THE DIVORCE OF AMERICANS IN FRANCE

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The first French law authorizing divorce *a vinculo matrimonii* by judgment was enacted in 1792, the very day of the fall of the Bourbon Monarchy. Prior thereto, separation *a mensa et thoro* alone was countenanced by the strongly clerical Kingdom. The rush to divorce under the new liberty was such that in the Year VI of the Republic the number of divorces exceeded that of marriages. The *Code Napoléon* of 1803 established divorce for cause and even by mutual consent; though Napoleon's own divorce from Josephine is the only known instance of the use of a consent method under the Code. Divorce was abolished in 1816 at the reëstablishment of the Kingdom, and separation only could be had in France from that time until the Third Republic. The articles of the Civil Code for divorce based upon cause were reënacted by Law of July 27, 1884, the articles for divorce by mutual consent remaining abolished. With some amendments, this is the law that now governs the institution.

Today, divorce is again frequent in France; separations are but a quarter as numerous. In 1885, 4,277 divorces were recorded; in 1913 the figure had risen to 15,372; in 1921, to 21,033. Now the figure exceeds 30,000. The ratio of divorce to population was 70 per hundred thousand in 1922; in America it was then 135. About 85 per cent of the divorce petitions are granted. The wife is plaintiff in 65 per cent of the divorce suits. In 90 per cent of the actions the cause alleged is "gross insults." Foreigners of many nationalities resort to France for their divorces; Americans, however, lead the list. No official figures exist of divorce in France by nationalities. From personal observation the writer can give an estimate of reasonable accuracy so far as Americans are concerned.

Between 1919 and 1927 the number of American couples divorced in France rose from a very few to several hundred a year. In 1922, one hundred a year was passed; in 1926 the three hundred mark was reached. A reaction set in during 1927; probably less than two hundred judgments involving United States citizens eventuated that year. In 1928 and 1929 the figure dropped below one hundred. The rate continued to fall between 1930 and 1934; the number in the last year is believed not to exceed twenty-five. Even the latter number is far in excess of the usual ratio,

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either in France or America, and indicates extensive migration for divorce. How does one explain the phenomenon of American divorce in France, its rise and fall?

To answer this question, the legal background of French divorce must be briefly explained. The grounds for divorce under the Civil Code are numerous, broad and liberally applied. Articles 229-232 of the Code permit judgment of divorce for adultery, violence, cruelty, gross insults, or penal condemnation to a corporal and degrading punishment. Article 310 allows the conversion of separation into divorce at the prayer of either party and as of right after three years from the judgment of separation. It is considered in France that society has an interest in seeing that marriages that occasion scandal shall be dissolved, equal to its interest in seeing that marriages which do not occasion scandal shall be preserved. An award of divorce is largely a matter of judicial discretion, and the courts have a wide latitude in appraising and weighing the facts and deciding whether or not the particular marriage ought to be ended.

According to French private international law, or conflict of laws, the grounds for divorce in the case of aliens are not those of *lex fori* alone, but of *lex fori* and *lex nationalis* combined. Hence Americans to obtain a divorce in the Republic must show a cause of action both in French and American law. In the Knibloe case, a wife, formerly American but restored to French nationality by decree, was not allowed to divorce her American husband domiciled in New York for habitual drunkenness, as this offense was found not to be a ground in New York.[1] In Viscount M's case, non-support in California law was deemed to be equivalent to gross insults in French.[2] The Valentino case applied Indiana law, finding that desertion was a gross insult and that Indiana law allowed divorce for this offense.[3] When the American grounds are more severe than the French, the difficulty is usually turned by proof that by American conflict of laws grounds are governed by *lex fori* alone, and France accepts the *renvoi*.[4] The proof of American law is made by *Certificat de Coutume*, a certificate of custom in the nature of expert evidence, signed by an American lawyer registered at the United States Consulate in France.

French courts take divorce jurisdiction over American couples if the facts fall within the exceptions to the rule of non-jurisdiction over aliens in matters of status. The rule and the exceptions are matters of custom or jurisprudence, not statute. The exceptions are now so numerous that the rule has almost disappeared and is resurrected when for some reason the judges do not feel inclined to take cognizance of the case. In the Chance case, it was decided that the French courts had jurisdiction to divorce Americans married in Illinois and domiciled in Paris because Illinois law refers to the law of the domicil for divorce jurisdiction.[5] Now, matrimonial domicil

[1] Havre, Nov. 17, 1923, Journal Clunet, 1924, p. 1000. The reference is to the *Journal du Droit International Privé*, formerly published by E. Clunet.

