

## RECOGNITION OF FOREIGN COUNTRY DIVORCES: IS DOMICILE REALLY NECESSARY?

Recognition by California courts of judgments rendered in foreign countries rests upon policy considerations similar to those applicable to judgments rendered in sister states. But there is one fundamental point of difference. The effect to be given a sister state judgment is, by virtue of the full faith and credit clause of the federal Constitution, a matter for ultimate decision by the United States Supreme Court. Its decisions, however, are not controlling with respect to recognition and enforcement of foreign country judgments. The effect to be given such judgments, in the absence of treaties,<sup>1</sup> rests with the California Supreme Court. Particularly important is the proper interpretation to be given Code of Civil Procedure Section 1915, which provides:

A final judgment of any other tribunal<sup>2</sup> of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state.<sup>3</sup>

The wording of this statute is much broader than that of Code of Civil Procedure Section 1913,<sup>4</sup> concerning judicial records of sister states. In fact, Section 1915 is too broad to be applied according to its literal meaning. It is unlikely that the legislature actually intended to give a foreign judgment *greater* effect than a California judgment by giving it the effect it would enjoy in the country where rendered as well as the effect of a California judgment. Nor is it to be supposed that the intent was to give foreign judgments greater effect than sister state judgments. For instance, a foreign country judgment would always have to be reduced to a California judgment before enforcement in this state, as is required for a sister state decree.

The principles found in conflict of laws permit greater latitude in refusing to recognize judgments of foreign countries than is permitted under

<sup>1</sup> The United States is not a party to any international agreement providing for the recognition of foreign judgments, such as the Code of Private International Law, approved at the 6th International Conference of American States at Habana, 1928, 86 LEAGUE OF NATIONS, TREATY SERIES 111-381 (1929). Although this treaty was signed by the United States, it was never ratified.

<sup>2</sup> Other than a court of admiralty, which is governed by CAL. CODE CIV. PROC. § 1914.

<sup>3</sup> Prior to 1907, when the code section was amended to its present form, a presumption only was established in favor of a right given by the judgment, rebuttable by evidence of a "want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." According to Professor Lorenzen, the statute was amended for the purpose of assuring the execution of judgments rendered in California against foreign businesses, especially German insurance companies, in consequence of the 1906 earthquake. Apparently the purpose was not achieved. Foreign decrees would not be enforced in Germany unless there was reciprocity. The German Court in refusing to enforce a California judgment declared that it was not a final judgment since a court of equity could always set it aside. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L. J. 188, 202-205 (1919).

<sup>4</sup> "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

the federal Constitution in recognizing sister state judgments.<sup>5</sup> But because of the strong wording of Section 1915, the courts have probably felt compelled to give at least as great effect to foreign country judgments as they would to sister state judgments. Their practice, therefore, has been to deal with a foreign country judgment just as they would deal with one rendered in a sister state. In the area of divorce law, this practice has had a rather startling effect.

Foreign divorces, whether granted in foreign countries or in sister states, have been most frequently attacked in California on jurisdictional grounds. Since the jurisdictional basis for divorce proceedings in the United States has rested upon domicile, the United States Supreme Court had not, until recently,<sup>6</sup> required that full faith and credit be given a decree where plaintiff had not been a bona fide domiciliary of the granting state.<sup>7</sup> The California Supreme Court has denied recognition to sister state decrees where domicile was lacking,<sup>8</sup> and district courts of appeal applied this rule to foreign country decrees, even though the foreign country did not require domicile as a basis for its divorce jurisdiction.<sup>9</sup> These courts, in applying a rule applicable to sister state decrees, have ignored not only the basic principles of conflict of laws, but also the clause in Section 1915 which requires that jurisdiction of a foreign country tribunal be determined "according to the laws of such country."

The California Supreme Court has never directly ruled that domicile is a necessary requisite for recognition of foreign country divorce decrees. The Uniform Divorce Recognition Act, enacted by the California legislature in 1949,<sup>10</sup> prohibits recognition of foreign divorce decrees where *both*

<sup>5</sup> STUMBERG, *CONFLICT OF LAWS* 130-133 (2d ed. 1951); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 *COL. L. REV.* 783 (1950).

