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FAMILY LAW—VALIDITY OF MEXICAN BILATERAL DIVORCE DECREE UPHeld WHERE OFFICIAL RESIDENCE REQUIREMENT OF ONE DAY WAS MET

Plaintiff husband and defendant wife were married in New York in 1956. In 1962 plaintiff brought an action to annul the marriage alleging that defendant had married one Felix Kaufmann in 1945 and that defendant's first marriage was still in effect. In answer, defendant pleaded a Mexican decree of divorce obtained by her first husband, Kaufmann, in 1954¹ on grounds of "ill treatment and incompatibility of characters." Kaufmann had entered Mexico, presented his divorce petition together with a certificate showing that he was listed in the official book of residents of the City of Juarez,² and returned to the United States on that same day. The defendant appeared by attorney on the next day, submitted to the court's jurisdiction and admitted the allegations of the complaint. The court granted a decree of divorce on the same day. Subsequently, plaintiff, knowing the facts of the Mexican divorce, married defendant. The Supreme Court³ granted a judgment granting an annulment of the marriage, based on the conclusion that the Mexican decree had been rendered by a tribunal without jurisdiction since neither Kaufmann nor defendant had been domiciled in the State of Chihuahua. The Appellate Division, two judges concurring on additional grounds, *held*, reversed; annulment vacated. Lack of domicile, as the concept is generally applied in the United States, is not necessarily a bar to recognition of a foreign divorce; defendant's first marriage did not constitute grounds for annulment of her second marriage, since the first marriage had been legally dissolved. *Rosenstiel v. Rosenstiel*, 21 A.D.2d 635, 253 N.Y.S.2d 206 (1st Dep't 1964).⁴

In the absence of a treaty prescribing the effect to be given a decree rendered in another country, its recognition is dependent upon the somewhat nebulous rule of comity.⁵ In order to pass upon the question as to whether a judgment

1. In the First Civil Court, District of Bravos, City of Juarez, State of Chihuahua, Mexico.

2. The Chihuahua law of divorce, Article 24, reads as follows: "Residence, . . . shall be proven by the respective certificate from the Municipal Register of the place." In other words, once the certificate is issued and the provisions of Article 24 of the Law of Divorce are complied with, the party is deemed a resident so that the Mexican court acquires in personam jurisdiction.

3. *Rosenstiel v. Rosenstiel*, 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct. 1964).

4. See *Wood v. Wood*, 41 Misc. 2d 95, 245 N.Y.S.2d 800 (Sup. Ct. 1963), modified 22 A.D.2d 660, 253 N.Y.S.2d 204 (1st Dep't 1964) (companion case with essentially the same facts except that plaintiff did not acquire a certificate of residence).

5. *Hilton v. Guyot*, 159 U.S. 113 (1895) (judgments rendered in a foreign country are only prima facie evidence when sued upon in this court); *c.f.* *Pandelides v. Pandelides*, 182 Misc. 819, 47 N.Y.S.2d 247 (Sup. Ct. 1944) (foreign decrees will be recognized, not by any reason of obligation, but upon considerations of utility and the mutual convenience of nations); "There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgment rendered by the courts of another nation." Appellant's brief, p. 49, *Hilton v. Guyot*, *supra*, quoted in *Williams v. North Carolina*, 325 U.S. 226, 228 n.4 (1945); see

RECENT CASES

of a foreign country is to be recognized, there must be a disclosure of subject matter and parties. Whether the foreign court had jurisdiction over the parties will be scrutinized.⁶ Thus, under comity—as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever allegations of jurisdiction may be claimed by the foreign court in handing down a judgment.⁷ In recent years New York courts, in the exercise of comity, have in some instances accorded recognition to divorces granted in various foreign countries, including Denmark,⁸ France,⁹ Germany,¹⁰ and Mexico.¹¹ In other instances recognition has been withheld where the decree contravenes the public policy of the state in which recognition is sought;¹² where the country in which the decree was rendered does not accord recognition to American decrees;¹³ where the decree was issued in the absence of jurisdiction of the foreign court;¹⁴ or where the parties seeking the decree lacked domicile in the foreign jurisdiction.¹⁵ Although a foreign decree will generally be recognized if the spouses were domiciled in the country at the time the decree was rendered,¹⁶ it is not always necessary that the parties actually reside in the foreign country at the time of the decree, for a foreign decree has been recognized by New York courts where the country in which the decree was rendered was the situs of the “marital domicile,” though both parties had become residents of other countries.¹⁷ However, where neither party is domiciled in the foreign country at the time of the divorce, the decree

generally Annot., 46 A.L.R. 446 (1927); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193 (1951).

