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Appearance by Both Parties Held Insufficient to Validate Mexican Divorce Decree

disabling condition of statelessness[28]—he becomes an alien with only limited rights and privileges.[29] The decision strikes down a statute which has operated to deprive many Americans of their citizenship because of the mere fact that, as naturalized citizens, they had resided abroad. The Court has thus determined that a classification so based is creative of a second-class citizenship.[30] The *Schneider* case will also strike down at least twenty existing naturalization treaties,[31] and will affect the lives of some 50,000 ex-citizens who have been expatriated by extended foreign residence.[32]

It appears, moreover, that this decision may well provide the impetus for a re-examination of the naturalization and expatriation laws of the United States. One author predicts that unless the Immigration and Nationality Act of 1952 is repealed, at least six sections will now be viewed by the courts as discriminatory in violation of due process.[33]

It would appear that two alternatives remain open to Congress in this area. On the one hand, Congress may retain a conclusive presumption of expatriation equally applicable to all citizens in any statute replacing section 352(a)(1). If this is done, the Court, while recognizing the congressional power to expatriate in certain instances,[34] will continue to investigate each case individually in an attempt to ascertain violations of due process.[35]

On the other hand, Congress might replace the present nationality law with a statute creating a rebuttable presumption similar to that contained in the Expatriation Act of 1907.[36] In view of the inherent value of citizenship, this alternative would seem preferable. Such a law might apply only a *rebuttable* presumption of voluntary expatriation for *all* citizens who perform the act designated by statute. Thus, individual rights would not be limited for mere convenience of administration and no man would lose his basic right of citizenship without first being granted an opportunity to exhibit a real attachment to the United States.

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[28] Perez v. Brownell, *supra* note 17, at 64; *accord*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[29] See generally Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L.J. 250 (1934).

[30] Schneider v. Rusk, *supra* note 18, at 1190.

[31] *Id.* at 1192 (dissenting opinion).

[32] Time, May 29, 1964, p. 57.

[33] Amundson, *No More Second-Class Citizenship*, 110 AMERICA 847 (1964).

[34] See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 214 (1963).

[35] *Compare* Schneider v. Rusk, 84 Sup. Ct. 1187 (1964), *with* Perez v. Brownell, 356 U.S. 44 (1957). In *Perez*, the act of expatriation was freely voting in a foreign political election. The Court apparently feels that activity of this type by those claiming American citizenship is clearly more conducive to international friction and embarrassment than is the neutral act of simple residence abroad. Therefore, Congress was empowered to expatriate in *Perez* without violation of due process; in *Schneider* it was not.

[36] See Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950).

Recent Decision: Appearance by Both Parties Held Insufficient to Validate Mexican Divorce Decree

Plaintiff husband commenced an action for annulment on the ground that a Mexican divorce procured by his wife and her former husband was a nullity. Having pre-

viously agreed to dissolve their marriage while in New York, both parties appeared in the Mexican proceeding, the husband personally and the wife by attorney. In granting the annulment and declaring the prior divorce invalid, the New York County Supreme Court *held* that since neither spouse was domiciled in Mexico, the foreign court was without jurisdiction. *Rosenstiel v. Rosenstiel,* (Sup. Ct.), 151 N.Y.L.J., May 20, 1964, p. 15, col. 7.

Since the United States is composed of fifty different sovereignties, each with its own laws of marriage and divorce, jurisdictional problems assume untold dimensions. In a series of decisions commencing with *Williams v. North Carolina (I),*[1] the Supreme Court of the United States undertook to clarify the jurisdictional prerequisites for affording full faith and credit to the divorce decrees of sister states. In *Williams v. North Carolina (I)* the Court held that an ex parte divorce decree is entitled to full faith and credit when the plaintiff is a bona fide domiciliary of the granting state and the defendant spouse is notified by constructive service.[2] However, the case of *Williams v. North Carolina (II)*[3] advanced the doctrine that although the recognition of such ex parte divorces is compulsory, a sister state is not bound by a recital of domicile in the court records of the granting state and thus may re-examine the jurisdictional question of bona fide domicile. In *Sherrer v. Sherrer,*[4] the Court, applying the principle of res judicata, held that *Williams (II)* was inapplicable where the defendant appeared in the foreign forum to contest the divorce, since the issue had previously been litigated in a court of competent jurisdiction. The cumulative effect of these holdings is that only ex parte proceedings may be collaterally attacked in a sister state.[5]

Thus, it is settled that full faith and credit must be accorded to a sister state's decrees where both parties, one of whom is a domiciliary, are before the court. Likewise, full faith and credit must be given to ex parte proceedings where the plaintiff has acquired a bona fide domicile in the forum state, with the *caveat* that the jurisdictional fact of domicile may be questioned by the sister state. Furthermore, the decree of a sister state is to be accorded prima facie validity.