[2] Seine, April 6, 1922, Journal Clunet, 1922, p. 674.

[3] Seine, Jan. 18, 1926, Journal Clunet, 1926, p. 663.

[4] *I. e.*, the reference by the American conflict of laws to the French substantive law of divorce as the *lex fori*.

[5] Seine, Oct. 16, 1912, Journal Clunet, 1913, p. 566.

in France without any *renvoi* is recognized as an exception to the rule of non-jurisdiction. According to the Sickles case, mere matrimonial residence of the spouses in France is not sufficient, when the matrimonial domicil is New York.[6] Neither domicil nor residence of one of the couple in France will suffice for jurisdiction. Thus, the action of former Secretary of State Colby was dismissed because he had come alone to France in 1928 to establish divorce residence, the wife remaining in America. Nevertheless, matrimonial residence in France coupled with some additional reason will lead the court to retain a case. The Gould case decided that the courts of France have jurisdiction over Americans resident in France but domiciled in New York when the adultery complained of took place in the Republic.[7] The anonymous case, "S-S," is also in point. It was held therein that Americans married and permanently established in France might submit their marital differences to the French tribunal, particularly as the offenses took place in France.[8] Jurisdiction is more a matter of discretion than of law, in so far as aliens are concerned. The local courts will accept jurisdiction when there would be some hardship if they did not do so. In the *Affaire Crane*, an American wife was allowed to set up a *bona fide* separate domicil in France under circumstances in which American law would recognize her right thereto, and then to sue her American husband, who had remained in the United States, upon proof that she could not sue him in America without renouncing her French domicil and residing a period of time in her own country before action.[9]

In 1927 the jurisdictional practice was modified in two particulars, although the law has remained unaltered. To bring a divorce action it has always been necessary for the intended plaintiff to summon the intended defendant to a preliminary conciliation hearing before the President of a Term or Chamber of the Civil Tribunal of First Instance. The order of said Judge is required to authorize the summons in the action itself, after the attempt at conciliation has failed. In Paris, all divorce conciliation hearings are now assigned to the 4th Chamber of the Tribunal of the Seine and can no longer be brought in any Chamber. Furthermore, the President of that Chamber has been advised by the Minister of Justice to apply a six months' residence test to the parties before granting leave to sue. Also, the District Attorneys, acting as do the King's Proctors in England, have been instructed to oppose the grant of divorce to aliens unless these have lived continuously in France for the last six months. The official circular is confidential; consequently its terms are not precisely known. So it is that today, while the French rules on jurisdiction do not contain as prerequisite a period of domicil or residence of the parties in France, unless both aliens have lived continuously in the Republic for six months jurisdiction is very likely to be refused. From 1927 to 1930 the President scrutinized rather carefully the evidence on domicil and required aliens to produce a copy of a long-term

[6] Paris, June 12, 1907, Journal Clunet, 1908, p. 148.
[7] Cassation, Dec. 8, 1920, Journal Clunet, 1921, p. 518.
[8] Seine, March 4, 1895, Journal Clunet, 1896, p. 602.
[9] Seine, May 14, 1926 (unreported).

lease taken out several months before action brought, an invoice showing the importation of household goods into France from their own country, and a French income tax receipt. The evidence now required is less drastic, but the time has passed when the question of domicil was not investigated practically at all, and an allegation of domicil not traversed was taken as sufficient for jurisdictional purposes. The instructions to the District Attorneys have not been rigidly observed, these officials being too busy to do much investigation into the truth of the evidence supplied the court.

When only one of the parties is American, the other French, certain statutory provisions apply on the matter of jurisdiction. By Article 14 of the Civil Code, a French citizen can always sue an alien in France on a cause of action sounding in contract. Marriage is a contract and a divorce suit is in the French view rather a contract action than a tort action as it is with us. By Article 15 an alien can sue a Frenchman in France on a contract made outside of France; *a fortiori*, he may do so on a contract made in France. Consequently, the French courts will always take jurisdiction when one of the spouses is French, regardless of where the marriage took place or the matrimonial domicil is located or the offenses occurred.

