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Conflicts of Law: Recognition of Foreign Country Divorce Decrees in California

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doctrines, decisions on state action, will be applied where the allegedly unconstitutional government action was a federal statute as executed by a cabinet officer. This may be decided soon since certiorari has been granted in the case of *Joint Anti-Fascist Refugee Committee* v. *Clark.*[13]

David Dolgin.

CONFLICTS OF LAW: RECOGNITION OF FOREIGN COUNTRY DIVORCE DECREES IN CALIFORNIA.—In the recent case of *Rediker* v. *Rediker* (1950), 35 A. C. 846, the Supreme Court of California recognized a Cuban divorce decree. Justice Traynor stated in that opinion, "The trial court did not find that the defendant was not a *bona fide* Cuban domiciliary. . . . The Cuban court therefore had jurisdiction to enter a divorce decree and since its procurement was not the result of fraud or collusion the decree must be given 'the same effect as final judgments rendered in this state' or in the court of a sister-state to which this court must give full faith and credit. (Code of Civil Procedure, section 1915)'." The result of the Rediker case would seem to be that all the courts of California are only required by the Code of Civil Procedure, section 1915, to give to judgments rendered in foreign countries the same effect to which a California judgment would be entitled or the same full faith and credit "effect" given to a sister-state divorce decree. The effect given to the Cuban divorce was without reference to Cuban divorce law* notwithstanding the express provision in section 1915 that effect given shall be to "a final judgment of any other tribunal of a foreign country having jurisdiction, *according to the laws of such country*, to pronounce the judgment, . . ." By the court in the Rediker case assuming that the defendant was a Cuban domiciliary and then going on to say "therefore" the Cuban court had jurisdiction to enter a divorce decree seems to establish that domicile is the basis for jurisdiction to render a divorce decree by a foreign country under California law. But this requirement of domicile is an application of the California laws respecting recognition of sister-state divorce decrees and the court in applying the same rules of law to foreign country divorces fails to distinguish between foreign country divorce decrees and sister-state divorces. One of the questions left open by the Rediker case is whether any distinction exists between foreign countries and sister-states under California law in regard to the jurisdictional prerequisites for recognition of a divorce by California. Section 1915, Code of Civil Procedure, would seem to make such a distinction, but under the Rediker decision the distinction is erased.

Divorce actions in the United States are equitable and *in rem* proceedings with the marital status as the res; because of the uncertainty of the res as a subject matter for divorce, the United States has adopted the "domicile" theory in determining the jurisdiction for divorce decrees. In the international sphere domicile is not necessarily the test for divorce jurisdiction, for in many of the countries "nationality" is the basis, and others have distinct laws of their own governing jurisdiction.

As the full faith and credit provision of the Federal Constitution, as applied by the Supreme Court of the United States, does not apply to judgments and decrees of

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[13]70 S. Ct. 573, 339 U. S. 910.

*C. C. Arts. 104-107; *Divorce Law* 206. *Actions by aliens.* Cuban courts will take jurisdiction of divorce suits by aliens. . . . Before bringing the action the alien must have resided in Cuba at least one month, to prove such residence he must make a declaration before a notary stating his *intention to be domiciled in Cuba,* and after thirty days he must make another declaration stating he has not left Cuba since the date of the first declaration. (Domicile, in fact, is not required.) Martindale-Hubbell, *Law Directory* 1950, Cuban Law Digest.

foreign countries, the only basis upon which recognition may be extended to foreign divorce decrees are the rules of international comity. But here, too, the well settled principle is that unless the foreign court has jurisdiction over the subject matter of the divorce, by reason of domicile of at least one of the parties thereto, its decree of divorce will not be recognized under the rules of comity; and this principle it seems is generally accepted,[1] even though the laws of such foreign country do not make domicile a condition of its courts' jurisdiction. Our law considers the marriage relation as a matter which the state, as well as the husband and wife, is concerned.[2] As a result, the law in the United States has been that only the law of the domicile has jurisdiction to grant a divorce.[3] This general rule has been consistently followed in numerous California cases.[4]

The public policy of California concerning judgments procured in foreign countries is announced by section 1915 of the Code of Civil Procedure. In respect to foreign divorces what effect have the courts of California given to section 1915?