<sup>6</sup> Personal jurisdiction may now serve as a substitute for domicile in some instances, see cases cited note 18 *infra*.

<sup>7</sup> *Williams v. North Carolina*, 325 U.S. 226 (1945) (where plaintiff is not a bona fide domiciliary of granting state and service was constructive, no full faith and credit need be given by other states); *Andrews v. Andrews*, 188 U.S. 14 (1903) (where plaintiff was not domiciled in granting state, no full faith and credit need be given even though defendant had been personally served).

<sup>8</sup> *Crouch v. Crouch*, 28 Cal. 2d 243, 169 P.2d 897 (1946) (Nevada decree invalidated on a finding by California court of lack of domicile, even though defendant was personally served); *Kadello v. Kadello*, 220 Cal. 1, 29 P.2d 171 (1934) (held trial court justified in invalidating Nevada decree, where there had been personal service, because evidence of domicile in Nevada was too vague and indefinite); *Brill v. Brill*, 38 Cal. App. 2d 741, 102 P.2d 534 (1940) (although defendant appeared in action, plaintiff was a New York domiciliary, so Nevada divorce decree could not be recognized in California).

<sup>9</sup> *Estate of Hensgen*, 80 Cal. App. 2d 78, 181 P.2d 69 (1947); *Harlan v. Harlan*, 70 Cal. App. 2d 657, 161 P.2d 490 (1945); *Estate of McNutt*, 36 Cal. App. 2d 542, 98 P.2d 253 (1940); *Stewart v. Stewart*, 32 Cal. App. 2d 148, 89 P.2d 404 (1939); *du Quesnay v. Henderson*, 24 Cal. App. 2d 11, 74 P.2d 294 (1937); *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 P.2d 482 (1936); *People v. Harlow*, 9 Cal. App. 2d 643, 50 P.2d 1052 (1935); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (1934); for a criticism of the application of this rule to foreign country decrees, see Ruiz, *The Effect of Section 1915 of the Code of Civil Procedure on Migratory Divorces Procured in Foreign Countries*, 13 *SO. CALIF. L. REV.* 294 (1940).

<sup>10</sup> CAL. CIV. CODE §§ 150-150.4. For a discussion of the Act, see March, *The Uniform Divorce Recognition Act: Sections 20 and 21 of the Divorce Act of 1949*, 24 *WASH. L. REV.* 259 (1949); Runyan, *A Nevada Lawyer Looks at California's New Uniform Divorce Recognition Act*, 25 *L. A. BAR BULL.* 39 (1949); Notes, 37 *CALIF. L. REV.* 660 (1949), 23 *SO. CALIF. L. REV.* 7 (1949).

parties were California domiciliaries at the time of the proceedings.<sup>11</sup> But where both parties were not domiciled in California and the foreign court did not require domicile in order to take jurisdiction, should a finding of domicile be essential to recognition of the divorce in California?

This comment attempts to explain why the district courts of appeal have disregarded the express wording of Section 1915 concerning the jurisdictional requirements of the foreign country and instead superimposed the full faith and credit requirement that plaintiff be domiciled in the place where the divorce was granted. It also examines the advisability of a California Supreme Court ruling that lack of domicile will not necessarily render a foreign country divorce decree invalid, or conversely that a finding of domicile will not validate it; but that reference must be had to the laws of the foreign country in order to determine whether the granting court had jurisdiction.

#### REASONS FOR REQUIRING DOMICILE

The basic reasons why the district courts of appeal have held foreign country decrees invalid in the absence of domicile appear to be: (1) the engrained habit of requiring domicile when determining the validity of sister state decrees; and (2) the policy of discouraging migratory divorce.

##### *The Habit of Requiring Domicile*

The habit of requiring domicile for divorce jurisdiction, while not of long duration, has become so deeply embedded in American jurisprudence it is forgotten that in the last century the doctrine was by no means as readily accepted as it is today.

