

CPLR 5401: Fourth Department Refutes Competence of Foreign Decree to Directly Affect New York Realty

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urged by the commentators after *Rovello* had, in effect, "relegated it to its common law demurrer equivalent."⁶² The language utilized by the *Guggenheimer* Court, coupled with the legislative background of this section, furnishes ample support for this position.⁶³ Yet, by purporting to follow *Rovello*⁶⁴ while actually applying a more flexible standard, the Court has introduced some uncertainty into this important area of civil practice. It is suggested that in future cases the Court of Appeals seek to clarify its position on the application of CPLR 3211(c) by articulating clear standards governing the use of extrinsic material in pre-answer proceedings.

William T. Miller

ARTICLE 54—ENFORCEMENT OF FOREIGN JUDGMENTS

CPLR 5401: Fourth department refutes competence of foreign decree to directly affect New York realty

Designed to promote national unity,⁶⁵ the full faith and credit

⁶² CPLR 3211, commentary at 9 (McKinney Supp. 1977-1978); see *Rovello v. Orfino Realty Co.*, 40 N.Y.2d 633, 636, 357 N.E.2d 970, 973, 389 N.Y.S.2d 314, 317 (1976) (Wachtler, J., dissenting); *The Survey*, 51 ST. JOHN'S L. REV. 632, 642 (1977).

⁶³ Additional support for the flexible approach approved in *Guggenheimer* can be found in *Rapoport v. Schneider*, 29 N.Y.2d 396, 401, 278 N.E.2d 642, 645, 328 N.Y.S.2d 431, 436 (1972), a pre-*Rovello* decision, which permitted the use of affidavits upon the hearing of a motion to dismiss for legal insufficiency. But see *Gerber v. New York City Hous. Auth.*, 42 N.Y.2d 162, 366 N.E.2d 268, 397 N.Y.S.2d 608 (1977). In *Gerber*, the Court dismissed the plaintiff's complaint because the extrinsic facts left "no other conclusion" than that the plaintiff had no cause of action. *Id.* at 167, 366 N.E.2d at 271, 397 N.Y.S.2d at 611. This language would appear to bring *Gerber* within the rigid *Rovello* exception permitting the use of affidavits only where they conclusively negate the cause of action. But see *id.* (Fuchsberg, J., dissenting).

⁶⁴ See text accompanying notes 53-55 *supra*.

⁶⁵ *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951); *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943); *Porter v. Wilson*, 419 F.2d 254, 259 (9th Cir. 1969), *cert. denied*, 397 U.S. 1020 (1970). One commentary has indicated that the full faith and credit doctrine is aimed at providing "the benefits of a unified nation by altering the status of otherwise 'independent, sovereign states.'" Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161 (1949) (footnote omitted) [hereinafter cited as Reese & Johnson] (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)). Since the underlying policy is the promotion of national unity, the courts should apply federal law in determining whether one state must afford full faith and credit to another state's judgment. Reese & Johnson, *supra*, at 161-62.

Because of the requirement "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced," *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.), quoted in *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (Holmes, J.), the full faith and credit clause extends nationwide *res judicata* effect to a state court's judgment. Since a final judgment in a state court usually would be conclusive on the parties and unimpeachable in subsequent proceedings within that state, full faith and credit mandates that all other

clause of the United States Constitution⁶⁶ requires state courts to recognize judgments rendered by tribunals of sister states⁶⁷ in the proper exercise of their jurisdiction.⁶⁸ Since a state generally has no

states give that judgment the same conclusiveness. *See, e.g.,* *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437-46 (1943); *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (Brandeis, J.); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908). The sole corrective for the alleged error in a foreign proceeding lies in direct appeal through that state's court system. *E.g.,* *Lynn v. Lynn*, 302 N.Y. 193, 201, 97 N.E.2d 748, 751, *cert. denied*, 342 U.S. 849 (1951); *Di Russo v. Di Russo*, 55 Misc. 2d 839, 845-48, 287 N.Y.S.2d 171, 178-81 (Sup. Ct. Nassau County 1968); *see Guggenheim v. Wahl*, 203 N.Y. 390, 396, 96 N.E. 726, 728 (1911). Conversely, where the law of the initial forum does not preclude a subsequent proceeding for further relief, a sister state need not treat the first award as an obstacle to further recovery in its courts. *E.g.,* *Industrial Comm'n v. McCartin*, 330 U.S. 622, 626-30 (1947); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943) (dictum).