It not infrequently happens that Americans litigating for divorce in France have already engaged in the same pastime in America. Divorces rendered in the United States are rarely recognized in France. A California divorce successfully ran the French legal gauntlet, but five American divorces have wholly failed of recognition, namely, divorces of Florida, Illinois, Utah, Nevada, and Louisiana, and one New York divorce was considered in evidence without acceptance or rejection. In the Waddington case, the wife's Reno divorce was considered invalid in France because neither party resided in Nevada at the time of the decree and the French court had already pronounced separation of the couple.[10] An American divorce was successfully contested collaterally in an action in France brought to annul a Wisconsin marriage.[11]

A French judgment of divorce produces in that country the effects expressly stated therein, but produces the implied legal effects of *lex nationalis, i.e.*, American law, in the case of United States citizens.[12] The French judgment's express relief or award may vary from that customary in America. So in the Count Salm case, divorce was granted to the American wife at the same time as separation was granted to the Austrian husband on his counterclaim.[13] Provisional remedies will often be granted in harmony with the French, not the foreign, law. So French law, not American or Turkish, was applied to decide the provisional custody of the children in an action between an American wife and her Turkish husband.[14] French judgments may be sometimes attacked collaterally in France, by third persons whose

[10] Seine, April 11, 1935 (not yet reported).
[11] Seine, Jan. 8, 1891, and Paris, April 5, 1891, Journal Clunet, 1891, p. 227.
[12] Paris, June 15, 1904, Le Droit, Aug. 4, 1904. [13] Seine, April 11, 1927 (unreported).
[14] Seine, Nov. 29, 1904, Journal Clunet, 1905, p. 187.

personal or pecuniary interests are affected thereby and who are not bound by the judgment.

Looking at the subject of the divorce in France from our legal viewpoint, the following striking features are observed:

(1) Jurisdiction over aliens is discretional rather than purely a question of law.

(2) Personal service of process is of no greater efficacy than substituted service and there is no constructive service by publication or personal service outside France.

(3) Foreign law on grounds and defenses is considered with the French; this is also true of matters of procedure affecting the merits and rules of evidence.

(4) Foreign statutory effects will usually be applied to French judgments between aliens.

(5) French default judgments will lapse if not executed within six months, although already recorded.

(6) Certain French judgments are not irrevocable until the recourse of new trial has been exhausted, and such recourse is sometimes indefinitely available, *i.e.,* until two months after the discovery, in the case of fraud, forgery, or newly discovered evidence of a decisive character.

(7) An action for damages will lie in addition to alimony for breach of the marriage leading to divorce or separation, and such action may be brought even after the judgment.

(8) An action will lie for alimony notwithstanding the contrary terms of a settlement and may be brought after the divorce.

(9) In order to equalize the statutory effects, the losing party may sue for divorce or separation after a judgment against him has been pronounced in an action in which he failed to counterclaim.

(10) A judgment or judgments of divorce or separation may exist simultaneously for or against both parties.

(11) Recrimination is not a defense in French law.

(12) In the court's discretion, all evidence (opinion, hearsay, affidavits, and statements made without cross examination) is available for what it is worth.

(13) Agreements which maintain a *de facto* separation are void in France, even though made by aliens outside France and valid according to foreign law.

(14) An appeal is a second trial before another court and not a reconsideration of the first one by another court.

One may also mention that by French law an action to annul a marriage may be brought even after a divorce, because the consequences in relation to persons and property will be different, and an action will always lie in France to annul a French marriage, even between two aliens. So also, the French courts will usually take jurisdiction to adjust the property rights of foreigners married in France under a French contract, or divorced there, even though the property concerned may not lie in France.

It is a strange thing that with all the divorces of Americans in France there

appears to be but one case in which the validity of such divorces has come up for adjudication in this country, namely, the famous Gould case.[15] The French judgment was recognized as valid, a fact which did a great deal to inspire confidence here in French divorces, although the facts of the case are not representative of most of the divorces rendered there. In *Hilton v. Guyot*,[16] the United States Supreme Court said: "A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the public policy of its own laws." In many states, reciprocity is the test of recognition of foreign judgments. In New York State recognition of a foreign judgment depends upon its persuasiveness, not upon reciprocity.[17]

