University of Miami Law Review

Volume 9
Number 2 *Miami Law Quarterly*

Article 6

1-1-1955

Effect of Mexican Divorces in United States

Hilery Silverman

EFFECT OF MEXICAN DIVORCES IN UNITED STATES

Introduction

Well-to-do Americans, eager to sever their marital ties, can always take up the six-week sojourn in Nevada. But Mexico remains the poor man's haven. For a comparatively small fee, from $100 to $200,[1] one can obtain a Mexican divorce—merely by writing for it. According to several typical advertising pamphlets[2] the following advantages are stressed —no appearance before courts, no witnesses, less cost and no unfavorable publicity. These pamphlets are sent through the mails to attorneys, although direct advertising in newspapers, both daily and weekly is common.

One such advertisement, in the classified section of a large New York daily,[3] offered "Mexican Law Office—free consultation." Upon inquiry, the interested party received literature,[4] a questionnaire, and a statement of financial terms. The literature, while extolling the virtues of Mexican divorces, purports to prove to the prospective divorcee that Mexican divorces are entitled to recognition as a matter of law and that mutual consent divorces are recognized in every state of the union.[5]

Such advertising, having finally irritated enough people, resulted in the introduction of a bill into Congress in 1935 to "prohibit the use of the mails for the solicitation of the procurement of divorces in foreign countries." Although subsequently shelved, the bill indicated one method of attack on the federal level on mail order divorces.[6]

Although the incidence of Mexican divorces obtained by Americans is unknown, one source[7] estimated in 1929 that over 2,000 had been granted. Another report[8] stated that one judge in Ciudad Juarez, Chihuahua, granted 2,800 divorces to Americans in a period of 19 months. The trend has increased rather than decreased judging from the amount of litigation in American courts that involve Mexican divorces.[9]

Thus the validity of Mexican divorces in the United States is a matter of concern to those who have taken advantage of the easy way to

---

1. Bergeson, *The Divorce Mill Advertises*, 2 Law and Contemporary Problems 348 (1935).
2. *Ibid.*
3. New York Daily Mirror, March 15, 1935, p. 4 col. 2.
4. See note 1, *supra*.
5. Numerous cases are cited to prove this contention, with only one being on point. For a full discussion see Bergeson, *op. cit. supra* 348, 350.
6. 74 Cong. Rec. 727 (1936).
7. Bates, *The Divorce of Americans in Mexico*, 15 A.B.A.J. 709 (1929).
8. New York Times, April 29, 1934, p. 9, col. 2.
9. Approximately 106 cases have been concerned directly or indirectly with the validity of Mexican divorces obtained by Americans.

dissolve their marriages and have re-shaped their lives in reliance upon such decrees.

The purpose and scope of this comment is limited to a comparative study of the effect of such divorces in American courts as delineated in the cases litigating the issue.

GENERALLY

Mexican divorces can be divided into three main categories. The best known type is of course the mail order divorce. As shown before, one or both of the parties authorizes, by letter, a Mexican lawyer to appear on his behalf before a Mexican state court. The attorney is able to perform the legal sleight of hand of obtaining a decree by the Mexican state laws designed expressly for this purpose. The party or parties remain at their respective residences and receive the necessary decrees, again by mail. No effort, and most of the time, very little legal effect is involved.

A variant of this procedure involves the personal appearance of one of the parties, who stays over a period of time ranging from one afternoon to several weeks, obtains the decree and departs. The personal appearance is usually made to simulate domicile. It involves more effort, with a slight legal effect in a few situations.

Yet another method uses the personal appearance of both parties or, a personal appearance by one and an appearance by an attorney for the other. This involves considerable effort but also has some legal effect.

Before delving into the effect of Mexican divorces in American courts, a consideration of comparative divorce law is necessary for adequate background information.

COMPARATIVE DIVORCE JURISDICTIONAL LAW—AMERICAN

To avoid immersion in the quagmire of the divorce status among the several states, only the broad general trends as indicated in several recent leading cases will be discussed.

The first *Williams* case[10] upheld a Nevada divorce on the finding that one spouse was domiciled in Nevada, where that state's finding of domicile was not questioned, though the other spouse had neither appeared nor been served with process in Nevada.

North Carolina took up the challenge in the second *Williams* case,[11] and re-examined the question of domicile, finding there was none. Thus the Nevada divorce was not entitled to full faith and credit.

Both *Williams* cases, as well as all American divorces, stand under the shadow of the Full Faith and Credit clause.[12] These cases affirmed

10. Williams v. North Carolina, 317 U.S. 287 (1942).
11. Williams v. North Carolina, 325 U.S. 226 (1945).
12. U.S. CONST. ART. IV, § 1, "Full Faith and Credit shall be given to the public acts, records and judicial proceedings of every other state."

the concept that domicile, the holy of holies in establishing any Anglo-American divorce jurisdiction,[13] is a prerequisite for the application of full faith and credit. Thus, an ex parte decree by a sister-state is not conclusive as to a finding of domicile and may, as a rule, be re-examined.

However, if the defendant appears or participates in the proceedings, the requirements of full faith and credit will bar a re-examination of the jurisdictional question.[14] In this connection it should be noted that jurisdiction to dissolve the marital status has been distinguished from jurisdiction to affect financial obligations resulting from marriage.[15] Even a third party collateral attack on a sister-state divorce where the defendant appeared by attorney, is barred where the party attacking would not have been permitted to make a collateral attack in the courts of the granting state.[16]

Since participation in a divorce proceeding by the other spouse renders it valid for all practical purposes, it has been said that this amounts to compulsory recognition of a divorce obtained by mutual consent.[17] There is no determination that the court had jurisdiction; rather it prevents the participating spouse from subsequently questioning that jurisdiction.