Section 1915. "A final judgment of any other tribunal 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."

The section sets out three distinct rules of law with reference to the legal effect which must be given to foreign judgments in California as distinguished from judgments of sister-states.

Rule 1—The judgment "shall have the same effect as in the country where rendered."

Rule 2—The judgment shall "also" have "the same effect as final judgments rendered in this state."

Rule 3—Rules 1 and 2 apply only to "a final judgment of any other tribunal of a foreign country having jurisdiction, *according to the laws of such country*, to pronounce judgment." (Emphasis added.)

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[1]Gould v. Gould, decided by the New York Court of Appeals in 1923, 138 N. E. 490, seems to undermine the general assumption that in New York domicile is a jurisdictional essential in matters of divorce. The Gould case, at page 494, in referring to a French divorce decree, the court stated, "Even though it be assumed that we are not required because of the absence of domicile to give effect to their judgment, we are not prohibited from doing so where recognition in conformity to the principle of comity, would not offend our public policy." This decision has been vigorously criticized. See 40 Columbia Law Review 373, 376.

[2]Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020.

[3]Williams v. North Carolina (1945), 325 U. S. 226. This case simplified the law on interstate divorces by compelling recognition of foreign divorces (used in the interstate sense) if the petitioner was domiciled in the state granting the divorce. Under authority of the Williams v. North Carolina case, a decree of divorce is not entitled to full faith and credit if obtained by a party not a bona fide domicile of the state granting the divorce. Restatement of Conflicts of Law, sections 110 and 111, apply the domicile test to determine jurisdiction of courts to grant divorces. Section 111 provides, "A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state." Crouch v. Crouch (1946), 28 C. 2d 243, held that a Nevada divorce was denied full faith and credit in California where the court found that the husband had not been a bona fide domicile of Nevada.

[4]Ryder v. Ryder (1934), 2 C. A. 2d 426; People v. Harlow (1935), 9 C. A. 2d 643; Kegley v. Kegley (1936), 16 C. A. 2d 216; In re McNutt's Estate (1940), 36 C. A. 2d 542; Harlan v. Harlan (1945), 70 C. A. 2d 657; DeYoung v. DeYoung (1946), 27 C. 2d 521; Roberts v. Roberts (1947), 81 C. A. 2d 871; Rediker v. Rediker (1950), 35 A. C. 846.

A review of the cases demonstrates that thus far in the State of California the first of the above rules, that a foreign judgment "shall have the same effect as in the country where rendered," has been effectively circumvented by first establishing the lack of jurisdiction of the foreign court rendering the divorce decree. And this is done, not "according to the laws of such country," but according to the laws of California. As a result, the interpretation of rule 1 of the code has never been squarely before the courts of California for judicial inquiry. In *People* v. *Harlow* the court stated that "section 1915 expressly limits its application to final judgments of courts having jurisdiction," and then refers to section 1917 of the Code of Civil Procedure to determine the elements necessary for jurisdiction.[5]

The first foreign country "mail order" divorce[6] judgment passed upon by our appellate courts wherein reference was made to section 1915 was *Ryder* v. *Ryder* (1934).[7] This court denied recognition to a decree of divorce rendered by a court in Mexico in favor of the husband. He had been in Mexico, if at all, only for a period of several days prior to the time of its rendition of the decree. The court expressed the view that neither recitals in the decree nor consent of the parties can confer jurisdiction upon the court rendering the decree where evidence shows clearly that the plaintiff in the divorce action did not have a bona fide residence within the jurisdiction of such court. The reasoning of the court is shown in the statement: "Even in this country where it is prescribed by the Constitution that full faith and credit must be given in each state to the judicial proceedings of another, it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if the want of jurisdiction appears on the face of the record, or is shown either as to subject matter or the person, the record will be regarded as a nullity. . . . The rule is certainly as strong, if not stronger, when applied to a court of a foreign country. . . ."