6. See, e.g., *Martens v. Martens*, 284 N.Y. 363, 31 N.E.2d 489 (1940).

7. See, e.g., *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955).

8. In *Weil v. Weil*, 26 N.Y.S.2d 467 (Dom. Rel. Ct., N.Y.C. 1941), the husband tried to set aside a Danish divorce which the petitioner-wife had obtained against her first husband. The court held that since “. . . the foreign country had jurisdiction over the marital res by reason . . . of the voluntary appearance . . . by both parties; . . . and by reason of the additional fact that the ground of divorce, namely, adultery, is recognized by the law of New York . . . then by all rules of comity and precedent the foreign decree must be recognized”, 26 N.Y.S.2d 467, 471 (1941).

9. In *Gould v. Gould*, 235 N.Y. 14, 138 N.E. 490 (1923), the New York court dismissed the action for an absolute divorce on the grounds that plaintiff was not the wife of the defendant, since the Civil Tribunal in the City of Paris had given a decree of divorce, on the basis of the charge of adultery, to the defendant.

10. In *Martens v. Martens*, 284 N.Y. 363, 31 N.E.2d 489 (1940), plaintiff's divorce action in New York was dismissed on the ground that a valid decree had been granted in Germany, even though the foreign decree was based on grounds not recognized in New York.

11. In *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct. 1938), the plaintiff (as in the instant case) instituted a divorce action in the State of Chihuahua, Republic of Mexico, and the defendant appeared by attorney. The New York court refused to let the plaintiff, who was not only party to the Mexican decree, but procured it, attack the decree.

12. *Hubbard v. Hubbard*, 228 N.Y. 81, 126 N.E. 508 (1920) (whether or not the operation of a foreign decree will contravene the policy of the state is exclusively for the courts of the state to determine).

13. See *Hilton v. Guyot*, 159 U.S. 113 (1895); *Gould v. Gould*, 235 N.Y. 14, 138 N.E. 490 (1923) (*semble*).

14. *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct. 1938).

15. See *Marx v. Marx*, 106 N.Y.S.2d 633 (Sup. Ct. 1951); See Annot., 28 A.L.R.2d 1303 (1953); see generally 3 Nelson, *Divorce* § 33.11 (2d ed. 1935).

16. *Sorensen v. Sorensen*, 219 App. Div. 344, 220 N.Y. Supp. 242 (2d Dep't 1927).

17. *Hansen v. Hansen*, 255 App. Div. 1016, 8 N.Y.S.2d 655 (2d Dep't 1938).

will generally not be recognized,¹⁸ and this holds true especially if neither party had ever been present in the foreign jurisdiction.¹⁹ In such a case, the decree will be void due to lack of jurisdiction because of absence of domicile, although both parties consented to the divorce.²⁰

To fully understand the New York view on divorce one must distinguish between ex parte and bilateral decrees. In the ex parte decree, only one party appears in the divorce proceeding; the other spouse does not appear, even though he or she may have been duly notified that a proceeding has been instituted.²¹ To have ex parte decrees upheld, the party in whose favor the decree was granted must establish both that there was a bona fide domicile in the divorce-granting state and also that the requirements of due process with respect to notice to the other spouse have been complied with.²² Even if a bona fide domicile is not established, an ex parte decree can serve to estop the proponent from later denying its validity.²³ In the bilateral proceeding, one party has to be physically present in the divorce-granting jurisdiction while the other party usually appears by a duly authorized attorney. These proceedings generally follow a separation agreement. After the separation agreement is signed, one of the parties goes to the foreign jurisdiction with the cooperation and appearance of the other spouse.²⁴ For a quarter of a century, New York decisions have given the Bar to understand that a Mexican bilateral divorce of the kind involved in the instant case would be recognized in New York.²⁵ These

18. *Shannon v. Shannon*, 247 App. Div. 790, 286 N.Y. Supp. 27 (2d Dep't 1936); see *Lefferts v. Lefferts*, 263 N.Y. 131, 188 N.E. 279 (1933) (foreign decree ineffective because the plaintiff had no intent to change his domicile); see Annot., 105 A.L.R. 817 (1936).