The burden of undermining the decree of a sister-state rests heavily on the assailant. The decree is entitled to a presumption of validity unless shown otherwise.[18]

Under due process,[18a] our concepts of jurisdictional power have received constitutional sanction to the extent that a judgment rendered in one state without an adequate basis of jurisdiction is void even in the state which rendered it, as well as in the sister-state where recognition is sought.[19]

COMPARATIVE DIVORCE LAW—MEXICAN

The United States of Mexico is a federal republic composed of 28 states, two federal territories and the federal district of Mexico City. Federal law is applicable in the federal district and territories, but each of

---

13. For a full discussion see Griswold, *Divorce Jurisdiction*, 65 HARV. L. REV. 193 (1951); Chesire, *Int'l Validity of Divorces*, 61 L.Q.R. 352 (1945), Chediak, *Validez de las Sentencias de Divorcio Dictadas por Tribunalez Extranjeros*, 21 REVISTA CUBANA DE DERECHO 37 (Cuba 1947).

14. Sherrer v. Sherrer, 334 U.S. 343 (1948).

15. Estin v. Estin, 334 U.S. 541 (1948) (Wife obtained a separate maintenance and support decree in New York. Husband later obtained *ex parte* Nevada divorce decree. The court held that Nevada had no right to alter wife's rights under the New York judgment, which was a property interest. The Nevada decree did not wipe out alimony claims accrued before or after).

16. Johnson v. Muelberger, 340 U.S. 581 (1951).

17. *Id.*, 65 HARV. L. REV. 193 (1951).

18. Cook v. Cook, 342 U.S. 126 (1951).

18a. U.S. CONST. AMEND. XIV, § 1.

19. Overton, *Sister State Divorces*, 22 TENN. L. REV. 891 (1953).

the 28 states has its own body of civil law. Some have adopted the federal codes and laws, although there is still a great variety.[20]

Mexico has been a staunch Catholic country and marriage was viewed as an indissoluble Sacrament—the traditional attitude of canon law since the Council of Trent in 1560.[21] But Venustiano Carranza, first chief of the constitutional armies, modified previous legislation[22] by providing for absolute divorce for valid cause or by mutual consent,[23] in 1915. In contemplation of subsequent trends, a later enactment[24] expressly set forth that to prevent foreigners and residents of the Mexican states from taking advantage of the law it was incumbent upon the parties to have resided for one year within the territorial jurisdiction of a competent court, although this has been reduced to six months.[24a] Grounds for divorce in the Federal Civil Code are varied, but interpretation has been so liberal that practically any marital offense can be used as the basis of a cause of action.[25]

Foreigners in Mexico may be divorced according to the causes and procedures of each of the states *if they reside there*, according to the Federal Civil Code.[26] The states have been more than willing to enable foreigners to take advantage of their laws.

The pioneer in this field was Yucatan, for as early as 1918, it had adopted "iconoclastic" legislation designed to expedite divorce.[27] Other states, noting the revenue-producing potentialities, soon followed. The

---

20. Stern, *Mexican Marriages and Divorces*, 20 CAL. S.B.J. 53 (1945); Galindez, *El divorcio en el derecho de Americas*, 2 BOLETIN DEL INSTITUTO DE DERECHO COMPARADO 10, 13, 38 (Mexico 1949) (contains a complete list of Mexican state laws relating to divorce and lists Mexican cases concerning foreigner's divorces).

21. Bates, *The Divorce of Americans in Mexico*, 15 A.B.A.J., 709, 712 (1929).

22. Under the old Federal Civil Code, divorce did not dissolve the matrimonial ties, it merely "suspended some of the civil obligations." *Id.*, 20 CAL. S.B.J. 53, 55 (1945).

23. Mexico: CODIFICACION DE LOS DECRETOS del C. Venustiano Carranza, 147 (1915).

24. Mexico: LAWS OF DOMESTIC RELATIONS, April 9, 1917, Art. 106.

24a. Mexico: FEDERAL CIVIL CODE, Art. 29-31 (1932); See Schoenrich, THE CIVIL CODE OF MEXICO 9 (1950); Arce, MANUEL DE DERECHO INTERNACIONAL PRIVADO MEXICANO 392 (Mexico 1943).

25. Grounds for divorce include: adultery of either spouse; child conceived illegitimately before marriage; proposal by the husband to prostitute the wife; incitement to crime by one spouse; corruption of children; incurable impotency, syphillis, tuberculosis, etc.; incurable insanity for the past two years; unjustified absence from home for over six months; absence from home for one year if motivated by cause justifying divorce; legally declared disappearance or presumption of death; cruelty, threats, or serious insults; non-support; slanderous accusations if spouse slandered is guilty of crime punishable by two year's imprisonment; commission of non-political but infamous crime; inveterate gambling, drunkenness, or drug addiction; an act by one spouse against the person or property of the other, which if committed by a third person would be punishable by at least one year's imprisonment, mutual consent, with over one year of marriage. (Divorce by mail is out of the question in the Federal district, since both must appear personally in mutual consent divorces).

26. 9 Anales de Jurisprudencia del D.F. 836; Civil Court V.D.F. (June 18, 1935).

27. Cartwright, *Yucatan Divorces*, 18 A.B.A.J. 307 (1932).

extreme liberality of these laws has acted as a magnet for the thousands of Americans anxious to dissolve their marriages.[28]

The question arises as to how, under Mexican state law, foreigners can obtain a divorce by mail or one-day appearance. A fairly typical state, by way of illustration, is Chihuahu. In that state, jurisdiction in a contested divorce is at the place of residence of the plaintiff. Jurisdiction may also be established by express or implied submission.[29] A constructive domicile is recognized. The entry of the plaintiff's name in the municipal register of the seat of the court suffices for the establishment of domicile for purposes of a divorce action.[30]

Practices of the states such as the above have not gone without reprimand from federal courts. It has been held that Yucatan divorces, granted in the absence of mutual consent and without valid cause, infringe the guarantees of the due process clause of the Mexican constitution.[31] A divorce has been invalidated if service was not made on a non-resident in accordance with the laws of the latter's domicile.[32] Service by publication was barred in Morelos if the plaintiff did not know the whereabouts of the defendant but could have discovered it.[33] The Mexican Supreme Court has held statutes of Campeche, similar to those of Chihuahua noted above, unconstitutional where jurisdiction was conferred on an administrative official of the Civil Registry to determine residence.[34]