The court in the Ryder case applied rules of law pertaining to sister-state judgments without any reference to international law, and specifically without reference to the law of divorce of the State of Chihuahua,[8] (where the Ryder judgment was procured), which provides that a divorce may be procured without the necessity of establishing a residence. But this evidence of the law of Mexico was not introduced by counsel. Possibly the failure to apply the laws of Mexico might have been avoided had the counsel introduced such law; however, it is questionable whether the court would have given more force to section 1915 in light of the following dictum:

"If, however, it be assumed that the laws of that country require no residence nor the presence of the parties within its territory as a basis of jurisdiction, and that the formal requirements established by Mexican law were met, then the divorce cannot be recognized under the laws of this state."

Subsequent to the Ryder case, *Kegley* v. *Kegley* (1936)[9] was decided. The court

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[5]People v. Harlow, 9 C. A. 2d 643. Code Civ. Proc., section 1917: "Jurisdiction—Sufficiency to Sustain Record. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

[6]The "mail order" divorce terminology applies to those divorces obtained merely through correspondence with some lawyer practicing in the country in which the parties seek the divorce. The label has been applied by the courts to those divorce decrees rendered in Mexico in cases where no attempt was made by either party to the action to establish domicile in Mexico or to establish good faith residence there.

[7]Ryder v. Ryder, 2 C. A. 2d 426.

[8]Ley de Divorcio, Chihuahua, Art. 23, Chihuahua Diaro Oficial, Sup. 28 (1933).

[9]Kegley v. Kegley, 16 C. A. 2d 216.

in this case denied recognition to a Mexican divorce which was obtained although neither party had left California. As a result of the lack of domicile in Mexico by either party to the divorce action the lower court found that the Mexican tribunal did not have jurisdiction to render the divorce decree. In adopting the lower court's finding of no jurisdiction the appellate court concluded that all of the legal requirements of the law of the foreign country had been complied with (unlike the Ryder case). It must be noted at this point that the finding of the trial court as to lack of jurisdiction was not attacked on appeal. Had there been a proper attack of this finding, possibly the court would have made some direct distinction between the jurisdictional requirements of foreign countries and sister-states.[10] But because of the failure of counsel to so attack, the court followed the reasoning of the Ryder case, *supra.*

It can be clearly seen that the courts in the Ryder case and the Kegley case referred to, and also based their opinions on, rules pertaining to sister-state judgments and jurisdictional requirements within the United States, mainly because no other relevant law was brought to their attention. It is possible that if in either case, especially the Kegley case on appeal, reference had been made to section 1915 and a complete analysis of its provisions insisted on by counsel, with reference to the pertinent laws of Mexico, a different decision might well have been reached since the code section treats "jurisdiction" exclusively with respect to final judgments of "foreign countries."

Following the reasoning of the Ryder case and the Kegley case are several recent decisions. One is *In re McNutt's Estate,*[11] which stated that in California it is held that "domicile is necessary to give a court jurisdiction in an action for divorce. . . ." In referring to the divorce decree rendered by the State of Sonora in Mexico which was not recognized, the court stated, "Nothing could be done to confer jurisdiction upon the Sonora court except to reside within that Mexican state." And in *Harlan* v. *Harlan* (1945),[12] the court stated, "The Mexican divorce granted to the defendant herein was of the 'mail order' class. The decree, however, did not affirmatively show upon its face that neither of the parties had resided there. Upon this fact being shown the invalidity of the decree in this state was thereby established, since the court in Mexico did not have jurisdiction of either of the parties or of the subject matter of the action."[13] In this case, as in the Ryder case, "There was nothing in the record to indicate what the law of Mexico was concerning divorce." The court went on to assume, however, by way of dictum, following the Ryder reasoning, that notwithstanding the requirements of Mexico, domicile was still the test for recognizing foreign divorce decrees in California.