⁶⁶ U.S. CONST. art. IV, § 1; *see* 28 U.S.C. § 1738 (1970) (implementing statute).

⁶⁷ *See, e.g.,* *Fall v. Eastin*, 215 U.S. 1 (1909); *Dobson v. Pearce*, 12 N.Y. 156 (1854); *Sloan v. Sloan*, 195 Misc. 111, 88 N.Y.S.2d 748 (Sup. Ct. Erie County 1949); D. SIEGEL, *NEW YORK PRACTICE* §§ 443(7), 471 (1978); 11 GA. L. REV. 683, 684 (1977). *See generally* H. GOODRICH, *CONFLICT OF LAWS* 395-97 (4th ed. E. Scoles 1964) [hereinafter cited as GOODRICH]. A state whose judgments have not been respected in a sister state must nevertheless afford full faith and credit to the sister state's judgments. *See, e.g.,* *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 75-78 (1939). In fact, a state must give full effect to foreign adjudications notwithstanding that the state's public policy or statute of limitations would have banned the original cause of action from its courts. *See Williams v. North Carolina*, 317 U.S. 287, 294 (1942); *Hirson v. United Stores Corp.*, 263 App. Div. 646, 34 N.Y.S.2d 122 (1st Dep't), *aff'd mem.*, 289 N.Y. 564, 43 N.E.2d 712 (1942).

The full faith and credit clause mandates acceptance of foreign judgments for a sum of money, since such judgments constitute a conclusive adjudication of indebtedness. *Tiedemann v. Tiedemann*, 172 App. Div. 819, 824, 158 N.Y.S. 851, 855 (1st Dep't 1916), *aff'd mem.*, 225 N.Y. 709, 122 N.E. 892, *cert. dismissed*, 251 U.S. 536 (1919). The doctrine has been interpreted, however, as not requiring a state to enforce a foreign court's order until it has been reduced to judgment in a local court. Thus, a sister state's judgment does not serve as a proper predicate for execution. *E.g.,* GOODRICH, *supra*, at 388; *Reese, Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 184 (1957) [hereinafter cited as *Reese*]; *see Anglo-American Provision Co. v. Davis Provision Co.*, 169 N.Y. 506, 513, 62 N.E. 587, 589 (1902), *aff'd*, 191 U.S. 373 (1903) (Holmes, J.); *In re Estate of Ullman*, 56 Misc. 2d 495, 505, 289 N.Y.S.2d 833, 843 (Sur. Ct. N.Y. County 1968). In addition, although it must recognize the validity of a foreign adjudication, the forum state need not adopt the methods the foreign court would have employed to enforce its decision. Thus, in the traditional view, a state need not comply with a sister state's order granting equitable relief, *see Blue v. Standard Coil Prods. Co.*, 117 N.Y.S.2d 858, 862 (Sup. Ct. N.Y. County 1952), since compliance would be akin to implementing the judgment itself. *See* 172 App. Div. at 824-25, 158 N.Y.S. at 855. Moreover, application of full faith and credit to decrees in equity would be tantamount to requiring a sovereign state to act as an involuntary agent for another. *See id.* *See generally* G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 120-27 (3d ed. 1963) [hereinafter cited as STUMBERG]; 7A WK&M ¶ 6301.26; *see also* Comment, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29 U. CHI. L. REV. 740, 743 (1962). For a criticism of this view, *see Reese, supra*; note 91 *infra*. *See generally* GOODRICH, *supra*, at 410-14; Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 DICK. L. REV. 293 (1950).

⁶⁸ In order for full faith and credit to be invoked in the subsequent litigation, it must be determined that the first forum possessed competent subject matter jurisdiction over the suit

jurisdiction over a res located outside its borders,⁶⁹ a state court judgment purporting to directly affect title to land situated in another state is not entitled to full faith and credit.⁷⁰ Some state courts outside New York, however, have voluntarily given effect to the equitable relief provisions of such judgments when a party to the first suit brings the same cause of action in the situs state.⁷¹ This approach was rejected in *Kindler v. Kindler*,⁷² wherein the Appellate Division, Fourth Department, denied recognition to that part of an Oklahoma in personam divorce decree which purported to grant the former wife full title to real property located in New York and held by the parties as tenants by the entirety.⁷³

In *Kindler*, the plaintiff wife had obtained personal jurisdiction

and proper personal jurisdiction over the parties. See D. SIEGEL, *NEW YORK PRACTICE* § 471 (1978).