But under the Mexican system of jurisprudence, these decisions do not have the force of precedent and the courts of most Mexican states have continued to grant divorces to Americans on the basis of Mexican state law.[35] For a decision to result in binding precedent, it is necessary that the Mexican Supreme Court hand down five decisions on the same point.[36] The determination of whether a decision is defective is a problem of constitutional law to be interpreted by the Mexican Supreme Court, although their decisions are entitled to the same respect, possibly, as *obiter dicta* of the United States Supreme Court.[37]

---

28. 2 LAW AND CONTEMPORARY PROBLEMS 310 (1935).
29. Mexico: LAW OF FAMILY RELATIONS, Art. 22, 23 (1933).
30. "Residence shall be proved by the official act of the municipal registry." Mexico: LAW OF FAMILY RELATIONS, Art. 24 (1933).
31. 18 Semanario Judicial de la Federacion, 5a epóca 631 (1927); S.J. 5 epóca 1556 (1933).
32. 33 S.J. 5 epóca 977 (1933) (This forces the plaintiff to serve the defendant according to the laws of the matrimonial domicile and not according to the easy requirements of the lex fori).
33. 42 S.J. 160 (1934); 14 La Justicia 6888 (1944).
34. 7 BOLETIN DE INFORMACION JUDICIAL 466 (1951).
35. *Id.*, 20 CAL. S.B. J. 53, 57 (1945).
36. 2 LAW AND CONTEMPORARY PROBLEMS 310 (1935).
37. *Ibid.*, See Mason, *Mexico's Cash and Carry Divorce for Americans*, 88 SCRIBNERS 360 (1930) ("We should remember that the whole theory of Mexican jurisprudence and government is different. Believing in a complete separation of judicial and legislative functions, Mexicans view with great repugnance such powers as the United States Supreme Court wields").

The Mexican government itself has taken a dim view of the divorce procedures of the states. A circular was sent to Mexican consuls in 1933,[38] which urged them to disregard solicitations of a Mexican attorney who tried to obtain help from the consuls.

Although no mail order divorce has been litigated in Mexico, it is not certain if submission to the jurisdicton of the court by mail would be considered sufficient by the Supreme Court of Mexico.[39] It would seem reasonably safe to assume, from the cases mentioned above, that the trend of the Mexican judiciary is toward an elimination of the lax practices of the states.[40]

EFFECT OF MEXICAN DIVORCES IN THE UNITED STATES

Recognition in sister-states of divorces obtained in a court in the United States is governed by the Full Faith and Credit clause. Because of lack of legislative power in the Congress, there can be no federal statute concerning recognition of divorces obtained in foreign countries. Although other means might be employed, either by executive treaty-making power or by control of the mails,[41] only state law (case-law and statutes) may regulate the effect of foreign nation divorces in the United States.

Generally, judgments of foreign nations are not open to re-examination on the merits when litigated before a local court—because of comity, a word "of loose and uncertain meaning at best. It has little significance other than as a statement of the conflicts rules of the forum."[42]

But foreign nation decrees may well be re-examined to question the jurisdiction of the rendering court as has been done in almost all of the cases litigating Mexican divorces.[43]

---

38. 61 BOLETIN OFICIAL DE LA SECRETARIA DE RELACIONES EXTERIORES 102 (Oct. 1933).

39. 2 LAW AND CONTEMPORARY PROBLEMS 310 (1935).

40. In 1941 the Tlaxcala state legislature abolished an earlier divorce law "because its immorality has given cause to unfortunate opinions which damage the prestige and traditions of the state." *Id.*, 20 CAL. S.B.J. 53, 57 (1945); In addition, a decree of the State of Morelos orders state judges to comply, in all divorce proceedings, strictly with the provisions of the new civil code of 1945 and rules of civil procedure stating expressly that the divorce law of 1934 was motivated by reasons of revenue and has, therefore, permitted "unscrupulous lawyers and litigants to take advantage of the benignity of its procedure . . . (but) the Supreme Court of the Nation by its several *amparo* judgments set aside such divorce decrees and, by so doing, gave sufficient ground to hold such proceedings unlawful . . . as being in flagrant violation of the right of fair trial under due process, a guarantee contained in our Constitution." The decree points out, in conclusion, that the "loss of prestige suffered by the judiciary of the State of Morelos has *reached beyond the boundaries of our country*, which practices have to be erased forever, thus rehabilitating the State of Morelos in this respect so that it shall enjoy the confidence of society in protecting the marriage bond as a basis of the sovereignty of the Fatherland and of the well-being of the Mexican people." Morelos: Law of June 6, 1952, [1952] PERIODICO OFICIAL 1504, no. 66 (Mexico).

41. See note 6 *supra.*

42. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COL. L. REV. 783, 784 (1950).

43. Harrison v. Harrison, 214 F.2d 571 (4th Cir. 1954); Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935); Bethune v. Bethune, 192 Ark. 811, 94 S.W.2d 1043

MAIL ORDER DIVORCES

The best known type of decree by Mexican state courts is the divorce secured by mail.[44] The earliest cases litigating mail order divorces have developed a method of attack and used language that prevails down to the most recent cases. Despite the result desired, from annulment[45] to an action for divorce,[46] the outcome is the same—practically no legal effect.

The facts are the same in most mail order divorces. The appearance through attorney by one or both sides if there is mutual agreement[47] with no personal appearance causes the obvious judicial reaction. In an early case,[48] a mail order divorce was held invalid because of lack of jurisdiction of the parties or over the subject matter. It could not be obtained by means of legislation granting jurisdiction without the consent of he state where the law is allowed to operate. Since both spouses were residents of New York, the court felt they were subject to all laws of the state, and in securing the Mexican divorce, they violated the law, procedure and public policy of New York.

