of things have to be determined in accordance with the national law of the petitioning party. If the national law of both parties recognizes absolute divorce, but differs as to the grounds for divorce, a similar problem arises. Shall the court grant a divorce to the petitioner if he or she has a cause for divorce under his or her national law, although there is no ground for divorce under the national law of the other spouse? This question has not come before the French courts.

2. *Recognition of foreign decrees of divorce.* (a) *Divorce of French citizens.* A divorce of French citizens pronounced by the courts of their domicil for a cause recognized as a cause for divorce in France has been recognized.<sup>53</sup> The rule is often stated in more general terms, according to which a divorce pronounced by the courts of their domicil will be recognized, provided it does not conflict with the French rules of public order.<sup>54</sup> Recognition to a foreign decree of divorce has been denied on the ground just mentioned, where the divorce was based upon the consent of the parties.<sup>55</sup>

(b) *Divorce of foreigners.* The divorce of foreigners pronounced by their national courts will be recognized in France.<sup>56</sup>

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May 7, 1908, 4 REV. DE DR. INT. PR. 627; O. v. M., Trib. civ. Seine, Feb. 11, 1913, 40 Clunet 1233; Guglielmi v. Guglielmi, Trib. civ. Seine, Jan. 19, 1926, 53 Clunet 663.

<sup>53</sup> Lafont v. Rouquet, Trib. civ. Seine, Aug. 2, 1887, 15 Clunet 86; Guillemin v. Guillemin, Trib. civ. Seine, May 29, 1897, 25 Clunet 129; C. v. M., Trib. civ. Seine, Apr. 6, 1922, 49 Clunet 674; Martin v. Dauprat, App. Paris, Nov. 2, 1906, 34 Clunet 1092; Brandham v. Merle, Trib. civ. Pau, Nov. 2, 1907, 35 Clunet 473.

<sup>54</sup> Martin v. Dauprat, *supra* note 53; Brandham v. Merle, *supra* note 53.

<sup>55</sup> To this effect, Malaud v. Malaud, Trib. civ. Seine, May 2, 1918, 45 Clunet 1182. According to Pillet the divorce should not be recognized if granted for insanity either. 1 PILLET, *op. cit. supra* note 26, at 624.

<sup>56</sup> Before the law of 1884, which reintroduced divorce in France, an exception to the above rule was recognized where the parties to the foreign divorce had been French citizens and had been naturalized in a foreign country "in fraud of the French law." Vidal v. Vidal, App. Paris, June 30, 1877, S. 1879, 2, 205; see 1 PILLET, *op. cit. supra* note 26, at 605-607.

The same conclusion was reached where only one of the spouses had be-

3. *Judicial separation.* The general rules governing divorce are applicable also to judicial separation. The national law of the parties governs, therefore, not only the grounds for which a judicial separation may be granted, but also the nature of the separation to be granted as permanent or temporary.<sup>57</sup>

#### LEGITIMACY, LEGITIMATION AND ADOPTION

1. *Legitimacy.* According to Article 3, par. 3, of the French Civil Code, the national law controls. The national law of the parents at the time of the birth of the child will determine, therefore, whether a child is legitimate or not. If the parents are foreigners who were domiciled in France, the French law may become applicable by virtue of the renvoi doctrine. This is generally accepted in matters of status.<sup>58</sup>

The mode of establishing legitimacy is controlled by the law governing the substantive rights themselves, that is, by the national law of the parties, in accordance with the general rule governing the means of proof.<sup>59</sup> The formalities of executing the documents required by the national law are governed, on the other hand, by the law of the place of execution,<sup>60</sup> and the administration of the proof, in accordance with the law of the forum.<sup>61</sup>

Where the parties have not the same nationality at the birth of the child, it is not certain whether the national law of the father or the national law of the child will control.<sup>62</sup>

If the child is illegitimate according to the proper national law, its rights may depend upon the fact whether it has been duly recognized by the father as such, or the relationship of father and child has been duly established by a judicial proceeding. In these respects again, the national law controls.<sup>63</sup>

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come naturalized in a foreign country for the purpose of obtaining a divorce, the other spouse remaining a French citizen. See *De R. v. De R.*, Cass. (civ.), July 19, 1875, S. 1876, 1, 289. In *In re Bauffremont*, App. Paris, July 17, 1876, S. 1876, 2, 249 and *supra* note 45, there was involved, beside the question of fraud on the French law, the question whether a French married woman after judicial separation had the power to become naturalized in a foreign country without the authorization of her husband.

<sup>57</sup> *Polanco v. Polanco*, *supra* note 47.

<sup>58</sup> See Lorenzen, *op. cit. supra* note 5, at 735.

<sup>59</sup> See Lorenzen, *op. cit. supra* note 5, at 749.

<sup>60</sup> *Chevillon v. Méchain*, App. Paris, Aug. 2, 1876, 4 Clunet 230.

<sup>61</sup> See Lorenzen, *op. cit. supra* note 5, at 749.

<sup>62</sup> In favor of the national law of the father: 1, PILLET, *op. cit. supra* note 16, at 641-642; PILLET & NIBOYET, *op. cit. supra* note 26, at 565; VALERY, *op. cit. supra* note 46, § 806. In favor of the national law of the child: DESPAGNET & DE BOECK, *op. cit. supra* note 46, at 828; 4 WEISS, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ* (2d ed. 1912) 27.