⁶⁹ GOODRICH, *supra* note 67, at 136-37; see, e.g., *Fall v. Eastin*, 215 U.S. 1, 12 (1909); *Ames v. Coirre*, N.Y.L.J., Oct. 25, 1977, at 13, col. 5 (Sup. Ct. Queens County). Real property is subject to the jurisdiction and laws of the state in which it is located. See Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 221, 224 (1933). Personalty, while once deemed to be in the owner's possession at all times and hence subject to the laws of the state where the owner happens to be, see *Van Cortlandt v. De Graffenried*, 147 App. Div. 825, 830-31, 132 N.Y.S. 1107, 1111 (1st Dep't 1911), *aff'd mem.*, 204 N.Y. 667, 98 N.E. 1118 (1912), is now governed by the same rules as realty, e.g., GOODRICH, *supra* note 67, at 104. Intangibles, such as patents, have *siti* at the owner's domicile. *Ebsary Gypsum Co. v. Ruby*, 256 N.Y. 406, 409-10, 176 N.E. 820, 821 (1931) (Cardozo, C.J.).

⁷⁰ See GOODRICH, *supra* note 67, at 404. An equitable decree of a sister state has no immediate extraterritorial effect. *Dobson v. Pearce*, 12 N.Y. 156, 166 (1854); *Tiedemann v. Tiedemann*, 172 App. Div. 819, 824, 158 N.Y.S. 851, 854-55 (1st Dep't 1916), *aff'd mem.*, 225 N.Y. 709, 122 N.E. 892, *cert. dismissed*, 251 U.S. 536 (1919); see note 67 *supra*. See generally *Reese*, *supra* note 67, at 198-201.

⁷¹ See, e.g., *Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919); *Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896); *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959); *Lea v. Dudley*, 20 N.C. App. 702, 202 S.E.2d 799 (1974); *Burnley v. Stevenson*, 24 Ohio St. 474 (1873); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comments b & e (1971); *Currie*, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 672-76 (1954) [hereinafter cited as *Currie*]; *Reese*, *supra* note 67, at 190-91, 198-201. An equitable decree may be determinative of the merits of the underlying claim and therefore have a partial estoppel effect upon subsequent litigation in a sister state's courts. See *Dobson v. Pearce*, 12 N.Y. 156 (1854) ("recognizing" Connecticut injunction against suit because foreign findings of fraud were conclusive under full faith and credit); *Watters v. Watters*, 259 App. Div. 611, 19 N.Y.S.2d 995 (1st Dep't 1940) (facts are settled even if erroneously ascertained). See generally GOODRICH, *supra* note 67, at 414; 5 WK&M ¶ 5011.13; notes 87 & 91 *infra*. An alternative rationale for enforcing a foreign court's order affecting domestic land is that the foreign forum's order is operative directly against the party whose interest in the land is sought to be conveyed and whose person was subject to the rendering court's jurisdiction. See *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959); cf. *Schwartz*, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 DICK. L. REV. 293, 294 (1950) (decree should be accorded full faith and credit where law of situs and forum are "substantially the same").

⁷² 60 App. Div. 2d 753, 400 N.Y.S.2d 605 (4th Dep't 1977) (mem.).

⁷³ *Id.* at 754, 400 N.Y.S.2d at 605-06.

over the defendant husband in a divorce action in Oklahoma.⁷⁴ In conjunction with the granting of the divorce, the Oklahoma court awarded the wife full title to the parties' New York property.⁷⁵ Having subsequently obtained jurisdiction over her former spouse, the plaintiff brought an action in New York to enforce the property provisions of the Oklahoma decree.⁷⁶ In response to the plaintiff's motion for summary judgment, the defendant argued that the Oklahoma decree could not vest title in his former wife and asserted that the only relief available was partition of the property.⁷⁷ The trial court denied the plaintiff's motion and instructed the parties to proceed to partition.⁷⁸

On appeal, the Appellate Division, Fourth Department, affirmed, noting that the courts of one state have no power to directly affect land located in another state.⁷⁹ Citing the Supreme Court's decision in *Fall v. Eastin*,⁸⁰ the *Kindler* court rejected those terms of the Oklahoma decree that were "intended directly to affect the New York real property."⁸¹ Since the Oklahoma court did have the power to dissolve the marriage, however, the *Kindler* court held that the Oklahoma divorce decree transformed the tenancy by the entirety into a tenancy in common.⁸² Emphasizing that the alteration

⁷⁴ *Id.*, 400 N.Y.S.2d at 605.