The full faith and credit clause, however, pertains only to sister states, whereas the recognition of *foreign* divorce decrees depends upon the principles of comity. Under comity principles—as contrasted with full faith and credit—courts have the power to deny even prima facie validity to the judgments of foreign countries, regardless of the jurisdictional basis of such foreign judgments.[6] Thus, foreign decrees are far more vulnerable and uncertain than those of sister states. New York courts have on occasion denied recognition to all three basic types

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[1] 317 U.S. 287 (1942).

[2] However, under ecclesiastical law the domicile of the defendant governed. JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS 363 (4th ed. 1961).

[3] Williams v. North Carolina (II), 325 U.S. 226 (1945).

[4] 334 U.S. 343 (1948).

[5] N.Y. DOM. REL. LAW § 170(2) allows an action for divorce to be entertained if the parties were married within the state. This seems to be prohibited by the *Williams II* doctrine which expressly requires the plaintiff to be a domiciliary of the granting state. *But see* David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954); compare Huneker v. Huneker, 57 N.Y.S.2d 99 (Sup. Ct. 1945).

[6] Martens v. Martens, 284 N.Y. 363, 365, 31 N.E.2d 489, 490 (1940).

of Mexican divorces: the mail order divorce, the ex parte proceeding, and the bilateral proceeding.

The basis of jurisdiction in a mail order divorce is consent of the parties. Both parties, while physically in New York, enter appearances in the Mexican court by attorneys. Though neither party acquires a domicile in Mexico, the foreign court acquires jurisdiction since Mexican law provides for jurisdiction when both parties to a divorce action expressly submit themselves to the court's power.[7] Though such a divorce is valid in Mexico, the New York Court of Appeals, in *Caldwell v. Caldwell,*[8] refused to recognize it on the ground that neither party was domiciled in Mexico, domicile being the controlling jurisdictional factor. In the course of its opinion the court noted that "the legal profession and, indeed, the general public now recognize the valueless character of mail order divorces."[9]

New York has also denied recognition to divorce decrees where only one party actually appears before the Mexican court. When such ex parte decrees are challenged, courts will determine whether or not the foreign jurisdiction was the bona fide domicile of the plaintiff.[10] Where strong evidence of the plaintiff's domicile is lacking, the decree will be declared a nullity on the ground that it is violative of public policy.[11] Hence, bona fide domicile is the *sine qua non* of the ex parte divorce. On the other hand, Mexican decrees based upon bilateral proceedings have usually been upheld. In *Leviton v. Leviton,*[12] for example, both the husband and the wife went to Mexico and obtained a divorce decree within the span of a single day. Despite the lack of domicile on the part of the plaintiff, the New York court upheld the validity of the decree, stating that

> in any collateral attack . . . our court ordinarily will not question the result where both parties have appeared and where on the face of the decree is presented clear evidence of jurisdiction over them by the court which rendered the judgment.[13]

The court rendered this decision despite the fact that divorce jurisdiction in Mexico may be based upon mere residence, as opposed to domicile.[14] It is interesting to note, however, that such residence may be acquired simply by signing a municipal register in some instances.[15]

Subsequent to *Leviton,* appellate courts, confronted with this issue, have continually

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[7] Berke, *Mexican Divorces,* 7 PRAC. LAW. 84 (March 1961).

[8] 298 N.Y. 146, 81 N.E.2d 60 (1948).

[9] *Id.* at 151, 81 N.E.2d at 63. Despite this admonition, attorneys have aided clients in obtaining Mexican mail order divorces, and such attorneys have been subjected to disciplinary action. In the Matter of Anonymous, 274 App. Div. 89, 80 N.Y.S.2d 75 (1st Dep't 1948) (an attorney was presumed to have had knowledge of the illegality of a Mexican mail order decree). See also In the Matter of Peters, 286 App. Div. 246, 142 N.Y.S.2d 158 (1st Dep't 1955) (an attorney who obtained a New Jersey decree, knowing that a client did not comply with New Jersey's residence requirements, was suspended for one year).

[10] Williams v. North Carolina (II), *supra* note 3; Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902 (1955).

[11] Rosenbaum v. Rosenbaum, *supra* note 10, at 376, 130 N.E.2d at 904.

[12] 6 N.Y.S.2d 535 (Sup. Ct.), *modified mem.,* 254 App. Div. 670, 4 N.Y.S.2d 992 (1st Dep't 1938).

[13] *Id.* at 537; see also Johnson v. Muelberger, 340 U.S. 581 (1951).

[14] Berke, *supra* note 7.