<sup>63</sup> A distinction is drawn in France between "natural" children, born of parents that could have married, and children born of adulterous or in-

As regards judicial proceedings in France to establish the paternity of the defendant, we must recall in the first place what has been said concerning the jurisdiction of French courts based on the nationality of the parties.<sup>64</sup> Assuming that the French courts are competent in this regard, the question arises concerning the application of Article 340 of the French Civil Code. Prior to 1912, suits to establish the paternity of the defendant were prohibited in France in order to avoid scandal. It was natural, therefore, that the doors of the French courts should be closed to such litigation by foreigners whose national law allowed such a proceeding.<sup>65</sup> Where such a relationship, however, had been established by a judgment abroad in accordance with the national law of the parties, it would be recognized in France.<sup>66</sup> Since 1912, a judicial proceeding to establish the defendant's paternity is allowed in a certain number of cases in France, and within these limits such proceedings may be brought by foreigners, if the national law allows.<sup>67</sup> Where the nationality of father and child differ, there is great disparity of view among courts and writers. According to some, the national law of the father would control.<sup>68</sup> According to others the national law of the child should govern.<sup>69</sup> Others hold that, in view of the

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cestuous relations. Recognized natural children are entitled both to support and to a share in the inheritance (Art. 758, Civ. Code), whereas children born of adulterous or incestuous relations are entitled only to support (Art. 762, Civ. Code). Until 1912 it was impossible for a child, barring one exception (Art. 340, Civ. Code), to institute legal proceedings in France against his alleged father in order to establish the relationship of father and son, it being feared that such action would give rise to much scandal. By the law of Nov. 16, 1912, various other exceptions have been added to the one formerly existing.

A voluntary recognition of a natural child can be effected in only two ways in France: (1) by a declaration to that effect in the birth certificate; (2) by means of an "authentic," *i. e.*, notarial, act. Art. 334, Civ. Code. The provisions as to voluntary recognition do not apply to adulterous or incestuous children. Art. 335, Civ. Code.

<sup>64</sup> See Lorenzen, *op. cit. supra* note 5 at 742.

<sup>65</sup> Sakakini v. Vincent, App. Aix, March 27, 1890, 18 Clunet 210; De Civry v. De Brunswick, Cass. (req.), May 25, 1863, S. 1868, 1, 365.

<sup>66</sup> PILLET & NIBOYET, *op. cit. supra* note 26, at 567.

<sup>67</sup> It has been suggested that the law of 1912 rests upon considerations of public order and should be applicable, therefore, to foreigners as well as to French citizens. Godfryd v. Adolphe & Kozan, App. Paris, Dec. 22 1920, S. 1921, 2, 97, and note by Audinet. But this view is disapproved by the weight of authority. Tomalis v. Fillon, App. Lyon, Dec. 30, 1920, S. 1921, 2, 97, and note by Audinet; Morse v. Serio, Cass. (civ.), Jan. 20, 1925, 20 REV. DE DR. INT. PR. 531; 1 PILLET, *op. cit. supra* note 26, at 657.

<sup>68</sup> Comte de Bari v. Princes de Bourbon, Cass. (civ.), Jan. 17, 1899, 26 Clunet 546; X. v. Z. & Moraël, Trib. civ. Seine, July 20, 1923, 19 REV. DE DR. INT. PR. 87.

<sup>69</sup> L. v. G., Trib. civ. Seine, Jan. 28, 1916, 17 REV. DE DR. INT. PR. 97; In re Apolzan, App. Paris, May 16, 1923, 51 Clunet 113; Godfryd v. Adol-

fact that the status of both father and child is involved, the proceedings should be allowed in France only if authorized by the national law of both.<sup>70</sup> It has been suggested also that if the child is born in France, French law is exclusively applicable.<sup>71</sup> The Court of Cassation in its late decisions has pronounced itself in favor of the national law of the child.<sup>72</sup>

A further complication arises when either the father or the child has changed his nationality since the child's birth. Assume, for example, that both father and child were French citizens at the time of the birth of the child and that one of them became a citizen of another country prior to the suit, or during its pendency, or that both were foreigners at the time of the child's birth and that either the child or the father, or both, had become French citizens prior to the commencement of the suit in France, or during its pendency. Shall the question of whether a suit may be brought in France to establish the relationship of father and child be resolved with reference to the national law existing at the time of the birth, or with reference to the time that the suit is brought, or the judgment rendered? The writers hold generally that the matter should be referred to the national law at the time of the birth.<sup>73</sup> The courts are divided on the subject.<sup>74</sup>

The French law does not permit any child born of an adulterous or incestuous connection to establish that fact by a judicial

phe, App. Paris, Dec. 22, 1920, 48 Clunet 210; *Martin v. Mihaesco*, Cass. (req.), June 8, 1921, 49 Clunet 141; *Orsini v. Ferrovicchio*, Cass. (civ.), July 28, 1925, 20 REV. DE DR. INT. PR. 458; S. 1925, 1, 305 and note by Niboyet; *Tomatis v. Fillon*, Cass. (civ.), Jan. 20, 1925, 52 Clunet 709; D. 1925, 1, 177, and note by Rouast.

<sup>70</sup> *Tomatis v. Fillon*, App. Lyon, Dec. 30, 1920, 17 REV. DE DR. INT. PR. 100; C. v. U., Trib. civ. Nice, Dec. 10, 1923, 19 REV. DE DR. INT. PR. 573; *Louise Berthaud v. Bertelletti*, Trib. civ. Nantua, Dec. 13, 1922, 19 REV. DE DR. INT. PR. 83; *Perrée v. Hamburg*, Trib. civ. Nice, July 18, 1922, 18 REV. DE DR. INT. PR. 496.