It is well settled that Mexican "mail order" divorces are absolute nullities in California regardless of section 1915 and without regard to whether under laws of Mexico

[10]The courts in these cases of foreign divorces neglect to make any distinction between a divorce decree of a foreign country and a sister-state divorce decree, which is exemplified in the case of Roberts v. Roberts (1947), 81 C. A. 2d 871; a case involving a sister-state divorce. The court stated that unless at least one of the spouses is a resident thereof in good faith, the court of such sister-state or of such foreign power cannot acquire jurisdiction to dissolve the marriage of those who have an established domicile in California.

[11]In re McNutt's Estate, 36 C. A. 2d 542.

[12]Harlan v. Harlan, 70 C. A. 2d 657.

[13]"Nor is this decree entitled to recognition by the courts of California under the provisions of the Code of Civil Procedure section 1915, for this section expressly limits its application to final judgments of courts having jurisdiction. And by section 1917 (of the same code), such jurisdiction must be over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." Harlan v. Harlan, *supra;* People v. Harlow, *supra.*

the parties qualified so as to give Mexico jurisdiction. . . . *Ryder* v. *Ryder, supra,* held the Mexican divorce void as against public policy.[14] Also in *DeYoung* v. *DeYoung* (1946),[15] the court inquired into the *bona fides* of the "domicile" of the divorced party to determine the validity of the divorce without making any inquiry into the laws of Mexico. The court went on to say, "No evidence was introduced regarding the law of the State of Chihuahua, Mexico, but for the purpose of the discussion, we may assume, without deciding, that regardless of whether the law of the state did or did not make domicile a condition to its court's jurisdiction, the decree of divorce obtained there would be subject to collateral attack in this state if defendant herein had no bona fide domicile there." Thus this 1946 decision lends support to the dictum in the 1935 Ryder case, *supra.*

Assuming that these "quickie" divorces must be dealt with and that public policy demands denial of recognition to such divorces, there still remains the problem of dealing with "good faith divorces" obtained in foreign countries without the parties establishing domicile but having complied with the laws of that country of which domicile is not a prerequisite to jurisdiction.

In all of the California cases cited the denial of recognition of foreign divorces was based on a finding that, in fact, the court, granting the divorce did not have jurisdiction. As stated above, in order to give a valid divorce there must be jurisdiction in rem, i. e., jurisdiction over the marital status, and "domicile" has been generally accepted as basis for this jurisdiction (*Williams* v. *North Carolina, supra*). But note that the determination of domicile as a condition precedent to granting a divorce has been applied under the full faith and credit clause of the Constitution in reference to sister-state divorces; whereas, the California Code of Civil Procedure, section 1915 states, "a foreign country having jurisdiction, according to the laws of such country. . . ." Cannot it be concluded from these determinations that the courts of this state must consider the public policy of California denying recognition to such divorces rendered without jurisdiction (according to the law of California) over the subject matter of the divorce, i. e., a finding that neither party was a *bona fide* domiciliary of the country rendering the decree as much stronger than and outweighing the literal application of section 1915 of the Code of Civil Procedure?[16]

Conclusion: A foreign divorce decree will not be recognized in California as a matter of comity even if valid where rendered unless "domicile"[17] can be shown in establishing jurisdiction, i. e., that it can be shown that the court had jurisdiction according to the laws of California which require domicile as a matter of public policy. This public policy is wholly incongruent with any literal application of code section 1915 which states expressly jurisdiction "according to the laws of such country."

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[14]In Ryder v. Ryder, *supra,* the court established that a person cannot evade the settled policy of California denying recognition to such migratory divorces obtained "through simulated residence and not in good faith."

[15]DeYoung v. DeYoung (1946), 27 C. 2d 521.

[16]Kegley v. Kegley, 16 C. A. 2d 216: "We believe there is good reason sounding in public policy why the decree should not be recognized." (No reference was made to Code of Civil Procedure section 1915.)

[17]"The acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode." DeYoung v. DeYoung, *supra.*