⁷⁵ *Id.* at 753, 400 N.Y.S.2d at 605.

⁷⁶ *Id.*

⁷⁷ *Id.* at 753-54, 400 N.Y.S.2d at 605. A tenancy by the entirety is an estate in land whose existence depends upon the continuance of a marital relationship. See *Stelz v. Shreck*, 128 N.Y. 263, 28 N.E. 510 (1891). As long as the marriage continues, each spouse owns an undivided one-half interest in the whole which cannot be severed by either cotenant unilaterally. See *id.* at 266-67, 28 N.E. at 511; *Anello v. Anello*, 22 App. Div. 2d 694, 253 N.Y.S.2d 759 (2d Dep't 1964) (mem.). A tenancy by the entirety automatically becomes a tenancy in common, however, upon a decree of divorce by a court of competent jurisdiction. See, e.g., *Yax v. Yax*, 240 N.Y. 590, 148 N.E. 717 (1925) (mem.). A tenancy in common gives each cotenant the right to partition the property, e.g., *Wood v. Fleet*, 36 N.Y. 499, 507 (1867), and thereby to receive either an equitable share of the land itself or of the proceeds from its sale. See RPAPL § 921(2) (McKinney 1972).

⁷⁸ 60 App. Div. 2d at 754, 400 N.Y.S.2d at 605.

⁷⁹ *Id.*

⁸⁰ 215 U.S. 1 (1909).

⁸¹ 60 App. Div. 2d at 754, 400 N.Y.S.2d at 606. The *Kindler* court had to recognize the proper dissolution of the marriage by the Oklahoma court since that court had jurisdiction over both parties. *Id.*; see *Grigoleit v. Grigoleit*, 205 Misc. 904, 133 N.Y.S.2d 442 (Sup. Ct. Suffolk County 1954); *Melchers v. Bertolido*, 118 Misc. 196, 192 N.Y.S. 781 (Sup. Ct. Queens County 1922); *Ross & Crawford, Gresham's Law of Domestic Relations: The Alabama Quickie*, 27 BROOKLYN L. REV. 224, 228 (1961). A sister state's bilateral divorce decree establishing "vested rights" is a "final judgment" within the meaning of the Uniform Enforcement of Foreign Judgments Act, CPLR 5401-5408, and is entitled to full faith and credit. *Wilder v. Wilder*, 93 Misc. 2d 247, 402 N.Y.S.2d 559, 561 (Sup. Ct. Suffolk County 1978) (mem.).

⁸² 60 App. Div. 2d at 754, 400 N.Y.S.2d at 606; see note 77 *supra*.

in the character of ownership arose by operation of New York law⁸³ rather than as a result of the relief provisions in the Oklahoma decree, the *Kindler* court granted the defendant the right to an equitable share of the property.⁸⁴

The result reached in *Kindler* was not mandated by the Supreme Court's decision in *Fall v. Eastin*. In *Fall*, the Court upheld a Nebraska court's refusal to recognize a deed issued by a Washington court in an effort to convey title to Nebraska land pursuant to a divorce decree.⁸⁵ The Court reasoned that, while the Nebraska court would be able to rely on the Washington court's prior determination of the underlying equities and transfer title, the failure to do so did not violate the full faith and credit clause.⁸⁶ Thus, *Fall* was not a barrier to awarding the wife the relief requested in the *Kindler* proceeding. In fact, the *Fall* Court, in dictum, expressly approved the alternative course whereby a court voluntarily recognizes a sister state court's relief order in a subsequent action to enforce the earlier decree.⁸⁷

While older New York cases tend to support the *Kindler* position,⁸⁸ the modern approach is to extend full faith and credit to real

⁸³ See note 77 *supra*.

⁸⁴ 60 App. Div. 2d at 754, 400 N.Y.S.2d at 606; see, e.g., *Hosford v. Hosford*, 273 App. Div. 659, 80 N.Y.S.2d 306 (4th Dep't 1948); note 77 *supra*.