<sup>71</sup> *Godfryd v. Germaine & Kozan*, App. Paris, Dec. 22, 1920, 17 REV. DE DR. INT. PR. 99.

<sup>72</sup> See *supra* note 69.

<sup>73</sup> 1 PILLET, *op. cit. supra* note 26, at 654-655; PILLET & NIBOYET, *op. cit. supra* note 26, at 565, n. 3. Audinet would support this view if the national law at the time is to the effect that no legal filiation between the parties is possible, but if it is possible, the question whether it may be established by a legal proceeding should be determined, according to this writer, with reference to the national law existing at the time suit is brought, for it relates merely to proof and the fear of scandal. Audinet, note S. 1921, 2, 97.

<sup>74</sup> To the effect that the national law at the time of birth controls: *Godfryd v. Germaine & Kozan*, *supra* note 71. To the effect that the law of the new nationality governs: see *Mihaesco v. Martin*, App. Toulouse, July 15, 1918, 15 REV. DE DR. INT. PR. 130; Cass. (req.), June 8, 1921, 49 Clunet 141; In re *Apolzan*, *supra* note 69.

proceeding, either against the father or the mother. Nor do the provisions relating to the voluntary recognition of natural children apply to them. To what extent these provisions are to be deemed to constitute rules of public policy in the face of which the foreign law to the contrary will not be respected has not been settled by the courts. According to some writers they are of such stringent nature that they will apply not only in all instances where such a proceeding between foreigners is brought in France, or such recognition takes place there, but also to all recognitions taking place in foreign countries in conformity with the national law of the parties, so that the latter will have no effect in France.<sup>75</sup> Pillet assumes a less radical position. He would apply the provisions of the French law only to foreigners who are domiciled in France or who are residents thereof; in other respects he would give effect to the provisions of the national law of the parties.<sup>76</sup>

A vast amount of litigation has taken place in France with respect to the subject of filiation. It is held that a voluntary recognition of national children must conform to the national law of the parties. If legal filiation does not result from such recognition according to the national law, none will result in France.<sup>77</sup> Where the national law of the parent and child does not coincide, the law is uncertain.<sup>78</sup>

As regards the mode in which the natural child may be recognized, the national law is held to control, in accordance with the general continental view that the mode of proof is governed by the rule applicable to the determination of the substantive rights in question.<sup>79</sup> Whether a child may be recognized by means of a declaration to that effect in a certificate of birth, whether it may be done by will, etc., will depend, therefore, upon the national law of the parties.<sup>80</sup> The form in which the will,

<sup>75</sup> SURVILLE, *op. cit. supra* note 4, at 456-457.

<sup>76</sup> 1 PILLET, *op. cit. supra* note 26, at 657-658.

<sup>77</sup> *Comte de Bari v. Princes de Bourbon*, *supra* note 68; *Orsini v. Ferrovecchio*, App. Alger, Sept. 8, 1922, 19 REV. DE DR. INT. PR. 81; *Pinazzo v. Belmonte*, App. Alger, Nov. 8, 1922, 19 REV. DE DR. INT. PR. 82.

<sup>78</sup> To the effect that the national law of the parent controls: *Beiter v. Meyer*, App. Paris, Aug. 3, 1898, 25 CLUNET 1067; *Gramzow v. Amman & Gentil*, Trib. civ. Pontoise, Feb. 7, 1911, 39 CLUNET 218.

To the effect that both laws must concur: *Gryon v. Moulton*, App. Rennes, July 24, 1923, 51 CLUNET 410.

<sup>79</sup> Lorenzen, *op. cit. supra* note 5, at 749.

<sup>80</sup> *Sakakini v. Sakakini*, Trib. civ. Marseille, Jan. 26, 1889, 16 CLUNET 676; *Foltz v. Foltz*, Consular Tribunal of France at Constantinople, Dec. 19, 1890, 18 CLUNET 598; *Hachem Mohamed & Descours v. Baléro*, App. Aix, May 21, 1902, 30 CLUNET 350.

According to French law the recognition must be either in the birth certificate or by an "authentic," *i.e.*, notarial, act. If a French citizen recognizes a natural child abroad there is dispute whether the "authentic" act

etc., must be executed is governed, on the other hand, by the law of the place of execution (*locus regit actum*).<sup>81</sup>

Whether the national law of the father or the national law of the child will control, as regards the mode of recognition, if their nationality is not the same, is not certain.<sup>82</sup>

2. *Legitimation*. France recognizes only legitimation by subsequent marriage. Other countries allow a second mode, namely, legitimation by judicial decree or governmental act. According to the provisions of the French law, illegitimate children, other than those born of an adulterous relation, will be legitimated by the subsequent marriage of the parents, provided the child was recognized before such marriage or at the time of the celebration of the marriage.<sup>83</sup> Children born of an adulterous relation will be legitimated by the subsequent marriage of the parties only under special conditions.<sup>84</sup> Incestuous children, that is, children born of persons prohibited to marry on account of blood relationship or relationship by marriage, will be legitimated if the parents have married after having obtained the necessary dispensations in conformity with Article 164 of the Civil Code.<sup>85</sup>