Another mail order divorce was subjected to much the same language with the court pointing out that since sister-state decrees may be denied recognition because of lack of domicile, the rule becomes even stronger when applied to foreign nation judgments especially if that nation's jurisprudence is not based on the common law.[49]

Such divorces have been termed a nullity,[50] as being void *ab initio*,[51] or perpetrating a fraud[52] on the court. Although there is sometimes

---

(1936); Ryder v. Ryder, 2 Cal. App.2d 426, 37 P.2d 1069 (1934); Newton v Newton, 13 N.J. Misc. 617, 179 Atl. 621 (Ch. 1935); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937); Ruderman v. Ruderman, 193 Misc. 85, 82 N.Y.S.2d 479 (Sup. Ct. 1949) *aff'd.*, 275 App. Div. 834, 89 N.Y.S.2d 894 (1st. Dep't 1949); Wynn v. Wynn, 66 N.Y.S.2d 259 (Sup. Ct. 1946); Lent v. Lent, 49 N.Y.S.2d 569 (Sup. Ct. 1944); Coakley v. Coakley, 161 Misc. 867, 293 N.Y. Supp. 421 (Sup. Ct. 1937); Bobala v Bobala, 68 Ohio App. 63, 33 N.E.2d 845 (1940); De Rosay v. De Rosay, 162 Pa. Super. 353, 57 A.2d 685 (1948).

44. For a full description, see text, *supra.*

45. Brown v. Brown, 282 App. Div. 726, 122 N.Y.S.2d 411 (2nd Dep't 1953 *aff'd.*, 306 N.Y. 788, 118 N.E.2d 603 (1953); Drybrough v. Drybrough, 87 N.Y.S.2d 153 (Sup. Ct. 1949); Sandberg v. Sandberg, 54 N.Y.S.2d 831 (Sup. Ct. 1945); Lotz v. Lotz, 49 N.Y.S.2d 319 (Sup. Ct. 1944); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938).

46. Stewart v. Stewart, 32 Cal. App.2d 148, 89 P.2d 404 (1939); Newitt v. Newitt, 282 App. Div. 81, 121 N.Y.S.2d 311 (1st Dep't 1953); Lent v. Lent, 49 N.Y.S.2d 569 (Sup. Ct. 1944); Massacar v. Massacar, 37 N.Y.S.2d 303 (Sup. Ct. 1942); Newins v. Newins, 13 N.Y.S.2d 377 (Sup. Ct. 1939).

47. Drybrough v. Drybrough, 87 N.Y.S.2d 153 (Sup. Ct. 1949).

48. Alzman v. Maher, 23 App. Div. 139, 240 N.Y. Supp. 60 (Sup. Ct. 1930) (Mandamus proceeding to compel city clerk to issue marriage license to plaintiff who offered Mexican divorce from prior marriage).

49. Greenspan v. Greenspan, 19 N.J. Misc. 153, 18 A.2d 283 (Ch. 1941).

50. Newins v. Newins, 13 N.Y.S.2d 377 (Sup. Ct. 1939).

51. Anonymous v. Anonymous, 174 Misc. 906, 22 N.Y.S.2d 598 (Dom. Rel. 1940).

52. Stewart v. Stewart, 32 Cal. App. 148, 89 P.2d 404 (1939).

personal service on the other spouse, this has not seemed to influence most of the decisions and service by publication has been held immaterial.[53]

PERSONAL APPEARANCE

Personal appearance by one or both of the parties does not, in the majority of cases, validate a Mexican divorce. Much the same approach is used as in the mail order situations with the exception that the courts are prone to go to great lengths in examining the question of domicile. The orthodox viewpoint of domicile usually governs and a recital of domicile in the decree, with few exceptions, does not change the outcome of the decisions.

In one of the earliest cases,[54] the husband had appeared in Yucatan and obtained a divorce there. The New York court pointed out its right to inquire into the question of domicile. Since there was nothing to show in the record, that the husband was ever legally domiciled in Mexico, the only evidence being a recital in the decree of residence, the divorce was held invalid. Another typical situation occurred where both husband and wife left their car on the American side of the International Bridge to avoid delay and obtained a Mexican divorce after an afternoon's visit across the border. Despite the usual recitals of the jurisdictional fact of domicile or residence the decree did not prevent the wife from bringing a subsequent divorce action in New Mexico. The court said, "To permit a foreign state or nation to assume jurisdiction over residents of this state and grant a divorce on request, like a slot machine in which you deposit a fixed sum of money, press the lever and out comes a decree, is a condition which New Mexico does not yet tolerate."[55]

Despite the length of the personal appearances, which ranges from forty hours[56] to nine days[57] or more, American courts apply the law of the forum in determining the fact of domicile, and for the most part find that the requisite residence plus intent was not present.[58] A California

53. Ohlson v. Ohlson, 54 N.Y.S.2d 900 (1945); *But see, In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940).

54. Bonner v. Reandrew, 203 Iowa 1355, 214 N.W. 536 (1927) (Action for alienation of affections); *Cf.*, Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935) (Mexican decree did not recite that the husband was a resident).

55. Golden v. Golden, 41 N.M. 356, 68 P.2d 928, 936 (1937).

56. Hodge v. Hodge, 80 F. Supp. 379 (D.C. 1948) (Action for support and maintenance).

57. Bethune v. Bethune, 192 Ark. 811, 94 S.W.2d 1043 (1936) (Additional reason given by court for non-recognition was that "incompatibility of temperament" was not a ground for divorce in Arkansas).

58. Newton v. Newton, 13 N.J. Misc. 617, 179 Atl. 621 (Ch. 1935) (Husband was in Mexico for less than a week "for sole purpose of obtaining a divorce"); Imbriosca v. Quayle, 278 App. Div. 144, 103 N.Y.S.2d 593 (1st Dep't. 1951) *rev'g.*, 197 Misc. 1049, 96 N.Y.S.2d 635 (Sup. Ct. 1950) *aff'd.*, 303 N.Y. 841, 104 N.E.2d 378 (1952) (Deceased took two-week vacation, six-week leave of absence, and secured a Mexican divorce, and then returned to his New York job); Ruderman v. Ruderman, 193 Misc.

court said that a foreign divorce obtained through simulated residence and not in good faith is open to attack.[59]

DECLARATORY JUDGMENTS

Often one spouse tries to enjoin the other spouse from going through with foreign divorce proceedings or desires a determination of the marital status. In the first instance the courts must consider the effect of a future decree while in the second they consider the effect of a past decree.

