

Domestic Relations--Mexican Divorce Where Both Parties Appeared Declared Invalid (Wood v. Wood, (Sup. Ct.), 150 N.Y.L.J., Aug. 15, 1963, p. 5, col. 7)

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failed to make out a prima facie case because of insufficient evidence.³²

This decision also indicates that the Supreme Court has retained the traditional approach that jeopardy attaches when the jury is sworn, even though the first witness has not taken the stand and no evidence has been produced. Thus, the Court has apparently rejected the test employed by the Model Penal Code. This choice is unfortunate, for it continues an illogical distinction between jury and non-jury trials. In all cases, jeopardy should attach at the same stage of the proceedings, regardless of who is the trier of the facts.³³

The rigid standard which the Supreme Court has adopted runs counter to many of its prior decisions in this area, which generally stressed flexibility.³⁴ The reason for choosing this course is not apparent, since no widespread abuse of discretion by trial courts seems to exist. While it is important to safeguard the rights of those accused of crime, we should also keep in mind that the fair administration of justice demands that the public be permitted to try the accused. This "public right" ought not to be defeated because of an inconsequential failure of the prosecutor to have the witnesses in the courtroom.



DOMESTIC RELATIONS—MEXICAN DIVORCE WHERE BOTH PARTIES APPEARED DECLARED INVALID.—In an action for separation, the defendant husband counterclaimed for annulment alleging that a Mexican divorce procured by his wife from her former spouse was a nullity. Both parties appeared in the Mexican action, the plaintiff personally and her former husband by appointed attorney. In granting the annulment and declaring the divorce invalid, the New York Supreme Court *held* that since neither spouse was domiciled in Mexico, the foreign court was without jurisdiction as we commonly understand that term. *Wood v. Wood*, (Sup. Ct.), 150 N.Y.L.J., Aug. 15, 1963, p. 5, col. 7.

New York attorneys are very often confronted with the necessity of advising their clients on foreign divorce because "New York's antiquated divorce law just simply does not resolve the problem when the parties to a marriage have reached the end

³² See text accompanying note 26 *supra*.

³³ MODEL PENAL CODE § 1.09, comment (Tent. Draft No. 5, 1956).

³⁴ See, *e.g.*, *Wade v. Hunter*, 336 U.S. 648 (1949); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

of their rope. . . ."¹ Furthermore, once the spouses have absolutely decided on divorce as the only solution to their marital problems, the following inquiries are typically made: where can we go, how long will it take, how much will it cost, and, will it be recognized where I live? The answer to the first question is, many times, Mexico² or Nevada³—the forums of the "quickie divorce."⁴ Compared to Mexico's famous "one hour" or "one day" decree, Nevada law seems almost restrictive with its six week residency requirement. If time is not prohibitive to the prospective divorcee, cost may be. It has been reported that a Mexican divorce, the least expensive, will generally cost 600 dollars and a Reno action will cost nearly twice that amount.⁵ It appears that neither the high cost nor the travel seems an effective deterrent to parties determined to dissolve their marriage. A recent newspaper article discussing *Wood v. Wood* reported that more than 250,000 persons in New York City hold Mexican divorce decrees.⁶

The last question posed above, *i.e.*, whether the foreign decree will have the same effect everywhere, is the most critical. This question of recognition takes on great importance in the United States where each of the fifty states is considered sovereign in the matter of divorce.⁷ The Supreme Court of the United States stated in *Williams v. North Carolina* (II), that divorce touches a basic interest of society and "since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."⁸

¹ *Alabama and Mexican Divorces*, 7 PRAC. LAW. 75, 77 (March 1961). This statement was made by the Honorable Morris Ploscowe, a former City Magistrate in New York City, at a symposium sponsored by the Association of the Bar of the City of New York and the Federal Bar Association of New York, New Jersey, and Connecticut on December 12, 1960.

² For a discussion of Mexican divorce law, see Berke, *Mexican Divorces*, 7 PRAC. LAW. 84 (March 1961).

³ NEV. REV. STAT. § 125.020 (1957).

⁴ Under certain circumstances Alabama may be considered a "quickie divorce" forum. Under Alabama law, a non-resident plaintiff must satisfy a one-year residency requirement and become a domiciliary of the state before instituting an action for divorce. This requirement is not applicable in a case where the court has jurisdiction over both parties. In that case there is not a specified length of residency and the plaintiff only has to prove that he or she is a domiciliary of the state. ALA. CODE tit. 34, §§ 27, 29 (1958); see generally Reese, *Alabama Divorces*, 7 PRAC. LAW. 78 (March, 1961).