From the standpoint of the conflict of laws, the question whether and under what conditions a natural, adulterous, or incestuous child can be legitimated by the subsequent marriage of the parties or in consequence of some judicial proceeding or governmental act is determined by the national law.<sup>86</sup> A foreign illegitimate child will be legitimated, therefore, if his parents were married in France or elsewhere, provided marriage has this effect under the national law. In like manner, a French child will become legitimated through the marriage of his par-

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is to be understood in the French sense, so that it could be executed only before a French consul, or whether any act regarded by the local law as "authentic" is sufficient. To the effect that it may be executed in either form, see *Béthune v. Legoanec*, Trib. Civ. Seine, July 19, 1892, 19 Clunet 1158; *Valtriny v. X.*, App. Paris, Feb. 26, 1896, 24 Clunet 337. To the effect that it must be executed before a French consul, see *Silvant-Martin v. X.*, App. Besançon, July 6, 1892, 20 Clunet 157. Some courts have given effect to recognition, though it was only in the form of a private writing, the law of the place of execution being satisfied. *Laporte & D'Etchepare v. Fort*, Trib. civ. Pau, May 13, 1888, 20 Clunet 858.

<sup>81</sup> *Lacroix v. Préfet d' Alger*, Trib. civ. Alger, March 19, 1914, 44 Clunet 1021.

<sup>82</sup> See 1 PILLET, *op. cit. supra* note 26, at 654.

<sup>83</sup> Art. 331, Civ. Code, modified by laws of Dec. 30, 1915, and of Apr. 25, 1924.

<sup>84</sup> Art. 331, Civ. Code, as modified by laws of Dec. 30, 1915 and of Apr. 25, 1924.

<sup>85</sup> For example, those born of an uncle and his niece. *Leflon v. Lesenne*, Cass. (req.), Jan. 27, 1874, D. 1874, 1, 216.

<sup>86</sup> *Castano v. Monaco*, App. Bastia, May 7, 1859, S. 1860, 2, 333.

ents, wherever such marriage may take place, provided the French law is satisfied.

Where the national law of the parties has changed since the birth of the child, the national law existing at the time of the act of legitimation appears to control.<sup>87</sup> Where the nationality of the child and that of its parents is not the same, the national law of the parents has been applied.<sup>88</sup>

Is the requirement of the French law that a child, in order to be legitimated by subsequent marriage, must have been recognized by the parent either before the celebration of the marriage, or at that time, to be governed by the national law, or is this a matter relating to "form" and governed by the law of the place where the marriage took place? The French decisions on this point are conflicting.<sup>89</sup>

Suppose the parties are foreigners whose national law provides for the legitimation of children born of an adulterous or incestuous relation, and that the marriage occurs in France. Should the French courts deny legitimacy to the child, unless the case falls within the provisions of Article 331 of the French Civil Code? Some writers appear to give an affirmative reply, holding that the question is one affecting the French public order. Pillet believes that this would be going too far and that the application of the French public order should be restricted to the cases where the parties are domiciled in France.<sup>90</sup>

In accordance with the general rule, an illegitimate child born of foreign parents, whose national law does not recognize legitimation, would not be legitimated by the subsequent marriage of the parties in France. But suppose that the child was born in France of a foreign father, whose national law does not recognize legitimation, and of a French mother. In this case, the

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<sup>87</sup> 1 PILLET, *op. cit. supra* note 26, at 648.

<sup>88</sup> Manoury v. Barritt, App. Caen, Nov. 18, 1852, S. 1852, 2, 432. Some apply the national law of the parent, on the ground that any restrictions imposed by law are not for the benefit of the illegitimate child, but in the interest of the legitimate family. 1 PILLET, *op. cit. supra* note 26, at 646-647. Surville would apply the national law of the parent because it is one of the effects of marriage, which, according to this author, are governed by the national law of the head of the family. SURVILLE, *op. cit. supra* note 4, at 462-463. In case of legitimation by governmental act Surville would allow such legitimation only if the national law of both concurred *Ibid.* 462-463. The effects of the legitimation, according to this writer, would be such only as are recognized by both laws. *Ibid.* 463.

<sup>89</sup> To the effect that the national law controls: Chevrillon v. Méchain *supra* note 60; Courbin v. Verrière, App. Bordeaux, Aug. 27, 1877, 5 Clunet 39; Bougon v. Bougon, Trib. civ. Havre, Feb. 14, 1907, 36 Clunet 1057.

To the effect that the *lex loci* controls: Balmiger v. Dutailly, App. Besançon, July 25, 1876, 4 Clunet 228; Pariot v. Pariot, Trib. civ. Seine, June 4 1901, 29 Clunet 334.

<sup>90</sup> 1 PILLET, *op. cit. supra* note 26, at 646-647.