19. *Lotz v. Lotz*, 49 N.Y.S.2d 319 (Sup. Ct. 1944).

20. *Shannon v. Shannon*, 247 App. Div. 790, 286 N.Y. Supp. 27 (2d Dep't 1936).

21. See, e.g., *Alfaro v. Alfaro*, 7 N.Y.S.2d 949, 165 N.E. 2d 880, 198 N.Y.S.2d 318 (1960) (the wife was served but did not appear); *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902, 54 A.L.R.2d 1232 (1955), (the defendant in the action did not appear); *Marum v. Marum*, 8 A.D.2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959) (the defendant was not served and did not appear).

22. See *Williams v. North Carolina*, 325 U.S. 226 (1945); *Bell v. Bell*, 181 U.S. 175 (1901).

23. In *Starbuck v. Starbuck*, 173 N.Y. 503, 66 N.E. 193 (1903), the court held that where a party has invoked the jurisdiction of any court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction; in *Pandelides v. Pandelides*, 182 Misc. 819, 47 N.Y.S.2d 247 (Sup. Ct. 1944), the plaintiff arranged for the specific procedure that the defendant should go through to obtain a divorce from her first husband on the Island of Cyprus. Plaintiff subsequently married the defendant. Even though all parties concerned were domiciled in the United States, the court refused to allow the plaintiff to raise that issue, saying plaintiff ". . . should not be put in a position where he can avoid the consequences of his own connivance." 182 Misc. 819, 820, 47 N.Y.S.2d 247, 248 (1944); in *Carbone v. Carbone*, 166 Misc. 924, 2 N.Y.S.2d 869 (Dom. Rel. Ct. N.Y.C. 1938), the court found that the wife had not set up domicile in Mexico, and the husband never appeared either personally or by counsel, yet the husband was estopped from questioning the decree since he accepted the decree of divorce by remarrying. *But see*, *Alfaro v. Alfaro*, 5 A.D.2d 770, 169 N.Y.S.2d 943 (1958); *cf.* *Shannon v. Shannon*, 247 App. Div. 790, 286 N.Y. Supp. 27 (2d Dep't 1936).

24. Address by the Honorable Morris Ploscowe to The Lawyer's Club Luncheon, March 3, 1964.

25. See, e.g., *Heine v. Heine*, 19 A.D.2d 695, 242 N.Y.S.2d 705 (2d Dep't 1963), (where the plaintiff appears personally in the divorce action within the Mexican jurisdiction, and the defendant appears by attorney, our courts will recognize the validity of the resulting decree; *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct. 1938); see 150 N.Y.L.J. 53 (1963)

proceedings are easily distinguishable from "mail order" divorces, in which both parties submit to jurisdiction but neither appears physically; yet attention to these distinctions has had to be forced upon the court in some instances.²⁶ Of course "mail order" decrees have been denied recognition even by way of estoppel,²⁷ since the entire scheme of such decrees is repugnant to public policy.²⁸

The majority opinion in the instant case notes that New York recognizes bilateral decrees of divorce from other jurisdictions involving New York domiciliaries where both husband and wife appeared in the divorce proceedings, despite the fact that domicile, as the concept is generally understood, was not established in the divorce-granting country. The basic error of the trial court lay in its belief that bona fide domicile is a necessary prerequisite for the recognition of a bilateral decree of divorce granted by a foreign country. The opinion points out, that since the decree was valid under Mexican law, it would not be against public policy to recognize it in New York since "[o]ur courts . . . without inquiring into domicile, have frequently recognized Mexican decrees if, as here, the petitioning spouse has appeared in person and the answering spouse in person or by attorney."²⁹ The Court of Appeals has indicated that, though bona fide domicile is absent, it need not be a bar to the validity of the decree. In *Gould v. Gould* the Court of Appeals stated: "Even though 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."³⁰ The majority opinion concludes that domicile, in its traditional sense, is required where only *one* party proceeds *ex parte*,³¹ but that New York is indifferent, in the judicial sense, to whether such domicile is acquired in the foreign country, if *both* parties appear.³² Even in the companion case of *Wood v. Wood*,³³ where the plaintiff failed to register, there is authority from the Court of Appeals that such a bilateral decree should be recognized.³⁴ The concurring opinion in the instant case points out that an additional ground for upholding the decree is the principle of equitable estoppel. Certainly it seems just to estop one who has consented to the entry of judgment of divorce in a foreign jurisdiction from questioning