⁵ Porter, *High Cost of Divorce*, N.Y. Post, Sept. 30, 1963, (Magazine), p. 2, col. 3. The figures include transportation, lawyers' fees, and living expenses.

⁶ N.Y. Journal-American, Aug. 15, 1963, p. 3, col. 1.

⁷ *Williams v. North Carolina* (I), 317 U.S. 287, 298-99 (1942).

⁸ 325 U.S. 226, 230 (1945). The Supreme Court of the United States in viewing the social dangers of non-recognition of foreign decrees has

In a series of decisions beginning with the *Williams* cases,⁹ the Supreme Court attempted to protect the migratory divorce and thus stabilize the marital status of individuals by insuring recognition of foreign decrees.¹⁰ The Court in effect created a "uniform divorce law." The grounds for divorce still are not the same in each state, but a valid decree dissolving the marriage is to have the same effect everywhere.

The first instance of compulsory recognition of sister state decrees was in *Williams* (I).¹¹ In that case the Court held that an ex parte divorce decree was entitled to full faith and credit when the plaintiff spouse has acquired a bona fide domicile in the divorcing state. This principle was expanded upon in *Williams* (II),¹² where it was decided that a court in one state may re-examine the jurisdictional fact of bona fide domicile when a divorce decree is entered in an ex parte proceeding in a sister state. A finding of domicile, therefore, does not preclude another state from arriving at an opposite conclusion.

After establishing the doctrine of compulsory recognition of foreign divorce decrees in *Williams* (I), the Court proceeded to extend this doctrine and hence further stabilize the decree. In *Sherrer v. Sherrer*,¹³ the power to re-examine sister state judgments, as recognized in *Williams* (II), was limited primarily to the ex parte divorce. The Court stated that:

[T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.¹⁴

Having already made the divorce decree based on the appearance of both parties relatively free from collateral inquiry by the parties, the Court added a further security in *Johnson v. Muelberger*,¹⁵ wherein such decrees were held free from subsequent attack by strangers as well as the parties.

stated: "Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring 'considerable disaster to innocent persons' and 'bastardize children hitherto supposed to be the offspring of lawful marriage.'" *Williams v. North Carolina* (I), *supra* note 7, at 301.

⁹ *Williams v. North Carolina* (II), 325 U.S. 226 (1945); *Williams v. North Carolina* (I), 317 U.S. 287 (1942).

¹⁰ ALL FAMILY LAW 124 (Clad ed. 1958).

¹¹ *Williams v. North Carolina* (I), *supra* note 9.

¹² *Williams v. North Carolina* (II), *supra* note 9.

¹³ 334 U.S. 343 (1948); *accord*, *Coe v. Coe*, 334 U.S. 378 (1948).

¹⁴ *Sherrer v. Sherrer*, 334 U.S. 343, 351-52 (1948).

¹⁵ 340 U.S. 581 (1951).

Thus, the Supreme Court, in applying the full faith and credit clause of the Constitution,¹⁶ has generally made recognition of sister state decrees compulsory under the following circumstances: (1) where both parties appear in the action¹⁷ and (2) where the action is ex parte and the plaintiff spouse has acquired a bona fide domicile in the divorcing state.¹⁸

The presumption of validity enjoyed by sister state decrees under the full faith and credit clause is not applicable, however, to foreign country decrees. Recognition of these decrees is far less certain and the judgments themselves more vulnerable than sister state decrees.¹⁹ The Mexican divorce when recognized is done so under the principle of comity.

Comity looks to the moral necessity to do justice, so that justice will be done in return. If the forum is satisfied that the foreign divorce court had jurisdiction, it will next consider whether or not the local public policy would be violated by recognizing the decree.²⁰

The question which arises then, is on what basis does a Mexican court assume jurisdiction in divorce actions? The laws of Chihuahua do not require bona fide domicile or residence as a condition precedent to jurisdiction. The Chihuahua courts have the power to proceed when the parties expressly submit themselves to the jurisdiction of the court. This can be done in person, by appointed attorney, or even through the mails. The resulting decree would be valid in Mexico, for the court would have jurisdiction as they commonly understand that term.²¹

The New York court, in *Wood v. Wood*, justified its examination of the Mexican decree based on the appearance of both parties, by distinguishing it from "American decrees." The court

¹⁶ U.S. Const. art. IV, § 1.