[15] Residence is "proved by certificates of the municipal register of the place" in Mexico. Rosenstiel v. Rosenstiel, (Sup. Ct.), 151 N.Y.L.J., May 20, 1964, p. 15, col. 7, at p. 16, col. 2.

upheld bilateral Mexican decrees[16] even though an inquiry into the plaintiff's domicile was permissible under the doctrine of comity. The lower courts, on the other hand, have recently chosen to collaterally examine the jurisdictional basis of bilateral Mexican decrees and to explore the issue of domicile.[17] In *Wood v. Wood,*[18] both parties appeared in the Mexican proceeding, the wife personally and her husband by attorney. Neither party had obtained a certificate of residence[19] and the Mexican decree contained no allegation of domicile or residence. Thus, the foreign court's jurisdiction was based *solely* upon the appearance of the parties and their consent.[20] Justice Coleman, holding the decree invalid, emphasized that under the principle of comity New York may examine the jurisdictional basis of the Mexican court, even in bilateral proceedings. He declared that the foreign decree should be denied recognition unless the granting court had jurisdiction over the marital res, as we understand jurisdiction in divorce actions. Such jurisdiction can only be obtained where the plaintiff spouse is a bona fide domiciliary of the granting state.[21]

Factually, the principal case is distinguishable from *Wood* by virtue of the acquisition of a certificate of residence and an allegation of residence in the Mexican decree.[22] Justice Greenberg, in declaring the divorce invalid, relied heavily upon the reasoning of Justice Coleman in *Wood*:

> 'A court granting a decree of divorce must have jurisdiction. . . . Jurisdiction must be based upon domicile. . . . Unless one of the parties . . . is domiciled in the divorcing state . . . the court has no power to hear the controversy. . . . It is for us to decide whether there was domicile.'[23]

In applying this reasoning, Justice Greenberg explored the question of domicile and concluded that the mere submission of the parties to the Mexican court's power, though adequate to provide jurisdiction under Mexican law, was contrary to our concept of jurisdiction which is predicated upon domicile.[24] Thus, a decree, proper in all respects on its face, would not be granted comity where jurisdiction was based upon mere residence, as opposed to domicile. As additional support for invalidating the divorce, the court stated that the parties' collusive agreement to procure the Mexican divorce was violative of Section 51 of the New York Domestic Relations Law, which prohibits an agreement "to alter or dissolve a marriage" between the husband and

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[16] *E.g.,* Heine v. Heine, 231 N.Y.S.2d 239 (Sup. Ct. 1962), *aff'd mem.,* 242 N.Y.S.2d 705, (App. Div. 2d Dep't 1963), *motion for leave to appeal denied,* (App. Div. 2d Dep't), 150 N.Y.L.J., Sept. 17, 1963, p. 13, col. 1; Laff v. Laff, 5 Misc. 2d 554, 160 N.Y.S.2d 933 (Sup. Ct.), *aff'd mem.,* 4 App. Div. 2d 874, 166 N.Y.S.2d 678 (2d Dep't), *motion for leave to appeal denied,* 4 App. Div. 2d 959, 168 N.Y.S.2d 470 (2d Dep't 1957).

[17] Rosenstiel v. Rosenstiel, (Sup. Ct.), 151 N.Y.L.J., May 20, 1964, p. 15, col. 7; Wood v. Wood, 41 Misc. 2d 95, 245 N.Y.S.2d 800 (Sup. Ct. 1963); Molnar v. Molnar, 131 N.Y.S.2d 120 (Sup. Ct.), *aff'd,* 284 App. Div. 948, 135 N.Y.S.2d 623 (1st Dep't 1954).

[18] 41 Misc. 2d 95, 245 N.Y.S.2d 800 (1963).

[19] *Supra* note 15.

[20] The Mexican courts may obtain jurisdiction by submission of the parties. Rosenstiel v. Rosenstiel, *supra* note 17, at p. 16, col. 2; see Berke, *supra* note 7.

[21] Wood v. Wood, *supra* note 17, at 100, 245 N.Y.S.2d at 807.

[22] Rosenstiel v. Rosenstiel, *supra* note 17, at p. 15, col. 9.

[23] *Id.* at p. 16, col. 2.

[24] *Ibid.*

wife.[25]

As a result of *Rosenstiel,* which extended the doctrine of *Wood* to decrees that even contain an allegation of residence, it appears that a trend is being established, at least in the lower courts, to inquire into the jurisdictional facts of a bilateral Mexican decree. No longer will a mere allegation of residence preclude inquiry.

The legal profession has been reminded that there is a distinction between the constitutional requirement of full faith and credit and the doctrine of comity. The former applies only to sister states and is mandatory,[26] while the latter permits recognition of only such foreign decrees that are not violative of public policy.[27] This distinction, based upon sound legal reasoning, invites close scrutiny of the Mexican divorce. Since domicile, not residence, is the basis of American divorce jurisdiction, a decree based upon mere residence is contrary to public policy and not entitled to comity.[28]

Though the apparent lower court trend is to examine the bona fides of domicile where a bilateral Mexican divorce has been granted, no New York appellate court has squarely met this issue.[29] The question of domicile has been skirted and the foreign decrees usually upheld. It is submitted that the appellate courts have failed to clearly distinguish between comity and full faith and credit. Despite the fact that comity allows inquiry into the question of domicile, these courts have treated Mexican decrees in the same manner as sister state decrees.