In the first case ever to litigate a Mexican divorce[60] the wife sought to enjoin her husband from continuing Mexican divorce proceedings. He was a New York resident who had made a personal appearance in Mexico for the express purpose of obtaining a divorce there. As a defense to her action, he admitted the invalidity of the Mexican divorce and in effect, asked the court why he should be enjoined from going ahead with an admittedly useless act. The court replied that this was an attempt to evade the laws of New York. If allowed to continue he might feel that he was free to remarry. His wife would then have to go to the expense of fighting the Mexican decree. There would also be an invasion of her rights by having a husband with one wife in New York and one in Mexico.

The opposite conclusion has been reached in several recent cases,[61] on the theory that the plaintiff had nothing to fear from the other spouse's action since the Mexican courts were wholly without jurisdiction to grant a valid decree. They thus denied relief to the plaintiff. Another recent case,[62] however, enjoined the husband from obtaining a divorce *in another state*, after he had been granted a Mexican divorce. The court held that it would be illogical to refuse relief because the Mexican divorce was invalid. "We ought to destroy the entire false situation."[62a]

Although seemingly not the basis of the decisions, those cases which have granted injunctive relief have involved appearance by one spouse in the Mexican divorce, while injunctive relief was denied where mail order divorces were involved.

When a determination of the marital status is sought by one spouse,

---

85, 82 N.Y.S.2d 479 (Sup. Ct. 1948) (Husband was in Mexico on a student's visa, renewable yearly); Com. *ex rel.* Allison v. Allison, 151 Pa. Super. 369, 30 A.2d 365 (1943) (Husband in Mexico for one day); Com. *ex rel.* Manzi v. Manzi, 120 Pa. Super. 360, 182 Atl. 795 (1936) (Husband "temporarily sojourned" in Mexico).

59. Ryder v. Ryder, 2 Cal. App. 426, 37 P.2d 1069 (1934).

60. Greenberg v. Greenberg, 218 App. Div. 104, 218 N.Y. Supp. 87 (1st Dep't 1926).

61. Newman v. Newman, 181 Misc. 256, 44 N.Y.S.2d 525 (Sup. Ct. 1943); Armetta v. Armetta, 68 N.Y.S.2d 880 (1947) (Relied on Newman decision).

62. Niver v. Niver, 200 Misc. 993, 111 N.Y.S.2d 889 (Sup. Ct. 1951).

62a *Id.*, at 996, 111 N.Y.S.2d at 892.

the courts are usually quick to render a declaratory judgment because it "impairs, injures, and misrepresents the marital status of the plaintiff."[63]

On the other hand, a declaratory judgment has been held unnecessary where a prior injunction prevented the spouse from completing a Mexican mail order proceeding, which even if completed would be ineffectual to dissolve the marital status.[64]

OTHER EFFECTS

Mexican divorces have fared no better in the federal courts than they have in the state courts. State law is examined to determine the validity of the Mexican divorce where it was necessary to determine the beneficiary in National Service Insurance policies[65] or for Social Security Board[66] claims. Lack of domicile is found in these cases as well as in cases affecting the marital status brought in the District of Columbia.[67] The United States Court of Appeals has also had occasion to rule on a Mexican divorce. It has held that despite a six-week sojourn in Mexico, a bona fide domicile was never acquired and that the "Mexican divorce decree, therefore, is utterly lacking in extraterritorial validity."[68]

In applications for citizenship that depend on the validity of the Mexican divorce to sever a former marriage, the courts have refused recognition because of the usual lack of domicile to establish jurisdiction.[69] However, a different result is reached in petitions for naturalization, where although the prior Mexican divorce was invalid, this did not prevent the petitioner from being a person of good moral character for purposes of

---

63. Baumann v. Baumann, 132 Misc. 217, 221, 228 N.Y. Supp. 539, 543 (Sup. Ct. 1928) *aff'd.*, without opinion, 224 App. Div. 719, 229 N.Y. Supp. 833 (1st Dep't 1928) *modified on other grounds*, 250 N.Y. 382, 165 N.E. 819 (1929); *Accord*, Herhammer v. Herhammer, 129 N.Y.S.2d 767 (Sup. Ct. 1954); Robinson v. Robinson, 94 N.Y.S.2d 806 (1949); Wynn v. Wynn, 188 Misc. 425, 66 N.Y.S.2d 259 (Sup. Ct. 1946); Hirsch v. Hirsch, 51 N.Y.S.2d 432 (Sup. Ct. 1944); Devletian v. Devletian, 51 N.S.Y.2d 431 (Sup. Ct. 1944).

64. Pantelides v. Pantelides, 54 N.Y.S.2d 841 (Sup. Ct. 1945).

65. United States v. Synder, 177 F.2d 44 (D.C. Cir. 1949); Muir v. United States, 93 F. Supp. 939 (N.D. Cal. 1950).

66. Magner v. Hobby, 215 F.2d 190 (2nd Cir. 1954); Atwater v. Ewing, 86 F. Supp. 47 (E.D.N.Y. 1949). *Contra*: Drew v. Hobby, 123 F. Supp. 245 (S.D.N.Y. 1954).

67. Garman v. Garman, 70 App. D.C. 4, 102 F.2d 272 (D.C. Cir. 1939) (Prior mail order decree invalid in new divorce action); Cover v. Mattingly, 62 Wash. L. Rep. 967 (Sup. Ct. 1934) (Prior mail order divorce invalid in annulment action).

68. Harrison v. Harrison, 214 F.2d 571, 573 (4th Cir. 1954) (The court cites the second *Williams* case for this statement, even though that case is authority only for inter-state divorce matters under the Full Faith and Credit clause); *cf.*, Magner v. Hobby, 215 F.2d 190, 193 (2nd Cir. 1954) (Here the court correctly distinguishes between foreign and sister-state divorces).