The early American courts, faced with the problem of whether or not to recognize a foreign divorce, looked to the old countries for applicable principles. They found English theory of divorce jurisdiction to be analogous to contract law, the substantive law of the country where the marriage was celebrated being applied at the forum. Scotland, however, predicated divorce jurisdiction on defendant's presence and proper service within the territory, and applied its own law in adjudicating the action.<sup>12</sup> Civil law jurisdiction was based upon nationality. The American courts, liking none of these theories since each would permit another state or country to control the marital rights and obligations of many of their citizens, developed their own doctrine of divorce jurisdiction: courts of the place where the parties lived and had their home, and where the "cause of action arose," had exclusive jurisdiction over divorce actions.<sup>13</sup>

<sup>11</sup> A presumption of domicile is raised if the party obtaining the divorce was domiciled in California within 12 months prior to the action and resumed residence within 18 months afterwards, or if a residence had been maintained during the absence. CAL. CIV. CODE § 150.2.

<sup>12</sup> For a history of the English-Scottish controversy over divorce jurisdiction, see STORRY, CONFLICT OF LAWS §§ 200-230 (4th ed. 1852).

<sup>13</sup> In *Barber v. Root*, 10 Mass. 260 (1813), this theory was rationalized on the grounds that divorce was like a species of punishment, operating as a redress of the injury, so that the state where the cause of action arose is the society which should inflict the punishment. In *Dorsey v. Dorsey*, 7 Watts 349, 352 (Pa. 1838), it was said that when the parties leave the place of their marriage, the rights which the state has in the marriage are remitted to the new place. "By sanctioning transfer, the state consents to part with the municipal governance incident to it."

This theory by no means found immediate acceptance in all states,<sup>14</sup> but, due in large part to the unifying influence of Justice Story's writings, by 1850 it was the "majority rule." Apparently it was at no time considered that the divorce forum should apply any but local law, although a few courts refused to recognize a divorce granted on grounds not recognized in their own state if the granting state was not the place of marriage<sup>15</sup> or the place where the cause of action arose.<sup>16</sup>

The original theory has, of course, changed considerably over the last one hundred years,<sup>17</sup> due in part to the mobility of the American people and in part to the freedom given a married woman to establish a domicile separate from her husband. But the principle of domicile, whether based upon the place where the cause of action arose, the place of matrimonial residence, or the place where the plaintiff intends to remain indefinitely, underlay all changes. Domicile as a basis of jurisdiction was felt somehow to rest upon a kind of natural law: the interest of the state in its fundamental unit—the family—was immutable and exclusive.

What is necessary in the way of divorce jurisdiction to fulfill the requirements of full faith and credit is today an uncertain and unstable area of constitutional law. It seems likely that personal jurisdiction over both parties could serve as a substitute for domicile in many of the most important kinds of situations.<sup>18</sup> But in 1934, when for the first time a California district court of appeal considered at length the advisability of recognizing a foreign country divorce decree,<sup>19</sup> the fact that a court would take jurisdiction of a divorce action where neither party was domiciled in the country was felt to be a flagrant and intolerable usurpation of power. The doctrine of domicile was by that time so deeply rooted that principles of private international law were ignored and the law applicable to California and sister state decrees alone was considered.

### *Policy Against Migratory Divorce*

Another, and perhaps principal, reason why California district courts of appeal required domicile as a requisite for recognizing a foreign country

<sup>14</sup> For a leading case where all the early authorities are reviewed see *Ditson v. Ditson*, 4 R. I. 87 (1856).

<sup>15</sup> *Lyon v. Lyon*, 68 Mass. (2 Gray) 367 (1854).

<sup>16</sup> *Harteau v. Harteau*, 14 Mass (Pick.) 181 (1833).