⁸⁵ In *Fall v. Eastin*, as part of a divorce decree, a Washington court ordered the husband to convey to the wife his right, title, and interest in Nebraska land previously held by the parties as tenants by the entirety. After the husband failed to convey title, the Washington court executed a deed to the land to the wife. In the meantime, the husband issued a deed to the defendant, Eastin, and mortgaged the land to W.H. Fall, who later released the mortgage. The former wife subsequently brought an action in Nebraska against the transferee. 215 U.S. at 2-4. The Supreme Court justified the Nebraska court's action, reasoning that the Washington court, "not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree." *Id.* at 11.

⁸⁶ *Id.* at 13-14.

⁸⁷ *Id.* at 11, 13-14. Indeed, in a subsequent case, Nebraska reversed its prior position. See *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959). The *Weesner* court maintained that, while a court of one state cannot directly affect title to another state's lands, it generally does have the authority to compel by decree the defendant to execute and deliver up a deed to property in the situs state. *Id.* at 356, 95 N.W.2d at 688-89. Since such an order originally has been supported by in personam jurisdiction, it may be considered *res judicata* and given force and effect under the full faith and credit clause provided all the necessary parties are brought before the situs court. See note 71 *supra*.

⁸⁸ See *Tiedemann v. Tiedemann*, 172 App. Div. 819, 158 N.Y.S. 851 (1st Dep't 1916), *aff'd mem.*, 225 N.Y. 709, 122 N.E. 892, *cert. dismissed*, 251 U.S. 536 (1919); cf. *Van Cortlandt v. De Graffenried*, 147 App. Div. 825, 132 N.Y.S. 1107 (1st Dep't 1911), *aff'd mem.*, 204 N.Y. 667, 98 N.E. 1118 (1912) (Swiss court's order requiring husband to reconvey title to New York property to ex-wife not enforced in New York court). In *Tiedemann*, a bilateral Nevada divorce decree was held unenforceable insofar as it sought to compel the defendant husband to account for community property situated in New York. While the *Tiedemann* court recognized that the foreign decree was conclusive on the merits, it further stated that

property awards resulting from suits in equity.⁸⁹ "One trial of an

the situs court was not bound to award equitable relief to enforce the property provisions of the decree. *But cf.* *Dobson v. Pearce*, 12 N.Y. 156 (1854) (injunction against suit recognized). In *Dobson*, a judgment creditor of Pearce assigned the New York judgment to Dobson after Pearce had obtained a Connecticut injunction enjoining any action brought upon the claim. The Court of Appeals dismissed Dobson's subsequent suit:

It is not the particular relief which was granted which affects the parties litigating in the courts of this state; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative here and necessarily prevents the plaintiff from asserting any claim under it.

Id. at 166-67. *Dobson* is significant because the grant of an injunction against suit is usually not recognized by other states. STUMBERG, *supra* note 67, at 123 n.52. Thus, the New York position has remained somewhat uncertain. *See generally* 5 WK&M ¶ 5011.13. For an analysis and rejection of the possible arguments for not treating the decree of relief as conclusive on the situs state, see GOODRICH, *supra* note 67, at 411-13.

⁸⁹ *See, e.g.*, GOODRICH, *supra* note 67, at 410-14; Reese, *supra* note 67, at 190-91, 198-201. One reason advanced for not requiring the situs state to enforce a foreign equitable decree is that there is a need to protect against infringements on the situs state's sovereignty and interests. *See* *Yarborough v. Yarborough*, 290 U.S. 202, 215 (1933) (Stone, J., dissenting); note 94 *infra*. Another argument stresses that equitable relief should be a discretionary tool of the forum. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comment c (1971). Others contend that continuing supervision or other burdens would be required if the situs state were compelled to enforce foreign decrees. *See id.* Finally, the traditional approach states that the situs forum should settle disputes involving land due to the local nature of the subject matter. *See* STUMBERG, *supra* note 67, at 125.

It is submitted that none of these considerations should control in a case involving facts similar to that presented by *Kindler*. Enforcing the order of the rendering court and thus compelling the husband to convey land in the situs state to the wife does not infringe on the situs state's jurisdiction or its legitimate interests. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comment d (1971). Since New York would recognize a deed executed by the husband under threat of contempt of the Oklahoma court, *see* note 93 *infra*, it seems clear that no further interests in relation to the land would be infringed simply because the husband has evaded the foreign court's contempt machinery. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comment d (1971).