In the Gould case, the parties were domiciled in New York, according to the plaintiff husband's will, but resided in France and the wife was found in adultery there. The New York Court of Appeals said: "Under the circumstances of this case, the policy of this state is not offended by the recognition of the judgments of the court of France. Even if it be assumed that we are not required because of the absence of domicile to give effect to their judgments, we are not prohibited from doing so where recognition, in conformity to the principle of comity, would not offend our public policy."[18]

The reasons for the popularity of France as a place for the divorce of Americans are many. A French divorce has come to be considered fashionable in some American social circles, and is regarded as having a certain *cachet*. It is popularly deemed superior to a Mexican or Nevada divorce. Until 1927 French divorces could be obtained with celerity and cheapness. Sometimes only a few weeks intervened between the arrival of the couple and their divorce. At one time a divorce could be obtained for eight hundred dollars. Those days have passed. But there still remain other attractions, particularly the secrecy which surrounds the hearings and the liberality of the grounds for which relief may be obtained. The grounds for divorce in the Civil Code are as generous as in America's most liberal states. Oral testimony is rare and when required is taken privately in chambers. Evidence is not open to public inspection and reporters are excluded. The decision of the court is concisely and discreetly stated. No co-respondents are made parties and any accomplices are usually referred to by initials only. Newspaper reports of the litigation are forbidden. Generally nothing whatever appears in the press until after judgment has been rendered, and then the mere fact of divorce is announced in the case of Americans in the Paris editions of the *New York Herald* and *Chicago Tribune*. French papers rarely concern themselves with the matrimonial troubles of foreigners. In view of these advantages it is probable that France will remain indefinitely a preferred place for the divorce of the richer Americans, although the abnormal rate of resort to French courts by our citizens from 1920 to 1927 is not likely to recur.

[15] Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923).

[16] 159 U. S. 113, 167 (1895).

[17] Johnson v. Compagnie Generale Transatlantique, 242 N. Y. 381, 152 N. E. 121 (1926).

[18] Gould v. Gould, 235 N. Y. at 29, 138 N. E. at 494.

It may be of interest to explain the reasons for the rapid decline after 1927 of the divorce of Americans in France. In that year, the American papers in America and in France published a list of about three hundred American couples known to have been divorced in 1926 in France. The names created a sensation in both countries. More than half the couples had been married in New York. It was a matter of common knowledge that many of the couples had never spent any considerable time in France and had returned to America. The French Ministry of Justice completed in June, 1928, an investigation into the matter. It found irregularities in procedure and petty grafting. The principal irregularities consisted in improper evidence of domicil submitted to the courts and non-observance of the required intervals for the performance of legal formalities. The matter was brought before the Court of Cassation, which has disciplinary jurisdiction over French magistrates and court employees. The Court imposed certain minor penalties on court officials. Three of the forty-five American lawyers practicing in Paris were publicly reprimanded, but no other action was taken against them. France does not, and never did, wish to be a divorce Mecca for Americans or other aliens. The "mill" was the creation of the American lawyers established in Paris, not of the French *avocats* or *avoués*. The former got about two-thirds of the fees and profits, the latter did most of the work. The American lawyers were necessary to give the Certificate of Custom, the French to be attorneys of record and to plead in court. American couples would nearly always engage an American lawyer to get the divorce; rarely would they go direct to a French *avoué*.

After 1928 the American lawyers experienced more and more difficulty in getting the courts to pass their cases. The Certificates of Custom were more often challenged on the question of their accuracy as expositions of American law; the evidence on domicil was more closely investigated. No longer could one apartment do as residence for several couples! An attempt was made to get the provincial courts outside Paris to take a lenient attitude, but the rural judges were afraid to touch these now "hot" cases. The divorce mill collapsed. American lawyers began to advise their clients to try Switzerland, Holland, even Latvia, but the endeavor did not work out very well, for Americans like to follow the crowd and not to pioneer in such matters.

About this time Mexico began to go for the American divorce trade, her states enacted exceedingly liberal laws for divorce, and the less wealthy Americans began more and more to resort to Yucatan, Sonora, and Campeche. While such divorces have fared badly before the American courts, the number of Mexican divorces of Americans is still exceedingly great. Cuba passed a liberal divorce law. Nevada reduced her period of residence from six months to three months, then to six weeks. The depression drove many Americans home from France. Competition and economics combined to destroy the position of France as an American divorce resort for all but the so-called social *élite*. French divorce for Americans is not now an acute contemporary problem; it was once, and it may again become this, but probably not for many years to come, perhaps never.