69. Taffel's Petition, 49 F. Supp. 109 (S.D.N.Y. 1941) (Wife denied divorce petition since husband's prior mail order divorce invalid); Petition of Morss, 37 N.Y.S.2d 298 (Sup. Ct. 1942) (Prior mail order divorce invalid).

naturalization,[70] nor render a spouse morally unfit in actions for custody or adoption.[71]

Even where invalidation of a prior Mexican mail order divorce would result in a conviction of bigamy because of a second marriage, the courts have not hesitated to invalidate,[72] although one court held that if to hold otherwise would convict, slight evidence would support exoneration of the parties.[73]

Payments made pursuant to a separation agreement executed with a Mexican divorce which was probably void were said to be income to the wife and deductible by the husband.[74]

FULL RECOGNITION

It can not be said that *all* divorces obtained in Mexico by Americans have been given no legal effect by our courts. Although the cases heretofore cited have certainly indicated the strong majority policy of non-recognition, a minority of decisions has accorded Mexican divorces some legal effect, including full recognition.

In the cases that have declared the Mexican divorce valid, there has been a personal appearance by either both parties, or personal appearance by one and appearance through an attorney by the other spouse.

The first case to fully recognize a Mexican decree held that where both parties appeared personally, and the Mexican court's jurisdictional competency was shown in the decree by a recital of domicile of both parties, it was New York's duty to recognize the jurisdiction of the Mexican court. "We must accept the conclusion of the Mexican courts upon the intent to domicile. . . ."[75] The parties had made a one day appearance, obtaining residence certificates from the Mayor's office which stated that their names were inscribed in the Municipal Register, and received their decree the same day. The court took judicial notice of the fact that under Chihuahua law residence can be fixed by either party and proven by the certificate.

---

70. Petition of R——, 56 F. Supp. 969 (D. C. Mass. 1944) (Even though petitioner might have committed fornication under Massachusetts laws, her good faith marriage to a man who had previously secured an invalid Mexican mail order divorce was not something to be regarded as reprehensible); Petition of Haverly, 180 Misc. 16, 42 N.Y.S.2d 217 (Sup. Ct. 1943) (Here petitioner had secured the Mexican divorce and re-married. The court held that she was not of "bad moral character").

71. *In re* Adoption of D.S., 107 Cal. App.2d 211, 236 P.2d 821 (1951); Com. *ex rel.*, Thompson v. Yarnell, 313 Pa. 244, 169 Atl. 370 (1933).

72. People v. Harlow, 9 Cal. App. 2d 643, 50 P.2d 1052 (1935); State v. Najjar, 1 N.J. Super. 208, 63 A.2d 807 (1949).

73. Ferret v. Ferret, 55 N.M. 565, 237 P.2d 594 (1951).

74. G.C.M. 25250 1947-18-12630 (Reasoning was that Congress required some decree as evidence that the parties were not using the agreement as an income-splitting device. Since the spouses remarried in reliance on the decree, it was doubtful that they went through the procedure merely to avoid taxes).

75 Leviton v. Leviton, 6 N.Y.S.2d 535, 537 (Sup. Ct. 1938).

Later cases[76] used the same approach; that is, upon personal appearance by one or both or appearance by attorney by the other, coupled with a recital of domicile or residence to establish jurisdiction, the decree is granted recognition, and collateral attacks by one of the spouses or by a third party is barred. The tone of these cases indicates that the Mexican divorces are recognized under a combination of two theories; one being that if the decree is valid under Mexican laws, it will be considered valid in New York by comity, and that appearance by the defending spouse, either personally or through an attorney, offers that spouse an opportunity to question the apparent lack of domicile.[77] Even property or alimony settlements embodied in these valid Mexican decrees have been held to be enforceable.[78]

BURDEN OF PROOF

Some Mexican divorces have been accorded recognition by failure to sustain the burden of proof. In absence of evidence to the contrary, some courts find a presumption of good faith and integrity of the judgment of a foreign court, and although fraud may be the basis of attack, it must be proved.[79] The burden is on one who attacks a second marriage[80] as well as to sustain the claim of lack of domicile[81] where there was abundant evidence showing intent to reside in Mexico.

Several courts have pointedly met the burden of proof by examining the Mexican decree's status under Mexican law and incidentally displaying a knowledge of Mexican procedure that has been all too rare in other cases. In one situation,[82] the evidence showed that the plaintiff had falsely registered as a resident under Chihuahua laws and thus Georgia would not validate a decree wherein jurisdiction had been conferred by the

---

76. Caswell v. Caswell, 111 N.Y. Supp. 875 (Sup. Ct. 1952); Mountain v. Mountain, 109 N.Y.S.2d 828 (Sup. Ct. 1951); Mitchell v. Mitchell, 194 Misc. 73, 85 N.Y.S.2d 627 (Sup. Ct. 1949); *In re* Fleischer's Estate, 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. 1948).

77. This might be considered as extending the *Sherrer* doctrine to foreign nation divorces. See Drew v. Hobby, 123 F. Supp. 245 (S.D.N.Y. 1954) (Action for social security benefits in which the court felt that personal appearance by both spouses was not contrary to public policy of New York in light of cases cited in notes 75, 76 *supra*).

78. Mitchell v. Mitchell, 194 Misc. 73, 85 N.Y.S.2d 627 (Sup. Ct. 1949) (Although enforceable, alimony arrears under New York rules must be reduced to judgment); *In re* Fleischer's Estate, 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. 1948) Enforceable separation agreement would in itself have prevented first wife from sharing in the estate); *But cf.*, Deshlar v. Rivas, 108 N.Y.S. 2d 837 (Sup. Ct. 1951) *aff'd.*, 280 App. Div. 775, 113 N.Y.S.2d 673 (1st Dep't 1952) (Since agreement also provided for procurement of Mexican divorce, it was void and against public policy although no refusal to enforce Mexican decree).