Nor should the nature of equitable relief be a bar to requiring the husband to convey the land. Equitable relief is commonplace today, *see* note 91 *infra*, and the modern majority view is to enforce the foreign decree. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comment c (1971). Moreover, the language of both the full faith and credit clause and its implementing statute is broad enough to include all equitable decrees within "judicial proceedings." *See id.*; note 91 *infra*.

Further, conveyance of title alone does not require continuing supervision, and therefore enforcement of the foreign order would not unduly burden the situs court. As Professor Reese points out, where the husband is ordered by the rendering court to convey land in the situs state to the wife, the situs court is not undertaking the burden of ensuring the defendant's compliance with the rendering court's decree; the situs court, which has jurisdiction over the land, can enforce the decree simply by vesting the wife with title to the land. Reese, *supra* note 67, at 190-91 & 191 n.43. Under these facts, the situs state's court merely is giving res judicata effect to the equitable decision and remains free to eject the successful litigant from the land if his possession subsequently contravenes its law or policy. *Id.* at 200.

Finally, the policy in favor of settling disputes to title to land locally is not undermined by apportioning marital property in accordance with a foreign divorce decree. The divorce court is not determining who has the better title to the land; instead, it seeks only to arrive

issue is enough"⁹⁰ and extending full faith and credit to equitable relief granted in bilateral divorce cases should prevent either party from obtaining an unjust advantage.⁹¹ Some commentators would go further and extend, with few exceptions, the mandate of full faith and credit to all equity decrees.⁹²

Apparently, the fourth department was disturbed by the manner in which the relief had been requested or by the terms of the decree itself. The pleadings seem to have relied entirely on the Oklahoma decree which "purported directly to affect the title" to New York land.⁹³ The *Kindler* court's apparent distaste for the notion of a sister state directly affecting title to New York land⁹⁴ has its roots

at a fair settlement upon the dissolution of the marriage. See note 91 *infra*. If third parties subsequently challenge title to the land, they are not bound by the determinations made by a foreign proceeding in which they were not parties. See Reese, *supra* note 67, at 200. Only if title disputes arise in the foreign divorce action might the policy in favor of settling title in the situs state prevent recognition and enforcement of a foreign state's decree.

⁹⁰ *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); see note 65 *supra*.

⁹¹ It seems likely that the Oklahoma court which granted the *Kindler* divorce did not award all the marital property to the wife but rather apportioned it between the parties after balancing the competing interests of both spouses. The New York court therefore appears to have bestowed a windfall on the husband, since he not only retained that which the Oklahoma court determined was justifiably his, but also acquired one-half of what the Oklahoma court determined to belong rightfully to his former wife.

⁹² *E.g.*, Reese, *supra* note 67, at 190-91; see GOODRICH, *supra* note 67, at 410, 414. New York has long accorded the same *res judicata* effect to equity decrees as it does to judgments at law. *E.g.*, *Wilder v. Wilder*, 402 N.Y.S.2d 559, 561 (Sup. Ct. Suffolk County 1978); see GOODRICH, *supra* note 67, at 411 (citing *Post v. Neafie*, 3 Cai. R. 22 (N.Y. Sup. Ct. 1805)); STUMBERG, *supra* note 67, at 121-22 (citing *Young v. Farwell*, 165 N.Y. 341, 59 N.E. 143 (1901), and *Post v. Neafie*, 3 Cai. R. 22 (N.Y. Sup. Ct. 1805)); 5 WK&M ¶ 5011.13. Professor Reese would require the situs court to implement a foreign court's relief order except in two possible circumstances. An exception would be made where the situs court is asked to enforce a decree compelling the defendant to act, or enjoining the defendant from performing a given act, where the sole means of enforcing the order is by threat of imprisonment. The other exception suggested would occur when the form of relief granted by the foreign court would be unavailable in the situs state.

⁹³ 60 App. Div. 2d at 754, 400 N.Y.S.2d at 606; see Currie, *supra* note 71, at 672-76. Professor Currie warns the attorney against two problems that may arise in representing a spouse who seeks to have rights to extraterritorial real property determined in a divorce action. The first danger is present when the attorney seeks to obtain a decree that is framed "in terms which purport to affect the title directly Such terms . . . are an invitation to the court at the situs . . . to invoke hornbook principles in support of a holding that the foreign court had no jurisdiction to do what it did." Currie, *supra* note 71, at 672. The other danger arises when the attorney claims relief at the situs "predicated on the assumption that he has acquired legal title by virtue of the foreign decree." *Id.* at 673-74. Such prayers for relief, according to Professor Currie, must be "scrupulously avoid[ed]." *Id.* at 673. Although the proper theory had been invoked in *Kindler*, wherein the plaintiff sought an "action . . . seeking enforcement . . . of an Oklahoma divorce decree," 60 App. Div. 2d at 753, 400 N.Y.S.2d at 605, the *Kindler* court apparently "sh[ie]d away from any position resting on the contention that the foreign decree is a source of 'title' of any kind." Currie, *supra* note 7, at 675.