<sup>17</sup> *Cheever v. Wilson*, 9 Wall. 108 (U.S. 1869) (full faith and credit must be given where one party has left the matrimonial domicile and acquired a new domicile, if there has been personal service); *Haddock v. Haddock*, 201 U.S. 562 (1906) (if the party at fault establishes a new domicile, full faith and credit need not be given where there has been constructive service); *Williams v. North Carolina*, 317 U.S. 287 (1942) (regardless of fault, full faith and credit must be given where there has been constructive service, if a bona fide domicile has been established); *Williams v. North Carolina*, 325 U.S. 226 (1945) (a finding of domicile by the granting court was subject to reexamination by the courts of other states; if not bona fide, no effect need be given the decree).

<sup>18</sup> *Sheerer v. Sheerer*, 334 U.S. 343 (1948) (where defendant has "participated," he cannot subsequently attack the decree on jurisdictional grounds); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (nor can strangers subsequently attack the decree where there has been "participation" if it would not be permitted in the granting state); *Cook v. Cook*, 342 U.S. 126 (1951) (a state cannot refuse to recognize a decree merely on finding of lack of domicile; it must also determine that defendant had not been personally served or had not appeared).

<sup>19</sup> *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (1934).

divorce decree is that at the time such decrees first came before them, there was no statutory basis for distinguishing between bona fide divorces and those obtained in a foreign jurisdiction solely to evade the California divorce laws. Until 1949, when the Uniform Divorce Recognition Act was enacted in California, the only statute concerning recognition of decrees rendered in foreign countries was Code of Civil Procedure Section 1915, requiring that effect be given foreign country decrees if the foreign court had jurisdiction according to its own laws.

One of the first district court of appeal cases, *Ryder v. Ryder*,<sup>20</sup> involved a Mexican "mail order" divorce. At least one Mexican state, Chihuahua, grants divorces upon written submission of the parties.<sup>21</sup> Thus, California domiciliaries could obtain a divorce in another jurisdiction without either party leaving California. Such a convenient way of evading California laws was not to be permitted. Although both parties in the *Ryder* case had executed documents submitting themselves to the jurisdiction of the Chihuahuan court, the decree was held not to be a bar to a California divorce action. While recognizing the inapplicability of the full faith and credit clause, the court declared that Section 1915 was equally inapplicable, because the Mexican court never had "jurisdiction" over the subject matter or parties. It further declared that even assuming all jurisdictional requirements of Mexican law were satisfied, a divorce rendered by any jurisdiction in which neither of the parties had domicile is not "entitled to full faith and credit" and would not be recognized in California. Thus, the court nullified the "mail order" divorce by applying the domiciliary test used in determining whether or not sister state decrees would be recognized.

Subsequently, there has been a string of district court of appeal cases denying recognition to Mexican "mail order" divorces.<sup>22</sup> Applications for hearings were denied by the California Supreme Court. The public policy of California, as expressed by these cases, does not permit the recognition of foreign divorce decrees where the sole purpose of seeking the jurisdiction of the foreign court was to evade the laws of the state in which the parties live and have their home.

#### THE ADVISABILITY OF CONTINUING TO REQUIRE DOMICILE

The enactment of the Uniform Divorce Recognition Act in California has created a statutory distinction between bona fide divorces and migra-

<sup>20</sup> *Ibid.*

<sup>21</sup> LEY DE DIVORCIO, CHIHUAHUA, ART. 23, CHIHUAHUA DIARIO OFICIAL, SUP. 28 (1933): "Jurisdiction may also be fixed by express or implied submission. Submission is express, when the interested parties renounce clearly and definitely the forum which the law otherwise concedes, and designate with precision the court to which they submit. Submission is implied by the act of petitioner filing his complaint or with respect to the defendant when he has been duly served, and does not specially appear to assert lack of jurisdiction, or having specially appeared abandons that contention." (Cited from Ruiz, *supra* note 9, at 296.)

If Mexico has jurisdiction over the parties, it has jurisdiction to try the suit. A divorce will not be set aside for lack of domicile, but it may be for lack of proper notification, which is a constitutional guarantee, IRELAND AND GALINDEZ, *DIVORCE IN THE AMERICAS* 192-208 (1st ed. 1947).