79. Galloway v. Galloway, 116 Cal. App. 478, 2 P.2d 842 (1931) (Action for separate maintenance); Com. *ex rel.*, Thompson v. Yarnell, 313 Pa. 244, 169 Atl. 370 (1933).

80. *In re* Adoption of D.S., 107 Cal. App. 2d 211, 236 P.2d 821 (1951).

81. De Young v. De Young, 27 Cal. App.2d 521, 165 P.2d 457 (1946).

82. Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944) (Mail order decree).

parties. Where a decree did not contain a formal declaration of execution as required by the laws of Chihuahua, it was only an interlocutory decree[83] and not a final and conclusive determination of the status of the parties as required by California procedure.[84]

ESTOPPEL

Ordinarily the term estoppel "connotes the denial to a party of the right to prove a fact to the detriment of his opponent, who had relied on that fact . . . and changed his legal position accordingly."[85]

However a quasi-estoppel doctrine relying on equitable principles has been developed to preclude a challenge of sister-state divorces[86] as well as that of foreign nations. The doctrine may be invoked regardless of the belief of one spouse in the validity of the decree or of any change in the position of the other spouse.[87]

The application of the above has been, to say the least, uncertain. The problem presented to the courts, while somewhat difficult to solve on legalistic principles, becomes even more difficult to resolve when considered along equitable lines. If viewed along strictly legal rules, a Mexican decree does not even have any color of validity and is absolutely void.[88] But if guided by equitable maxims, the situation of the spouse who obtained or participated in a void Mexican divorce and then attempts to disregard it by suing for divorce in New York, illustrates that he comes into court with unclean hands,[89] or is attempting to profit by his own wrongdoing.[90]

Those cases in which the participating spouse was estopped from challenging the validity of the Mexican decree are relatively few in number. The courts are careful to point out that the Mexican decree is invalid for lack of domicile to establish jurisdiction. It makes no difference whether the spouse, being estopped, instituted the Mexican proceedings,[91] participated as a defendant,[92] or as a third person was merely instrumental

---

83. *In re* Cleland's Estate, 119 Cal. App.2d 18, 258 P.2d 1097 (1953) (Determination of surviving widow).

84. CALIFORNIA CODE OF CIVIL PROCEDURE, § 1915, (Only a "final decree" of a foreign country having jurisdiction according to the laws of such country, shall have the same effect as in the country where rendered and also the same effect as final judgments rendered in California).

85 Lenhoff, *Rationale of the Recognition of Foreign Divorces in New York*, 16 FORD L. REV. 231 (1947).

86. *In re* Ellis' Estate, 55 Minn. 401, 412, 413, 56 N. W. 1056, 1059, 1060 (1893); Kelsey v. Kelsey, 204 App. Div. 116, 197 N.Y. Supp. 371 (4th Dep't. 1922) *aff'd.*, 237 N.Y. 520, 143 N.E. 726 (1922); Krause v. Krause, 282 N. Y. 355, 26 N.E.2d 290 (1940).

87. *Id.*, 16 FORD L. REV. 231, 233 (1947).

88. See notes 50-52 *supra*.

89. Tonti v. Chadwick, 1 N.J. 531, 64 A.2d 436 (1949).

90. Weber v. Weber, 135 Misc. 717, 238 N.Y. Supp. 333 (1929).

91. Fisher v. Fisher, 162 Misc. 775, 295 N.Y. Supp. 451 (1937).

92. See note 90 *supra*.

in aiding one spouse in the procuring of the Mexican decree.[93] One court summed up its position by pointing out that not to allow estoppel would be a "flagrant invitation to others to attempt to circumvent the law, cohabit in an unlawful state and when tired, apply to the courts for a release from the indicia of the marital status."[94]

In those decisions which after a lengthy discussion, have rejected the estoppel argument, there has been a distinction made between a private claim and a determination of the marital status in the public interest. Where the marital status is involved, the courts have refused an estoppel[95] although barring the other spouse from pleading the invalidity of the Mexican decree where a private claim was involved.[96]

Another distinction is made where the courts point out that there is not the slightest semblance or color of jurisdiction in mail order decrees, since the spouses have never submitted nor invoked the jurisdiction of the Mexican courts as we understand it. The spouse who obtains the Mexican decree engages in no deception of the court and perpetrates no fraud. He never alleges or claims domicile in Mexico.[97] Nor would that spouse be acting inconsistently with a position taken in a prior decree.[98]

As a result of a strict interpretation of a New York statute,[99] a spouse who obtained a Mexican mail order decree was precluded because of

---

93 Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490 (1945) (In action for annulment, plaintiff had helped spouse procure mail order decree from prior mate. The court felt that one who has invoked a court's jurisdiction cannot now plead that court's lack of jurisdiction. But, it is submitted that the plaintiff had not *himself* invoked the jurisdiction of the Mexican court. He had merely *helped* someone *else* invoke that jurisdiction); Weiss v. Hughes, 1 N.J. Super. 104, 62 A.2d 695 (Sup. Ct. 1948) (In action for annulment, plaintiff was estopped after relying on Mexican mail order decree to marry the defendant, who had herself obtained that divorce. "He was aware of the manner in which his wife dissolved her previous marriage" and thus was now barred from pleading the invalidity of the Mexican decree).

94. Harlan v. Harlan, 70 Cal. App.2d 657, 661, 161 P.2d 490, 494 (1945); See Smith v. Smith 72, Ohio App. 203, 50 N.E.2d 889 (1943) (Dissenting opinion); Garman v. Garman, 70 App. D.C. 4, 102 F.2d 272 (D.C. Cir. 1939) (Dissenting opinion).

95. *In re* Hensgen, 80 Cal. App.2d 78, 80, 181 P.2d 69, 71 (1947) (Determination of the marital status of parties claiming right of appointment as administratrix); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943) (In divorce action court held that although a void foreign decree precludes the spouse from asserting a private claim it will have no effect on the right of either spouse to a full adjudication of the question of the existing marital status); Risk v. Risk, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938).