⁹⁴ Oklahoma did have power to affect title to the New York realty indirectly. Had the

in earlier territorial concepts of jurisdiction.⁹⁵ Such a provincial attitude, however, has little viability as a principle of modern law.⁹⁶ Recognition of an in personam foreign decree that adjudicates the rights of the parties in real property, wherever located, would not appear to jeopardize the interests of the forum state and would obviate the need for unnecessary relitigation. It is hoped that the questionable policy of making judicial relief hinge solely on the language of the complaint or the terms of the foreign court's decree will be abandoned in future cases.

Frederick J. Dorchak

CRIMINAL PROCEDURE LAW

Right to counsel triggered by court-ordered lineup appearance may be waived in attorney's absence

New York courts uniformly recognize that the filing of an accusatory instrument marks the commencement of formal adversary proceedings⁹⁷ and thus the time at which a criminal defendant's general right to counsel attaches.⁹⁸ Following the Court of Appeals'

husband executed a deed under threat of contempt, the conveyance would have passed title to the wife, and New York would have been required to recognize that conveyance. *See* Fall v. Eastin, 215 U.S. 1, 10-12 (1909); *Deschenes v. Tallman*, 248 N.Y. 33, 37-38, 161 N.E. 321, 322 (1928) (Cardozo, C.J.); *Goodrich*, *supra* note 67, at 410, 412; notes 72 & 88 *supra*. Thus, it seems the real objection is not that a foreign court may cause some ramifications within the boundaries of a sister state by its judgment. Rather, the opposition appears to be founded on due process grounds. Just as "[a]n attempt to render a personal judgment where there is no jurisdiction [over the person] is a violation of due process . . . [rendering the judgment] void in the state where rendered and not entitled to recognition elsewhere," *Goodrich*, *supra* note 67, at 396 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)) (footnote omitted), so, too, an exercise of power over land not within the rendering state is seen as "a 'forbidden infringement' of the interests of the situs state." *Reese*, *supra* note 67, at 200.

⁹⁵ Courts resent infringements on their jurisdiction and, as a result, are quite often solicitous of other states' sovereignty as well. *See, e.g.,* *Davis v. Tremain*, 205 N.Y. 236, 98 N.E. 383 (1912); *Ames v. Coirre*, N.Y.L.J., Oct. 25, 1977, at 13, col. 5 (Sup. Ct. Queens County); *Chesny v. Chesny*, 197 Misc. 768, 94 N.Y.S.2d 674 (Sup. Ct. Nassau County), *modified on other grounds mem.*, 277 App. Div. 879, 98 N.Y.S.2d 151 (2d Dep't 1950); 1 WK&M ¶ 301.02, at 3-10. In addition to maintaining respect for a sister state's sovereignty, the local forum may be better able to settle disputes pertaining to realty. 7A WK&M ¶ 6301.26.

⁹⁶ *Cf. Stumberg*, *supra* note 67, at 125 (there has been a "decided tendency in the direction of giving full faith and credit to foreign decrees granted in connection with divorce" in recent years).

⁹⁷ *E.g.,* *People v. Sugden*, 35 N.Y.2d 453, 461, 323 N.E.2d 169, 173-74, 363 N.Y.S.2d 923, 929-30 (1974); *People v. Blake*, 35 N.Y.2d 331, 339, 320 N.E.2d 625, 631, 361 N.Y.S.2d 881, 890 (1974); *People v. Poywing*, 90 Misc. 2d 197, 200, 393 N.Y.S.2d 888, 890 (Sup. Ct. N.Y. County 1977).

⁹⁸ *See* *People v. Blake*, 35 N.Y.2d 331, 339-40, 320 N.E.2d 625, 631-32, 361 N.Y.S.2d 881, 890-91 (1974). Initially, the Court of Appeals determined that the right to counsel attached