Court of Cassation has held that the marriage of the parents in France would legitimate the child upon compliance with the provisions of the French law, for "legitimation by subsequent marriage of the parents is in France, like marriage itself, a matter of the public order."<sup>91</sup> Although this rule has been generally disapproved by the writers,<sup>92</sup> it has been followed by the lower courts.<sup>93</sup>

3. *Adoption.* Adoption has been held by the French courts to be an institution of strict civil law, which, according to Article 11 of the Civil Code, is not open to foreigners in the absence of a treaty or an "authorized" domicile.<sup>94</sup> It has been held, accordingly, that a foreigner cannot adopt a French citizen in France, nor can a French citizen adopt a foreigner. This point of view was changed by the law of June 19, 1923, amending Article 345 of the Civil Code and providing expressly: "A French citizen may adopt a foreigner or may be adopted by a foreigner." In some states and countries adoption is not allowed. In others it is allowed only under severe restrictions. Where the parties are of the same nationality, no difficulty arises, for the national law clearly controls. A child does not acquire, however, the nationality of the adoptive parent, and the question is, therefore, if his nationality should differ from that of the adoptive parent, what law will govern. Can a person be adopted if the national law of either party does not recognize adoption? Pillet answers the question in the negative.<sup>95</sup>

Assuming that the law of both the adoptive parent and adopted child allow adoption, what law will govern with respect to the conditions under which adoption is allowed and the effect thereof? As regards the conditions under which adoption may take place, the national law of the parties controls;<sup>96</sup> for example, the requirements as to age, whether the adoptive parent must have no legitimate children, or whether a "natural" child can be adopted. Where the nationality of the adoptive parent and of the adopted child are different, there is no definite judicial authority as to

<sup>91</sup> Skottove v. Ferrand, Cass. (civ.), Nov. 23, 1857, S. 1858, 1, 293.

<sup>92</sup> SURVILLE, *op. cit. supra* note 4, at 461.

<sup>93</sup> Ferrand v. Skottove, App. Bourges, May 26, 1858, D. 1858, 2, 178; In re Joly C. Perkins, App. Rouen, Jan. 5, 1887, 14 Clunet 183; O'Rorke v. Grados, App. Paris, March 23, 1888, 16 Clunet 638.

<sup>94</sup> In re H., App. Paris, June 2, 1892, 19 Clunet 1137; Lecoq v. Parmentier, Trib. civ. Seine, Aug. 4, 1883, 11 Clunet 179; In re Hollaender & Donnet, App. Rouen, Sept. 8, 1916, 44 Clunet 1009.

<sup>95</sup> 1 PILLET, *op. cit. supra* note 26, at 650. It was held in In re Hume-Moreau, App. Paris, Jan. 14, 1926, 54 Clunet 641, that the French law of June 19, 1923, permitted the adoption of a French child by an adoptive parent whose national law did not recognize adoption. The decision is criticized by Perroud in (1927) 54 Clunet 624.

<sup>96</sup> SURVILLE, *op. cit. supra* note 4, at 464.

the governing law. Some authors would apply the national law of the adoptive parent;<sup>97</sup> others that of the adopted child.<sup>98</sup> Still others would make various distinctions.<sup>99</sup>

According to the provisions of the French Code, the consents of the parents are necessary if the adopted child is under age, and these consents must be given at the time of the adoption proceedings or by separate "authentic" instruments, executed before a notary or a justice of the peace of the domicile or residence of such parents, or, if given abroad, before a French diplomatic or consular agent.<sup>100</sup> If the parents are dead, the consent must be given by the family council.<sup>101</sup> These requirements, which are regarded as something more than mere matters of form,<sup>102</sup> must be complied with whenever a French citizen is adopted, whether in France or in a foreign country.<sup>103</sup>

The effect of adoption will depend upon the national law of the parties.<sup>104</sup> If their nationality differs, it has been suggested that it should be governed by the national law of the adoptive parent, so far as rights are claimed with respect to the new family, and by the national law of the adopted child, so far as rights are claimed with respect to the old family.<sup>105</sup>

#### PATERNAL RIGHTS

According to continental law, the paternal power includes much more than it does in Anglo-American law. It confers upon the parent the "right of representation," that is, the power to bind the child by contract made in the child's behalf, or to supplement the child's lack of capacity. It makes the parent also the administrator of the child's property, and generally confers upon him a right of usufruct in such property.<sup>106</sup>

As regards the personal relations existing between parent and child, the national law of the parties controls.<sup>107</sup> The national law determines, therefore, whether only the father or both the father and the mother have the paternal power over the child, and, if the mother does not enjoy such power during the lifetime

<sup>97</sup> SURVILLE, *op. cit. supra* note 4, at 465; 6 LAURENT, *op. cit. supra* note 46, at 78.

<sup>98</sup> 4 WEISS, *op. cit. supra* note 62, at 126.

<sup>99</sup> 1 PILLET, *op. cit. supra* note 26, at 651-652.

<sup>100</sup> Art. 349, Civ. Code.

<sup>101</sup> Art. 350, Civ. Code.

<sup>102</sup> Cf. SURVILLE, *op. cit. supra* note 4, at 464.

<sup>103</sup> See T. v. Marquis B., App. Paris, July 30, 1903, 31 Clunet 604; PILLET & NIBOYET, *op. cit. supra* note 26, at 573-574.

<sup>104</sup> 1 PILLET, *op. cit. supra* note 26, at 652; SURVILLE, *op. cit. supra* note 4, at 465.

<sup>105</sup> VALERY, *op. cit. supra* note 46, at 1153.

<sup>106</sup> Art. 384, Civ. Code.