96. Hensgen v. Silberman, 87 Cal. App.2d 668, 197 P.2d 356 (1948) (Suit by first wife to recover community property from second wife accumulated during second marriage); Dorn v. Dorn, 112 N.Y.S.2d 90 (Sup. Ct. 1952) (Action for balance of support payments under separation agreement); *But cf.*, Magner v. Hobby, 215 F.2d 190, 194, 195 (2nd Cir. 1954) (Query—what is a private claim?).

97. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948) (Action for support and maintenance); Garman v. Garman, 70 App. D.C. 4, 102 F.2d 272 (D.C. Cir. 1939).

98. Johnson v. Johnson, 26 N.Y.S.2d. 942 (1941).

99. N.Y. DECEDENT ESTATE LAW, § 87(b), "no share. . .to a spouse who has procured without. . .New York a final decree or judgment. . .where such decree or judgment is not recognized as valid by the laws of this state."

that decree when she claimed a share in the estate of the husband.[100] The court held that there could be no distinction for purposes of this act between invalid decrees of sister-states and void Mexican mail order divorces. Although invalid sister-state decrees result in an estoppel, void Mexican decrees do not ordinarily have even that effect; and the language of the act precluded the plaintiff of a share in the estate.

UNETHICAL CONDUCT

Mexican divorces have not only affected the parties involved, but have been the cause of disciplinary actions by state bar associations against attorneys who have participated in obtaining such decrees.

A ruling by the Professional Ethics Committee of the American Bar Association in 1942[101] held that "it is illegal and unethical" for attorneys to participate and aid in the procuring of admittedly illegal Mexican mail order divorces for New York residents.

Although there were other grounds for such measures, New York attorneys have been warned,[102] and suspended[103] and a New Jersey attorney disbarred[104] for aiding in the procurement of Mexican mail order divorces.

One court said, "We condemn as unethical the participation of a lawyer in, or his giving aid to, the procurement of mail order divorces."[105]

CONCLUSION

Apart from its nuisance value, a Mexican divorce not based on adequate jurisdiction by American standards has little effect when tested in American courts.

The chances of the Mexican decree being given some weight in the United States, although relatively slight, increase with the jurisdictional contacts between the Mexican court and the parties involved.

Disregarding jurisdictional requirements, a Mexican decree which would otherwise be void, should have the logical effect at least of estopping

---

100. *In re* Rathscheck's Estate, 300 N.Y. 346, 90 N.E.2d 887, (1950), *rev'g*, 275 App. Div. 363, 89 N.Y.S.2d 490 (1st Dep't. 1949), *aff'g*, 194 Misc. 446, 80 N.Y.S.2d 622 (Surr. Ct. 1949).

101. 29 A.B.A.J. 239 (1942).

102. *In re* Anonymous, 274 App. Div. 89, 80 N.Y.S.2d 75 (1st Dep't. 1948) (Attorney accepted retainer to procure Mexican mail order divorce for New York residents. Court said that repetition "of like conduct in the future will be deemed sufficient basis for appropriate disciplinary action").

103. *In re* Gomez Franco, 274 App. Div. 56, 80 N.Y.S.2d 87 (1st Dep't 1948); Reinstatement granted, 83 N.Y.S.2d 250 (1st Dep't 1948) (Attorney suspended three months for, among other things, being guilty of unprofessional conduct for participating in and aiding in the procurement of Mexican mail order divorce).

104. *In re* Cohen, 10 N.J. 601, 93 A.2d 4 (1952) (Attorney guilty of other "flagrant transgressions, which apart from his actions in obtaining the Mexican decrees, merit severe discipline").

105. *Id.*, at 602, 93 A.2d at 5.

the procuring spouse from pleading the invalidity of the Mexican decree, especially where all interested parties have acted in reliance on that decree.

Where both spouses have personally appeared in the Mexican action, they certainly had the opportunity at that time to litigate the question of jurisdiction.

Another method of treating Mexican divorces would be to give them the same effect in the United States that they would have in Mexican state or federal courts.[106] As has been indicated before, lax practices of the state courts are being eliminated. This would mean that American courts would have to delve into Mexican law to determine the effect of the Mexican divorce according to the applicable Mexican law. Although they have shown, with few exceptions, an extreme reluctance to do so, our courts could then give meaning to the doctrine of comity with a freer judicial conscience.

And finally, should there be a "moral difference between a person in moderate circumstances securing a Mexican decree and a more affluent person securing a Nevada divorce. . . . It would disregard the fact that in our society Mexican and Nevada divorces both pose as being more or less respectable and representative of the mores of the day."[107]

Hilery Silverman.

INSURANCE—DETERMINATION OF TOTAL DISABILITY

In general the courts experience difficulty in determining what is total disability within the meaning of insurance disability clauses; this is due in part to variations in the language of the disability provisions, which in many instances are circumscribed and restricted by qualifying words and phrases, and in part to the variant factors in the individual situations to which the courts are asked to apply disability provisions.

It has long been the rule that the total disability contemplated by an accident policy, or a life insurance policy containing a disability clause,[1] does not mean a state of absolute helplessness,[2] but rather an

106. Vieira, *Efectos de las sentencias de divorcio el los paises extranjeros*, 3 RIVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES 557, 569 (Uraguay 1953) (Suggesting that recognition be granted only to divorce decrees rendered by courts competent "according to international principles").

107. Petition of R_____, 56 F. Supp. 969, 971 (D.C. Mass. 1944).

1. A typical disability clause reads: "Benefits will be paid when insured has become totally disabled as the result of bodily injury or disease occuring after the issuance of this agreement, so as to be prevented from engaging in any business or occupation and performing any work for compensation, gain or profit."

2. New York Life Ins. Co. v. Bird, 152 Fla. 532, 12 So.2d 454 (1943); Equitable Life Assur. Soc'y of U.S. v. McKeithan, 160 Fla. 486, 160 So. 883 (1935); Ayers v. New York Life Ins. Co., 219 La. 945, 54 So.2d 409 (1951); Carver v. Metropolitan Life Ins. Co., 191 Va. 265, 60 S.E.2d 865 (1950).