¹⁷ *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Coe v. Coe*, *supra* note 13; *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

¹⁸ *Williams v. North Carolina (I)*, *supra* note 9.

¹⁹ *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 376, 130 N.E.2d 902, 904 (1955).

²⁰ ALL FAMILY LAW 132 (Clad ed. 1958).

²¹ *Berke, Mexican Divorces*, 7 PRAC. LAW. 84 (March 1961). The following are extracts from a divorce decree issued by a Civil Court in the City of Juarez, State of Chihuahua, Mexico on May 11, 1962, which exemplify such consent jurisdiction: "The suit was entered and notification to the defendant was ordered, and as the plaintiff . . . appeared personally to file her complaint, she was notified of said order and she then declared: That she ratifies the divorce complaint in all its parts, including her express submission to the jurisdiction of this Court. Through his motion filed today, Mr. Carlos Monges Caldera appeared in Court as attorney in fact for the defendant . . . and answered the complaint, admitting its allegations in all its parts and stating that he submits his principal expressly to the jurisdiction of this Court and asking for a decision, which is now rendered. . . ."

relied by analogy on *Rosenbaum v. Rosenbaum*,²² where it was stated that New York courts under principles of comity have the power to deny even prima facie validity to the judgments of foreign countries for policy reasons, no matter what allegations of jurisdiction appear on the face of the foreign decree. Before recognizing the decree under the principles of comity the court must "at least accept the basis of jurisdiction upon which the foreign court acted as a proper basis as 'we understand' jurisdiction. . . ." ²³

Since there were no allegations or findings of domicile or residence in the foreign action, the court held that the Mexican forum based its jurisdiction wholly on the appearances of both parties and their expressed submission to the jurisdiction of the Chihuahua court. Thus, it appeared that the only interest the Mexican forum had in the marital status was the fact that the parties agreed to allow the Chihuahua court to dissolve their marriage. Judge Coleman in *Wood*, stated that the parties had "simply said we are here—in person or through attorney—and 'let us have a divorce.'" ²⁴ He noted that there was not even the slightest semblance or color of jurisdiction justifying action by the Mexico court. One cannot "'confer' jurisdiction or power over their status upon Chihuahua by a fleeting call upon its courts and a mailing of a paper to someone to present to the court." ²⁵ Thus, although the decree in *Wood* is valid in Mexico, the New York court refused recognition.

In *Wood*, the court explains jurisdiction, as we commonly understand that term in matrimonial matters, by stating:

We insist upon a link of some length and of some degree of permanence actual or prospective, between the spouses and the sovereignty which assumes to exercise power over them in relation to the marital status. Unless there is that link, the sovereignty has no power to act.²⁶

Judge Coleman implies that this "link" must be domicile,²⁷ and thus, at least one of the parties must be a domiciliary of the divorcing forum. If domicile is a prerequisite to jurisdiction in all divorce proceedings, then there can be no doubt that the

²² *Rosenbaum v. Rosenbaum*, *supra* note 19, at 375, 130 N.E.2d at 903.

²³ *Wood v. Wood*, (Sup. Ct.), 150 N.Y.L.J., Aug. 15, 1963, p. 5, col. 7.

²⁴ *Id.* at 6, col. 1.

²⁵ *Id.* at 6, col. 3.

²⁶ *Id.* at 6, col. 1.

²⁷ *Ibid.* Residence means living in a particular locality, and simply requires bodily presence as an inhabitant in a given place. Domicile means living in that locality with the intent to make it a fixed and permanent home. *Foot v. Foot*, 192 Misc. 270, 274, 77 N.Y.S.2d 60, 65 (Sup. Ct. 1948).

decision in *Wood* is correct, since neither the plaintiff nor her former husband were domiciliaries of Chihuahua.