<sup>107</sup> Armandi v. Godard, App. Paris, Aug. 2, 1872, 1 Clunet 32.

of the husband, whether she acquires it upon the husband's death.<sup>108</sup> The national law determines also if and under what circumstances a parent can represent the child in court,<sup>109</sup> or bind it and its property by juristic acts.<sup>110</sup>

Where the nationality of the child and that of the parent differ, it seems to be recognized that if the parent is French and the child a citizen of some other country, French law will control.<sup>111</sup> Whether the same conclusion would be reached if the child is French but the parent a foreigner is not so certain. Where both parent and child were foreigners, the Court of Cassation has applied the national law of the child.<sup>112</sup>

The right to the custody of the child is said to be governed likewise by the national law of the parties;<sup>113</sup> but there is a distinct tendency to hold that all questions relating to the custody of children fall within the local public order, so that the local French rules relating to custody are applied even to foreigners.<sup>114</sup> The parent's power to punish the child is a matter falling within the police laws of the state, which are applicable to foreigners as well as to French citizens.<sup>115</sup> Under the laws of July 24, 1899, and November 15, 1921, a father may forfeit his paternal rights because of mal-treatment or abandonment of the child. These laws also are regarded as a part of the police legislation, which is applicable to foreigners living in France.<sup>116</sup>

The paternal power includes the right to manage the child's property. The extent to which this power exists is governed by the national law.<sup>117</sup> The right of usufruct is likewise gov-

<sup>108</sup> Fangasso v. Roche Tarbaud, Trib. civ. Marseille, Aug. 3, 1888, 17 Clunet 943; Quintin v. Bernasconi, App. Bordeaux, July 23, 1897, D. 1901, 2, 265.

<sup>109</sup> Berta v. Mazzolini, Cass. (civ.), June 2, 1908, 35 Clunet 1155; Fangasso v. Roche Tarbaud, *supra* note 108.

<sup>110</sup> Banque Parisienne v. De Graffenried, App. Paris, June 27, 1888, 17 Clunet 946.

<sup>111</sup> Ghezzi v. Marincowich, Cass. (civ.), Jan. 13, 1873, S. 1873, 1, 13; In re Sokolowski, App. Bourges, Aug. 4, 1874, 3 Clunet 31; Homberg v. Consul d' Autriche, Trib. civ. Seine, Apr. 5, 1884, 11 Clunet 521.

<sup>112</sup> Berta v. Mazzolini, Cass. (civ.), *supra* note 109.

<sup>113</sup> Etchegoyen v. Etchegoyen, Trib. civ. Laval, Apr. 12, 1902, 29 Clunet 1044. So as to right of grandparent to visit the child. Minnaert v. Zilcher, App. Paris, Aug. 5, 1908, 36 Clunet 173.

<sup>114</sup> Zalduondo v. Mendec, App. Paris, May 7, 1919, 47 Clunet 614; S. 1920, 2, 49 and note by Niboyet. So as to validity of a contract relating to the custody of the child. I. v. I., App. Paris, Apr. 29, 1913, 40 Clunet 1266.

<sup>115</sup> Art. 3, § 1, Civ. Code.

<sup>116</sup> In re Crudeli, App. Aix, Nov. 15, 1897, S. 1899, 2, 57; In re Lefèvre-Guéter, App. Douai, Dec. 10, 1895, S. 1899, 2, 57, and note by Audinet; Ministère Public v. Van Eckhoudt, App. Paris, Apr. 25, 1899, 26 Clunet 823; Sempéré v. Sempéré, App. Alger, Oct. 24, 1904, 2 REV. DE DR. INT. PR. 187.

<sup>117</sup> See cases *supra* notes 109-110.

erned by the national law of the parties, even with respect to immovable property situated in France.<sup>118</sup> The law of the situs does not control for the reason that the question is not regarded as relating directly to "property." No rights with respect to French land can be created, of course, except those recognized by French law, but rights of usufruct may be created under the French local law. The question at issue is merely whether or not a parent shall have such a usufruct in the property of the child and this is determined by considerations affecting the family, and for that reason is subject to the rule determining family rights in general.

Similar considerations would lead to the conclusion that the existence of a lien in favor of the child upon the property of the parent in France, on account of the parent's administration of the child's property, should be controlled by the national law of the parties.<sup>119</sup> The French courts regard this question, however, as one involving a strict civil right, which foreigners are not entitled to in the absence of an "authorized" domicile in France or a treaty provision.<sup>120</sup>

Where the parents and child have different nationalities, the law is not certain. The Court of Cassation stated in two earlier decisions that the right of usufruct would be controlled by the national law of the parent.<sup>121</sup> In these cases, however, the nationality of the parents was French, and France conferred the paternal power and right of usufruct. Some writers are of the opinion that inasmuch as the paternal power exists today chiefly for the protection of the child, the national law of the child should control.<sup>122</sup>

#### DUTY TO SUPPORT

The French Code imposes upon parents the duty to support their legitimate and illegitimate children. Children are under a duty to support their parents and other ascendants if they are in need. Sons and daughters-in-law are under a like duty to support their parents-in-law, and parents-in-law, to support their sons and daughters-in-law.<sup>123</sup> Husbands and wives are also un-

<sup>118</sup> Ben Chimol v. Cohen, Cass. (civ.), March 14, 1877, S. 1878, 1, 25, and note by Renault.

<sup>119</sup> Quintin v. Bernasconi, App. Bordeaux, July 23, 1897, S. 1900, 2, 89, and note by Audinet; *supra* note 108, and note by Martin.

<sup>120</sup> Seligman v. Frenzel, Cass. (civ.), May 20, 1862, S. 1862, 1, 673; Pepin v. Société du Crédit Agricole, Cass. (civ.), March 4, 1884, S. 1884, 1, 273.