<sup>22</sup> Cases cited note 9 *supra*.

tory and mail order divorces. Thus, no longer need evasioneary divorces be guarded against by conditioning application of Section 1915 upon a finding of domicile. Where both parties are California domiciliaries at the time of the action, Section 1915 would have no application, since recognition would be denied under the more recent legislative expression of the Uniform Divorce Recognition Act. But where both parties had not been domiciled in California, the effect of a foreign divorce could be determined by reference to the jurisdictional laws of a foreign country without in any way encouraging migratory divorce.

The California Supreme Court has not directly passed upon the question of whether a non-evasioneary foreign country divorce decree will be recognized in the absence of a finding of domicile. In *De Young v. De Young*<sup>23</sup> the supreme court gave effect to a Mexican divorce on the ground that there was sufficient evidence to support the trial court's finding of bona fide domicile in Mexico and proper notice to the defendant. The court "assumed without deciding," however, that the decree would be subject to collateral attack in California if the plaintiff had not been domiciled in Mexico, thus leaving open the question of whether jurisdiction is to be determined according to the laws of the foreign country, or solely with reference to domicile.

Nor has the most recent expression of the California Supreme Court settled the matter. In *Rediker v. Rediker*<sup>24</sup> a Cuban decree was held valid on the ground that since the trial court did not find the plaintiff in the Cuban divorce action was not a bona fide Cuban domiciliary, it was "assumed" that the Cuban court had jurisdiction to enter the decree. By way of dictum, Justice Traynor, speaking for the court, said that the Cuban decree must be given the same effect as a final judgment rendered in this state, or the same effect as is given a decree rendered in a sister state which must be given full faith and credit. To sustain this proposition, Section 1915 was cited; but also cited were three United States Supreme Court cases declaring the effect which must be given sister state divorce decrees.<sup>25</sup> The result of this expression was to read into Section 1915 the additional phrase that judgments rendered in foreign countries must also be given the same effect in California as sister state judgments.

By this dictum, Justice Traynor may have meant that full faith and credit rules applicable to sister state decrees should be applied to foreign country decrees. If such is his meaning, divorce jurisdiction of a Cuban court based on *defendant's* domicile in Cuba<sup>26</sup> would not be sufficient for recognition of the decree in California.

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<sup>23</sup> 27 Cal.2d 521, 165 P.2d 457 (1946).

<sup>24</sup> 35 Cal.2d 796, 221 P.2d 1 (1950).

<sup>25</sup> The three cases cited were: *Sherrer v. Sherrer*, *supra* note 18; *Coe v. Coe*, 334 U.S. 378 (1948); *Williams v. State of North Carolina*, 317 U.S. 287 (1942).

<sup>26</sup> Cuban law permits actions to be brought either at the matrimonial domicile, or in plaintiff's or defendant's domicile, or where defendant is found. ART. 25, DECREE-LAW No. 206 (1934), and as modified by DECREE-LAW No. 739 (1934). ART. 37 provides that the procedure to be followed is that of ordinary actions for money, with modifications introduced by the divorce law itself. IRELAND AND GALINDEZ, *op. cit. supra* note 21, at 116-117.

On the other hand, Justice Traynor may merely have meant that decrees of foreign countries, by virtue of Section 1915, were to be given the same conclusive effect as is required by the federal Constitution to be given sister state decrees. If this is his meaning, a Cuban decree granted by a court which satisfied all the jurisdictional requirements of Cuban law would be entitled to as much force and effect in California as the decree of a sister state, even though the action was not brought at plaintiff's domicile. In other words, a decree valid in Cuba would be valid in California, in the absence of fraud or collusion.

Since neither the *Rediker* nor *De Young* cases holds that domicile is the sole criterion to be used in determining whether or not the foreign court had jurisdiction, the California Supreme Court is today faced with the choice of deciding: (1) whether the full faith and credit requirements, announced by the United States Supreme Court, should continue to be applied in determining the validity of foreign country divorce decrees; or (2) whether reference should be had to the jurisdictional laws of the foreign country, as required by Section 1915, in order to determine the validity of the foreign decree.