The appellate division, in *Kantrowitz v. Kantrowitz,*[30] decided on the same day as *Rosenstiel,* was presented with an opportunity to clarify the domicile doctrine. In *Kantrowitz* the wife claimed that the Mexican court acquired jurisdiction to enter the bilateral decree as a result of a fraudulently induced power of attorney and appearance by her. Unfortunately, the appellate court failed to discuss the necessity of domicile and remanded the case to the trial court, reasoning that if fraud existed, the divorce could be collaterally attacked and declared void.

Although *Kantrowitz* did not discuss the question of domicile, it did allow an inquiry into the jurisdictional facts of a bilateral Mexican divorce. Thus, if fraud existed the foreign court would be deemed to have

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[25] A careful review of § 51 and the cases thereunder indicates that the statute has only been employed against written agreements. The wisdom of extending this to oral agreements is questionable in view of the probability of fraud. In the event that one spouse had acquired a bona fide domicile in a foreign jurisdiction, the stay-at-home spouse could allege and through prejudiced witnesses "prove" such agreements and have the decree set aside. Therefore, to prevent fraud it is preferrable to restrict § 51 to written agreements. Whether the appellate courts will follow Mr. Justice Greenberg's broad use of this section is a matter of conjecture; the precedents indicate they will not. Viles v. Viles, 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct. 1962), *aff'd,* 20 App. Div. 2d 626, 245 N.Y.S.2d 981 (1st Dep't 1963); In the Matter of Estate of Nichols, 201 Misc. 922, 107 N.Y.S.2d 311 (Surr. Ct. 1951).

[26] U.S. CONST. art. IV, § 1.

[27] Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902 (1955); ALI FAMILY LAW 132 (Clad ed. 1958).

[28] Compare Williams v. North Carolina (II), 325 U.S. 226 (1945).

[29] *E.g.,* Kantrowitz v. Kantrowitz, (App. Div. 1st Dep't), 151 N.Y.L.J., May 20, 1964, p. 14, col. 2; Heine v. Heine, *supra* note 16; Laff v. Laff, *supra* note 16.

[30] *Supra* note 29.

lacked jurisdiction. In *Kantrowitz* the appellate division, for the first time, allowed an examination into the power of a foreign court to grant a divorce despite the fact that both parties appeared and submitted themselves to its jurisdiction. Consequently, *Kantrowitz* appears to follow the trend established in *Wood* and continued in *Rosenstiel.*

The underlying reasons for the failure of the appellate courts to question the plaintiff's domicile may be social and pragmatic ones. There are approximately 250,000[31] New Yorkers who have obtained such divorces. Many have remarried and raised children in subsequent marriages. To declare the foreign divorces void would render the subsequent "marriages" bigamous unions.[32] Furthermore, the rights of the parties under the laws of descent and distribution would be affected.[33]

While the appellate courts have granted comity to the bilateral Mexican decree, the lower courts[34] have recently tended to apply strict legal theory by requiring bona fide domicile as a condition to recognizing the foreign decree. The result is a state of confusion wherein reliance cannot be placed upon even the *bilateral* decree. An appellate confrontation with the question of whether domicile is the *sine qua non* of recognition would be desirable. Such a confrontation appears to be the proper means by which the prevalent confusion in the area could be clarified, since the problem is essentially a judicial one. An alternative means of clarifying the necessity of domicile as a condition to recognizing foreign decrees may be by legislative action, though this method is unlikely in view of the judicial character of the problem. Nevertheless, because of the many social interests involved, the requirement of domicile is deserving of some definitive interpretation.

[31] N.Y. Journal-American, Aug. 15, 1963, p. 3, col. 1.
[32] See Williams v. North Carolina (II), *supra* note 28.
[33] See N.Y. DECED. EST. LAW §§ 18, 83.
[34] Rosenstiel v. Rosenstiel, *supra* note 17; Wood v. Wood, *supra* note 17.

Recent Decision: Adult Patient Compelled to Take Blood Transfusion Contrary to Religious Belief

The petitioner, a Jehovah's Witness, refused a blood transfusion that was necessary to save her life since the consumption of human blood was violative of her biblical teachings. The hospital obtained an order authorizing the transfusion from Judge Wright of the United States Court of Appeals for the District of Columbia,[1] after having failed in its attempt in the district court on the same day. When the petitioner requested a rehearing, the Court, in a five to four decision, ordered the petition denied and *held* that the question had become moot since the petitioner had received the transfusion and had subsequently recovered. *Ap-*

[1] Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964).