<sup>121</sup> Ben Chimol v. Cohen, Cass. (civ.), March 14, 1877, D. 1877, 1, 385, 5 Clunet 167; Ghezzi & Sgitcovich v. Marinkowich, Cass. (civ.), Jan. 13, 1873, D. 1873, 1, 297.

<sup>122</sup> SURVILLE, *op. cit. supra* note 4, at 472.

<sup>123</sup> Arts. 203-207, Civ. Code.

der a reciprocal duty to support each other.<sup>124</sup> In other countries the duty to support is sometimes less and sometimes more extensive.

As the duty to support is a family obligation, it is governed by the law governing family relations in general, that is, by the national law of the parties.<sup>125</sup> Where the parties have different nationalities, most writers prefer the national law of the debtor.<sup>126</sup> According to Surville, the laws of the creditor and debtor must concur.<sup>127</sup> The French courts have not determined this question specifically. Foreigners living in France are held in accordance with the local provisions of the French law, although they are under no such duty under their national law.<sup>128</sup> The courts apply Article 3, par. 3, of the French Civil Code, according to which laws of police and public order are binding upon all living in the country, for otherwise such foreigner might become a public charge if his national law should impose no duty to support upon any relative. With respect to persons living or being in France, it seems that the French provisions constitute a minimum obligation, and that if the national law imposes a more extensive duty, it will be enforced.<sup>129</sup> The implied power of a married woman to bind her husband for necessaries appears to be governed by similar principles.<sup>130</sup>

#### GUARDIANSHIP

With respect to guardianship, the French rules of the conflict of laws and those of the continent in general differ radically from those followed in England and the United States. Guardianship, whether relating to the person or to the property of the ward, it is argued, being an institution of the family, should be governed by the rules governing family rights in general. Hence the fundamental rule that a guardian must be appointed by the courts of the state of which the ward is a citizen, and

<sup>124</sup> 1 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* (8th ed. 1920) 294.

<sup>125</sup> *In re Broni Yso*, App. Alger, Jan. 16, 1882, 9 *Clunet* 626; *B. v. X.*, Trib. civ. Pontoise, May 15, 1895, 23 *Clunet* 627; *Zecopini v. Pancrazi*, Trib. Tunis, Apr. 5, 1905, 33 *Clunet* 135.

<sup>126</sup> AUDINET, *op. cit. supra* note 46, at 21; 1 PILLET, *op. cit. supra* note 26, at 599.

<sup>127</sup> SURVILLE, *op. cit. supra* note 4, at 490-491.

<sup>128</sup> *Guerrier v. Guerrier*, Cass. (req.), July 22, 1903, 31 *Clunet* 355; *S.* 1909, 1, 373 and note; *Moret v. Ryan*, Justice de Paix de Paris, July 10, 1903, 31 *Clunet* 356; *Teretschenko v. Noé*, Cass. (req.), March 27, 1922, 49 *Clunet* 115; *Riabouchinski v. Riabouchinskaya*, App. Paris, Apr. 11, 1923, 19 *REV. DE DR. INT. PR.* 403.

<sup>129</sup> PILLET & NIBOYET, *op. cit. supra* note 26, at 550.

<sup>130</sup> *Beer v. Kotschoubey*, App. Paris, Nov. 5, 1907, 4 *REV. DE DR. INT. PR.* 632 and note; *Redfern v. Prince Youriewsky*, Trib. civ. Seine, July 13, 1911, 8 *REV. DE DR. INT. PR.* 385 and note.

that the powers of such guardian extend to all the property belonging to the ward, whatever its nature and wherever situated.

A French citizen abroad must be placed under guardianship in accordance with the local provisions of the French law. Unless the foreign law recognizes the institution of "family council," no guardianship could be created, therefore, with respect to a French citizen in such country, which would be entitled to recognition in France. In such a case the guardianship would have to be created by the French consulate.<sup>131</sup>

By virtue of the police power of the state, French courts are authorized to appoint "temporary guardians" in France.<sup>132</sup> Such provisional guardianship will cease and the property will be handed over to the foreign guardian as soon as such guardian is appointed by the national law.<sup>133</sup> If the national law does not provide for the appointment of guardians for citizens domiciled in another country, the French courts will appoint such guardian if the ward is domiciled in France.<sup>134</sup> So far as other than temporary guardians are appointed in France, the national law will be followed.<sup>135</sup> Thus, a foreigner cannot be placed under guardianship as a spendthrift unless his national law provides for such an appointment.<sup>136</sup>

The capacity of a foreigner in France is governed by his national law. This is true of persons placed under guardianship. The Anglo-American point of view which distinguishes between "natural" disabilities and "artificial" disabilities imposed by courts is unknown in France. A spendthrift who has been placed under guardianship by his national law is, therefore, under the same disability in France as he would be at home.<sup>137</sup>

<sup>131</sup> A foreigner may be placed under guardianship in France by a consul of his country, even in the absence of a treaty provision to that effect, if the national law so provides. *In re Drake del Castillo*, Trib. civ. Seine, Dec. 26, 1882, 10 Clunet 51.

<sup>132</sup> *Fagot v. Richter*, Trib. civ. Lille, June 12, 1884, 12 Clunet 94; *Monthieu v. Stahmann*, App. Besançon, Nov. 30, 1887, S. 1890, 2, 59; *Comp. des Chemins de fer de l'Est v. Godefroy*, Cass. (req.), Nov. 10, 1896, 24 Clunet 823; *Tichomirow v. Giunto Fausto de Jannaro*, App. Paris, Dec. 5, 1902, 30 Clunet 616; *Antoniotti v. Antoniotti*, Cass. (civ.), Nov. 19, 1923, 51 Clunet 163.