#### *Objections to Applying Full Faith and Credit Rules*

If the California Supreme Court decides that recognition of foreign divorce decrees is to be determined by the same rules applicable to sister state decrees, it would be difficult to justify deviations from these rules where specific situations would seem to demand it. For example, if the plaintiff were found to have been domiciled in the country where the decree was granted, the divorce would have to be recognized even though the substantive or procedural law of that country was in conflict with local policy. A divorce granted on grounds of mutual consent may be repugnant to California's policy, but neither that issue nor any similar one would come before the court. A divorce obtained *ex parte*, where defendant had no notice of the pending action, or even of the final decree, would hardly be permitted in the United States, but may be a routine procedure elsewhere. The level of administration of justice is not everywhere the same, and despite the broad wording of Section 1915, it is not likely that the legislature intended that the statute should override California laws and local policy.

In situations where domicile is not essential to jurisdiction of the foreign court, but where there has been a finding of domicile by the California court, it should not be presumed that the court in the foreign country had jurisdiction because of the recital of the decree. The objection to presuming jurisdiction without examining the laws of the country is illustrated by *De Young v. De Young*, where a Mexican decree was recognized in California upon a finding of domicile and recital of due and proper notice. Actually it is unlikely that the decree would have withstood a collateral attack in Mexico. The defendant in the divorce action had never been in Mexico, nor had she been personally served. Proper notification is a constitutional guarantee in Mexico, and in 1941 the Mexican Supreme Court ruled,<sup>27</sup> with

<sup>27</sup> *Anales de Jurisp. del D.F., Ind. gen. Tomax, I-XXV, num. prog. 6, D, Civil; Mexico, April 15, 1941, cited in IRELAND AND GALINDEZ, op. cit. supra note 21, at 206.*

retroactive effect, that a divorce decree granted in one of the Mexican states was not to be recognized in another state if the defendant had not been domiciled in the granting state, or submitted to its jurisdiction, or been personally served. A recital of jurisdiction and of due and proper notice to defendant in a foreign country decree may have an entirely different meaning than the same recital in a sister state decree. Only by referring to the laws of the foreign country can its meaning be understood.

A more basic objection, perhaps, is that the requirement of domicile by California courts may introduce an alien element into divorce decrees without justification. A number of countries, England, Canada, and even some of the civil law countries, have taken from American jurisprudence the domicile theory as a jurisdictional basis for divorce actions. But many countries take jurisdiction of an action involving their own citizens, even though neither party is domiciled in the country of citizenship.<sup>28</sup> Other countries take jurisdiction if the defendant resides within their borders.<sup>29</sup> Still others take jurisdiction if both parties reside, but are not necessarily domiciled, therein.<sup>30</sup> And others, only if they are the place of matrimonial domicile, regardless of the present domicile of either party.<sup>31</sup>

If a decree is granted in a country where domicile is not essential to jurisdiction, for a California court to invalidate the decree solely on a finding of lack of domicile is neither logical nor just. A husband and wife, conforming to the jurisdictional requirements of a court in good faith because of greater familiarity with the foreign law or in reliance upon advice of foreign lawyers, legitimately sought, should not have their justified intentions and expectations defeated because of the jurisdictional requirements of an alien country. That the decree was or was not rendered in the place of domicile might be a factor to be considered in determining whether the divorce was bona fide or evasory, but lack of domicile should not automatically render the decree invalid without reference to the jurisdictional requirements of the foreign country.

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<sup>28</sup> *E.g.*, Belgium, Finland, Germany, and Switzerland, VREELAND, *VALIDITY OF FOREIGN DIVORCES* 262-265, 270-271, 274-282, 305-308 (1st ed. 1938).

<sup>29</sup> In Norway, the suit must be brought in either plaintiff's or defendant's domicile; in Spain and Sweden, the plaintiff has his choice of the last matrimonial domicile or of defendant's domicile. VREELAND, *op. cit. supra* note 28, 293-296, 299-305. This is true also of many of the Latin American countries.