citing thirty decisions which have upheld such decrees; see generally, Siegel, Commentary on the Domestic Relations Law 13-17 (1964).

26. See *Rosenstiel v. Rosenstiel*, 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct. 1964).

27. See, e.g., *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948); *Querze v. Querze*, 290 N.Y. 13, 47 N.E.2d 423 (1943); *Vose v. Vose*, 280 N.Y. 779, 21 N.E.2d 616 (1939).

28. *Weil v. Weil*, 26 N.Y.S.2d 467 (Dom. Rel. Ct. N.Y.C. 1941). *But cf.* *Considine v. Rawl*, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (Sup. Ct. 1963).

29. *Ronsnstiel v. Rosenstiel*, 21 A.D.2d 635, 638, 253 N.Y.S.2d 206, 209 (1st Dep't 1964).

30. 235 N.Y. 14, 29, 138 N.E. 490, 494 (1923).

31. *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902, 54 A.L.R.2d 1232.

32. See authorities cited note 25 *supra*.

33. 22 A.D.2d 660, 253 N.Y.S.2d 204 (1st Dep't 1964).

34. *Boxer v. Boxer*, 7 N.Y.2d 781, 163 N.E.2d 149, 194 N.Y.S.2d 47 (1959). (Alabama law was violated with respect to residence, but because Boxer's wife appeared by attorney the decree was recognized). *But cf.* *Rosenbluth v. Rosenbluth*, 34 Misc. 2d 290, 228 N.Y.S.2d 613 (Sup. Ct. 1962).

the validity of the decree.³⁵ It has been held that, even though the decree is void, where a party has conspired to obtain it and has recognized it by his conduct, he will not be permitted to impeach its validity.³⁶ The question in the instant case is whether the plaintiff, a stranger to the divorce, may attack its validity. Only those strangers whose pre-existing rights would be prejudiced by the decree may attack it. Since such strangers were not parties to the action, or entitled to manage the cause, or to appeal from the judgment, they are by law allowed to impeach it only when it is attempted to be enforced against them in derogation of rights or interests acquired prior to its rendition.³⁷ In the instant case the plaintiff's rights were not prejudiced. If anything, he took advantage of the decree, for he married the defendant. No fraud was perpetrated on him; he was fully aware of the facts concerning his wife's prior marriage and divorce before he married her.

The instant case and its companion case, *Wood v. Wood*,³⁸ were argued before the Court of Appeals on February 1, 1965, and both are presently *sub judice*. It is submitted that the Court of Appeals should affirm the instant decision. In granting dissolution of marriage the controversy over the respective roles of church and state has raged for many centuries. Some theologians have said that there may properly be distinctions between what the law permits and what Christians ought to do.³⁹ The law may sensibly set up liberal provisions for divorce so that "wicked and unmanageable people" may be divorced instead of "vexing or murdering each other or . . . living together in incessant hate, discord, and hostility."⁴⁰ Although the New York legislature has retained strict rules of divorce, a fact long criticized,⁴¹ the Court of Appeals should recognize that by the same token the legislature's failure to overrule those cases which uphold foreign bilateral divorce decrees perhaps indicates that such decrees are consistent with public policy. If the Court of Appeals strikes down the instant

35. See *Matter of Fleischer's Estate*, 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. N.Y.C. 1948); *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct. 1938).