<sup>133</sup> *Buxton v. Moreau*, Trib. civ. Seine, Aug. 6, 1885, 12 Clunet 683; *Fagot v. Richter*, *supra* note 132.

<sup>134</sup> Trib. civ. Seine, Apr. 10, 1877, 5 Clunet 275.

<sup>135</sup> *Fangasso v. Roche Tarbaud*, *supra* note 108; *Berta v. Mazzolini*, Cass. (civ.), June 2, 1903, 5 REV. DE DR. INT. PR. 247; *Antoniotti v. Antoniotti*, *supra* note 132.

<sup>136</sup> *Destembert v. Arthez*, App. Paris, March 27, 1897, 25 Clunet 721; *Maréchale de Santa Cruz v. Granger*, App. Paris, March 22, 1899, 26 Clunet 791.

<sup>137</sup> *Infant d' Espagne v. Orléans & Bourbon*, Trib. civ. Seine, July 28, 1921, 49 Clunet 670.

The powers of guardians in their control over the ward's property are not limited territorially to the state of their appointment. In accordance with the general rules underlying the subject, their powers are determined in France with reference to the national law.<sup>138</sup> As in the case of the parent's power over the child's property, the question is regarded as relating primarily to the "family" and not to the "property" law. It concerns the welfare of the family or of the child, the property regime not being directly affected.<sup>139</sup> The powers of the foreign guardian extend to both real and personal property.<sup>140</sup> The conditions under which a guardian can dispose of the ward's property is ascertained, therefore, with reference to his national law.<sup>141</sup> If the national law requires authorization from the family council or from some judicial tribunal, such authorization must be proved.<sup>142</sup> Such authorization need not be obtained, however, from a national tribunal, but may be granted by a French court as nearly as possible in conformity with the national legislation.<sup>143</sup>

Where the nationality is changed, the new national law controls. A French citizen placed under guardianship as a spendthrift regains his full legal capacity, therefore, if he becomes naturalized in a country under the local law of which such disability is unknown.<sup>144</sup>

A foreigner who has acquired a de facto domicile in France may become subject to the French rules as to guardianship by virtue of the renvoi doctrine accepted by the French courts, if the national law refers the matter to the law of the place of domicile.<sup>145</sup>

Under the law of some countries, including France, the ward is protected in respect to the management of his property by

<sup>138</sup> *Guntzberger v. Rivière*, Trib. civ. Seine, Aug. 3, 1888, 17 Clunet 872; *Hausman v. Squéart & Hausman*, Trib. civ. Arlon, March 1, 1894, 22 Clunet 171.

<sup>139</sup> Transmission of property is said to be only indirectly affected. In re *Retortillo & Juan Coghén y Llorente*, App. Pau, July 9, 1907, 35 Clunet 183.

<sup>140</sup> In re *Retortillo & Juan Coghén y Llorente*, *supra* note 139. See also, *Tschacher v. Comte de Talleyrand-Périgord*, App. Paris, Dec. 7, 1905, 2 REV. DE DR. INT. PR. 580; *Zermati v. Suissa*, App. Alger, June 17, 1909, 7 REV. DE DR. INT. PR. 401; *Duc de Talleyrand & Sagan v. Comte de Périgord*, Trib. civ. Seine, May 26, 1910, 37 Clunet 1246.

<sup>141</sup> *Sidi Belkassen v. Ali Ben Karkeri*, Cass. (civ.), June 13, 1893, 21 Clunet 562; *Banque Parisienne v. De Graffenried*, *supra* note 110.

<sup>142</sup> AUDINET, *op. cit. supra* note 46, at 541.

<sup>143</sup> See *supra* note 23.

<sup>144</sup> *Kann v. Martin du Gard*, Trib. civ. Seine, Nov. 10, 1905, 33 Clunet 145; In re *Weill*, Trib. civ. Seine, Dec. 31, 1910, 7 REV. DE DR. INT. PR. 348; 38 Clunet 889; In re *Raffalovich*, Trib. civ. Seine, May 6, 1911, 7 REV. DE DR. INT. PR. 349.

<sup>145</sup> See *Soulié v. Latorre*, App. Paris, March 15, 1899, 26 Clunet 794; note by Audinet, S. 1899, 2, 105.

the guardian by a lien on the guardian's property. Foreigners are not entitled to such a lien, however, in accordance with their national law with respect to property in France, such a lien being regarded as a strict civil right which is not available to foreigners in the absence of an "authorized" domicil or a treaty provision.<sup>146</sup>

It has been assumed so far that the national law of the guardian and ward was the same.<sup>147</sup> If the nationalities should differ, that of the ward would probably be preferred.

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<sup>146</sup> *Seligman v. Frentzel*, Cass. (civ.), May 20, 1862, D. 1862, 1, 201.

<sup>147</sup> Foreigners could formerly not be guardians of French wards. An exception is recognized today in favor of ascendants. *Du B. v. T.*, Cass. (civ.), Feb. 16, 1875, S. 1875, 1, 193 and note by Labbé.

<sup>148</sup> See *Berta v. Mazzolini*, *supra* note 109; S. 1911, 1, 385 and note by Audinet; D. 1912, 1, 457, and note by Pic.