Although the Supreme Court of the United States has never held domicile to be a jurisdictional prerequisite, the "domicile doctrine" is recognized by most states. All fifty states have divorce laws that provide for some requirement of residency or domicile as a prerequisite for divorce jurisdiction, and in most states domicile is the only basis for such jurisdiction.²⁸ The rationale behind this requirement is: (1) divorce is in the nature of an in rem proceeding and the marital status constitutes the res; (2) since marriage is of great public concern, the state has an interest in creating and dissolving the res; (3) the state must have some nexus or link with the res before it can validly alter it; (4) the res exists where the parties are domiciled and if they are separated, the res exists in two places; and (5) only the place of domicile of at least one of the spouses has jurisdiction over the res and hence power to dissolve it.²⁹ It has been said that "the idea that divorce is based on domicile is too firmly rooted in our law to be changed at the present time."³⁰

However, the "domicile doctrine," although generally accepted, is not always strictly adhered to. In fact, domicile may be considered as only one criterion upon which jurisdiction may be assumed. Several other factors may provide a "link" between the marital res and the divorcing forum which would allow a court to entertain jurisdiction. An example can be found in a New York statute which recognizes the place of the marriage ceremony as an adequate "link."³¹ Parties who marry in this state can always invoke the jurisdiction of the New York courts in divorce proceedings even though they are no longer residents or domiciliaries. Although this exception to the "domicile doctrine" is not applicable to the *Wood* case since the divorcing parties did not marry in Mexico, it is evidence of the fact that New York is not strictly committed to the "domicile doctrine" and will recognize some other relationship between the state and litigants as an adequate basis for jurisdiction. Other evidence may be found in the many cases where New York courts have been willing to accept the appearance of the plaintiff in Mexico and the appearance of the defendant by appointed attorney as a sufficient "link" between the marital status of New Yorkers and the

²⁸ Berke, *supra* note 21, at 88; see Note, 44 IOWA L. REV. 765 (1959); Ligon, *Is Domicile A Jurisdictional Prerequisite To A Valid Divorce Decree?* 3 J.A. BULL. 9 (Jan. 1961).

²⁹ Ligon, *supra* note 28, at 10.

³⁰ ALL FAMILY LAW 125 (Clad. ed. 1958).

³¹ N.Y. DOM. REL. LAW § 170; *David-Zieseniss v. Zieseniss*, 205 Misc. 455, 129 N.Y.S.2d 649 (Sup. Ct. 1954). For other exceptions to the "domicile doctrine," see Ligon, *supra* note 28, at 13.

Mexico court.³² New York courts have declared Mexican *ex parte* divorces and "mail order" decrees void in the past, but have never declared a divorce, where both parties appeared, void for lack of jurisdiction. Therefore, Judge Coleman's insistence on domicile as a jurisdictional prerequisite is inconsistent with the majority of New York cases. A decision recognizing the Mexican decree would have been supported by ample precedent.³³

The effect of *Wood v. Wood* is still a matter of conjecture. If this case is followed the courts may examine Mexican decrees more carefully, since they will insist upon a more substantial nexus between the parties and the foreign jurisdiction. This would alter existing New York law under which the courts recognize Mexican decrees on little more than the fact that one party physically appeared in Mexico and the other appeared by attorney.³⁴

The appellate courts will have to determine whether Judge Coleman's sound reasoning is more persuasive than the hardships that would emanate from affirming. One consideration which must be reckoned with is the decided policy of the Supreme Court of the United States to stabilize divorce judgments in order to avoid "considerable disaster to innocent persons."³⁵ Although the Court's decisions only safeguard "American divorces," would not the same "disasters" occur if this policy or attitude was not applied to the 250,000 persons holding Mexican decrees in New York City? There is no doubt that a New York appellate court would have many precedents to rely on if it decided to reverse the lower court's decision. These precedents may not be cloaked with Judge Coleman's sound logic and may have been decided more by "winking at the law" instead of applying it, but they are rooted in a social awareness of the disasters that would occur if all Mexican divorces could be invalidated. The "quickie divorce" has not been eliminated by *Wood v. Wood*, but until New York's position is clarified, it may be assumed that New Yorkers will be taking their divorce litigation to liberal sister states like Nevada, instead of Mexico.

³² *E.g.*, *Heine v. Heine*, 231 N.Y.S.2d 239 (Sup. Ct. 1962), *aff'd mem.*, (App. Div. 2d Dep't), 149 N.Y.L.J., June 5, 1963, p. 18, col. 4, *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), *leave to appeal denied*, 4 App. Div. 2d 959, 168 N.Y.S.2d 470 (2d Dep't 1957); *Caswell v. Caswell*, 111 N.Y.S.2d 875 (Sup. Ct.), *aff'd mem.*, 280 App. Div. 969, 117 N.Y.S.2d 326 (1st Dep't 1952).

³³ *Ibid.*

³⁴ Berke, *Mexican Divorces*, 7 PRAC. LAW. 84, 87 (March 1961).

³⁵ *Williams v. North Carolina* (I), 317 U.S. 287, 301 (1942).