36. See, e.g., *Kelsey v. Kelsey*, 237 N.Y. 520, 143 N.E. 726 (1923); *Brown v. Brown*, 242 App. Div. 33, 272 N.Y. Supp. 877 (4th Dep't 1934); *Matter of Swales' Estate*, 60 App. Div. 599, 70 N.Y. Supp. 220 (4th Dep't 1901).

37. 1 Freeman, *Judgments* § 319 (5th ed. 1925).

38. 22 A.D.2d 660, 253 N.Y.S.2d 204 (1st Dep't 1964).

39. "The Sermon on the Mount," *Luther's Works* 21 (1955).

40. *Id.* at 94; Virginia added a ninth ground for divorce in 1960. The ground applies ". . . on the application of either party if and when the husband and the wife have lived separate and apart without any cohabitation and without interruption for three years . . ." Va. Code Ann. § 20-91(9) (Repl. Vol. 1960). Many states have similar statutory provisions. (Alabama, Arizona, Arkansas, Louisiana, Maryland, North Carolina, Rhode Island, Wyoming, Washington, and District of Columbia) The legislative concept embodied in the statute is that it is better for spouses who have been living separately and apart for the statutory period and have found reconciliation to be hopeless to have an opportunity to remarry and re-establish the family relationship. *Otis v. Baham*, 209 La. 1082, 26 So. 2d 146 (1946); see Annot., 51 A.L.R. 763 (1927).

41. "New York has divorce laws of unusual stringency, considerably mitigated by perjury and collusion. It would be safe to guess that in at least a third of the divorces granted in this State the infidelity is fictitious . . . These things are the natural consequences of a divorce law which is out of harmony with the present opinion of a large part of the public . . ." *New York Times*, April 22, 1922, p. 8, col. 3.

RECENT CASES

decree, the plaintiff, after having married the defendant with full knowledge of the foreign divorce, will have the power to have the defendant declared a bigamist.⁴² He should not be permitted to place that stigma upon her in this way. In matrimonial actions, courts should apply equitable principles where the facts warrant, by refusing to grant relief to a plaintiff who does not come into courts with clean hands.⁴³ With the decision of the instant case the Court of Appeals has the power to return New York law to an unreasonably conservative stage,⁴⁴ or to continue to allow egress from unhappy unions. As long as New York State retains its unrealistic divorce laws, innumerable couples will flock elsewhere for solutions of their matrimonial problems. New York couples should be permitted to dissolve their marriages with ostensible propriety by complying with the formalities required in another country.⁴⁵

HARRY J. POOLE

42. See *People v. Weed*, 96 N.Y. 625 (1884), *affirming*, 29 Hun. (N.Y.) 628 (1883).
43. See *Bays v. Bays*, 105 Misc. 492, 174 N.Y. Supp. 212 (Sup. Ct. 1918).

44. *Niles' Register* 28 (June 11, 1825), p. 229, as related in Blake, *The Road to Reno* 80 (1962), published the following item of doubtful authenticity, but pointing out a lesson to legislators and courts; The following inscription is written in large characters over the principal gate of the City of Agra, in Hindustan: "In the first year of the reign of King Julief, two thousand married couples were separated, by the magistrates, with their own consent. The emperor was so indignant, on learning these particulars, that he abolished the privilege of divorce. In the course of the following year, the number of marriages in Agra was less than before by three thousand; the number of adulteries was greater by seven thousand; three hundred women were burned alive for poisoning their husbands; seventy-five men were burned for the murder of their wives; and the quantity of furniture broken and destroyed, in the interior of private families, amounted to the value of three millions of rupees. The emperor re-established the privilege of divorce." It should be noted that according to Jacobson, *American Marriage and Divorce*, 108 (1959) there were more than 4,300 Mexican divorces given to Americans in 1955.

45. This would be in accord with two decisions decided since the instant case. In *Guillermo v. Guillermo*, 43 Misc. 2d 763, 252 N.Y.S.2d 171 (Family Ct. N.Y.C. 1964) and *Hickok v. Hickok*, 151 N.Y.L.J. 30 (1964) the courts held that where the Mexican residence requirements are satisfied, and the defendant appears by duly authorized attorney, New York will recognize the validity of the decree of divorce; see Address by the Honorable Morris Ploscowe to The Lawyer's Club Luncheon, March 3, 1964.