<sup>30</sup> France, Germany and Switzerland will take jurisdiction if the parties reside therein, but will apply the substantive law of the country of citizenship, VREELAND, *op. cit. supra* note 28, at 271-282, 305-308.

<sup>31</sup> This is true of most of the South American countries which permit divorce, with the proviso that if the cause of action arose prior to the acquisition of the present matrimonial domicile, it cannot be used as grounds unless it is a cause which is also permitted by the national law of the spouses. Fifteen of the South American countries signed the Bustamante Code in Havana in 1928, which provides that such divorces must be given effect everywhere. The state of origin of the spouses, however, reserves the right to refuse recognition, if the divorce was obtained for any cause not permitted by its own laws. The other four, Argentina, Columbia, Paraguay, and Uruguay, remained faithful to the International Law Treaties, signed at Montevideo in 1889. This provides that the country of conjugal domicile is competent to grant a divorce, but the cause relied upon must also be permitted in the place where the marriage was celebrated, IRELAND AND GALINDEZ, *op. cit. supra* note 21, at 293-297. Of the European countries only Austria and Yugoslavia seem to require that the court of last conjugal domicile has exclusive jurisdiction, VREELAND, *op. cit. supra* note 28, at 257-262, 309.



### *New York's Experience in This Field*

New York courts have probably handled more litigation in this field than have those of any other state.<sup>32</sup> Under their technique, the foreign proceedings and laws must be put in evidence and the trial court has discretion in determining the effect to be given the foreign country judgment. The theory underlying this practice is that a country (or state) other than that of plaintiff's domicile may have a legitimate interest in the marital status of the parties; if such is the case, that country is considered as competent to adjudicate the divorce and to see that neither fraud nor connivance reduces the marriage to a matter of temporary convenience as is the court in the country of domicile.

A leading case is *Gould v. Gould*.<sup>33</sup> The parties were citizens and domiciliaries of New York, but had resided in France for several years. In an action there for divorce, the French court took jurisdiction, applying New York law. In holding the French decree a bar to an action for divorce in New York, the Court of Appeals declared that France had as legitimate an interest in the matrimonial status of the parties as New York.

Where New York domiciliaries have obtained Mexican "mail order" divorces, recognition is denied on the ground that Mexico had no legitimate interest in the marital status of the parties.<sup>34</sup> In a recent case, *Matter of Rathscheck*,<sup>35</sup> the plaintiff was estopped from attacking her Mexican mail order divorce since she had procured it. The dissent, however, was bitter: the decree is void and should be given no effect whatsoever.

On the other hand, divorces have been recognized where the parties, although domiciled and living in New York, had obtained a divorce through the New York consulate of their country of citizenship;<sup>36</sup> or where both parties had submitted to the jurisdiction of the foreign court, and the plaintiff was physically present there.<sup>37</sup> In such cases, the foreign jurisdiction was considered to have as legitimate an interest in the parties as the State of New York. Where such interest is found, domicile is disregarded.

Domicile is also disregarded where the defendant has appeared in the foreign action. The rule first appeared in 1871;<sup>38</sup> in such cases, the question of whether the plaintiff was domiciled in the granting state is not subject to examination by a New York court. The most recent expression of this rule is found in *Robb v. Mariani*.<sup>39</sup> The parties were Swiss nationals,

<sup>32</sup> For a discussion of New York law in this field see Lenhoff, *The Rationale of the Recognition of Foreign Divorces in New York*, 16 *FORD. L. REV.* 231 (1947); Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 *COL. L. REV.* 373 (1940).

<sup>33</sup> 235 N.Y. 14, 138 N.E. 490 (1923).

<sup>34</sup> *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).

<sup>35</sup> 300 N.Y. 346, 90 N.E.2d 887 (1950).

<sup>36</sup> *Oettgen v. Oettgen*, 196 Misc. 937, 94 N.Y.S.2d 168 (1949) (German decree); *Weil v. Weil*, 26 N.Y.S.2d 467 (1941) (Danish decree); *Hansen v. Hansen*, 255 App. Div. 1016, 8 N.Y.S.2d 655 (1938) (Danish decree).

<sup>37</sup> *Mitchell v. Mitchell*, 194 Misc. 73, 85 N.Y.S.2d 627 (1949) (Mexican decree); *In re Fleischer's Estate*, 80 N.Y.S.2d 543 (1948) (Mexican decree); *Leviton v. Leviton*, 6 N.Y.S.2d 535 (1938) (Mexican decree).

<sup>38</sup> *Kinnier v. Kinnier*, 45 N.Y. 535 (1871).

<sup>39</sup> 198 Misc. 814, 100 N.Y.S.2d 731 (1950).

but the matrimonial domicile was Austria. The divorce decree, obtained by the husband through submission to a Swiss court while still living in Austria, was held a bar to an action in New York, since the defendant had been represented by counsel in the Swiss action.

Nor does domicile necessarily become important where service has been constructive. In an early case, *Kerr v. Kerr*,<sup>40</sup> an Indiana decree was invalidated because the wife had not authorized the appearance which had been made on her behalf; in such a case the New York court refused to consider whether or not plaintiff was domiciled in Indiana. Today, of course, New York must conform to the full faith and credit requirements laid down by the Supreme Court for sister state decrees, but her courts examine decrees rendered in foreign countries with great care where there has been no personal service or appearance. In *Karfiol v. Karfiol*,<sup>41</sup> a recent case involving a Swiss divorce granted on grounds not recognized in New York and where service was constructive, the court held that although Switzerland had been the matrimonial domicile of the parties the decree would be given effect in New York only if the wife had not been justified in leaving Switzerland.

Doubtless the public policy of New York and California differ. New York courts have held that a divorce obtained in a foreign jurisdiction solely for the purpose of evading the New York divorce laws is not offensive to its public policy.<sup>42</sup> It is not suggested that California courts adopt this attitude, nor is it suggested that divorce actions be treated as ordinary actions *in personam*. But because of New York's wide and successful experience in this field, some consideration should be given to the way in which her courts handle this conflict of laws problem. Reference is made to the foreign law and jurisdiction is determined according to such law. Once jurisdiction is conceded, recognition will be given unless a strong local policy supervenes.

#### CONCLUSION

The requirement of domicile as a jurisdictional restriction upon the application of Code of Civil Procedure Section 1915 to foreign country divorces is not satisfactory. Because the statute is poorly drafted, lawyers and courts have found difficulty in working with it. But the statute is an expression of California's public policy, and it seems clear that the legislature intended that foreign country judgments should be given at least as much effect as is consistent with private international law. The domiciliary doctrine should not be carried over into decrees rendered in foreign countries where the jurisdictional basis for divorce may rest upon an entirely different theory. The requirements for full faith and credit, as announced by the United States Supreme Court, should have no application to judgments rendered in foreign countries.

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<sup>40</sup> 41 N.Y. 272 (1869).

<sup>41</sup> 277 App. Div. 866, 98 N.Y.S. 2d 485 (1950).

<sup>42</sup> *In re Fleischer's Estate*, *supra* note 37; *Leviton v. Leviton*, *supra* note 37; *Glaser v. Glaser*, 276 N.Y. 296, 12 N.E. 2d 305 (1938).

Implicit in Section 1915 is the requirement that the laws of the country where the decree was rendered are to be referred to in determining jurisdiction. In no other way can the California court determine whether the divorce is valid in the country where granted. If the decree is valid there, it should be valid in California, in the absence of fraud or collusion, or strong local policy against recognition.

Since the legislature has provided a statutory basis, by enactment of the Uniform Divorce Recognition Act in 1949, for distinguishing between bona fide divorces and mail order or migratory ones, the domiciliary requirement need no longer serve this function. Section 1915 may now be more freely applied and consideration given to the jurisdictional requirements of the foreign country.

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