A NEVADA LAWYER LOOKS AT CALIFORNIA'S NEW UNIFORM DIVORCE RECOGNITION ACT

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By William G. Ruymann*

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THE problems incident to interstate recognition of divorces have long been with us. The task of reconciling local interests, the rights of the parties to the divorce, and the Constitutional mandate of full faith and credit has been before our courts for nearly a century and a half.[1] During that period much has been accomplished toward protecting the party who relies on the nation-wide validity of a divorce obtained in any particular state, as well as the spouse-defendant who does not reside in the state granting such a divorce.

Two vital characteristics must be present for a satisfactory divorce law from a national viewpoint. First, there must be certainty. When a judgment is rendered, we must be able to say with confidence whether it is valid or not. Second, there must be fairness to both spouses involved in the proceedings.

The recent cases of *Sherrer*[2] and *Estin*[3] have gone far toward achieving these desirable ends. Under the present Constitutional doctrine, it is clear that a divorce is entirely effective to dissolve the status of marriage if both of the spouses were within the personal jurisdiction of the court awarding the decree.[4] On the other hand, if the defendant-wife has obtained a valid award of separate maintenance in one state, her husband's *ex parte* divorce in a second

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[1]For an early example see *Jackson v. Jackson*, 1 John. 424 (N.Y. 1806).

[2]334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed.1429, 1 A.L.R.(2d) 1355 (1948).

[3]334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed.1561, 1 A.L.R.(2d) 1412 (1948).

[4]The California Supreme Court has had occasion to apply the *Sherrer* case. In *Heuer v. Heuer*, 33 Adv. Cal. 241, 244, 201 Pac. (2d) 385, 387 (1949), the Court stated: "The test therefore is not whether the issue of jurisdiction was actively litigated in the court rendering the divorce decree. It is sufficient if the defendant has participated in the proceedings and had full opportunity to litigate the issue. If so, the decree is binding even though a relitigation of the question of jurisdictional residence requirements in another State might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree which as a matter of policy could not be procured in the State of actual domicile."

state, even though he is domiciled there, will not affect her right to such maintenance. While these two rules may appear somewhat inconsistent, they are amply justifiable on grounds of due process, or fairness, as we have referred to this factor.

But there are still those among us who are not satisfied with the pattern drawn by judicial evolution in the field of constitutional law and divorce. Some are dissatisfied because the recognition of sister-state divorces has been limited too severely; others feel that the Supreme Court is going too far in disregarding the basic right of the states to control their local affairs.

Among the fruits of the efforts of the latter group is the recently promulgated Uniform Divorce Recognition Act. As adopted this year in California, this Act is designed to speed up the process of resolving the dilemma. The extent of its effectiveness in that regard is the question to be examined briefly herein.

The California Act provides:[5]

"§150. This article may be cited as the Uniform Divorce Recognition Act.

§150.1. A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

§150.2. Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this State and until his return maintained a place of residence within this State, shall be *prima facie* evidence that the person was domiciled in this State when the divorce proceeding was commenced.

§150.3. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§150.4. *The application of this article is limited by the requirement of the Constitution of the United States that*

[5]The Act adds the indicated sections to the CALIFORNIA CIVIL CODE.

full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." [Italics added]

What is the effect of this Act? Section 150.1 states existing law, limited by the doctrine of the recent *Sherrer* case. To the extent that the section purports to invalidate a divorce obtained in a proceeding in which both parties appeared, it is unconstitutional under the rule of the above case.

Let us look at previously existing California Law. Section 90 (2) of the Civil Code declares that marriage is dissolved only:

"2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

Section 1916 of the Code of Civil Procedure provides that:

"Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, ... in respect to such proceedings."[6]

Thus, the first section of the new Act adds nothing to the present law except some unconstitutional provisions covered by its generality.

Section 150.2 presents some more interesting questions. It provides a rule of evidence in aid of the policy set out in subsection one. Suppose a person, domiciled in California, moved to another state. After living there for eleven months, he commenced an action for divorce in that state. Sometime after obtaining the divorce, he moved to a third state for a year, and then to still a fourth in which he lived for over five months. If he then decided to return to California to reside, his divorce would be subject to the presumption of invalidity created by this section of the Uniform Act. In other words, such a person might be living outside of California for two and one-half or three years, and yet be met with a presumption that he had never acquired a domicile in another state. This, in spite of all the elements required to effect a change of domicile to the other state!

This provision may well be subject to question on the grounds of due process. While a presumption is entirely proper if it embodies a reasonable inference, there is certainly room for doubt here. Space will not permit an extended discussion of this question, but it is a matter which will undoubtedly be raised in future litigation.

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[6]See *Crouch v. Crouch*, 28 Cal.(2d) 243, 250-251, 169 Pac.(2d) 897, 901 (1946).

Moreover, California's much-discussed rule providing that presumptions constitute evidence may give rise to other problems.[7] Under the full faith and credit clause, a judgment must be accorded the same respect in another state as it would have received in the rendering state. To this rule is the corollary that the jurisdiction of the original court may be questioned in order to ascertain whether the judgment is entitled to recognition in any court. The policy of the Constitutional provision, however, clearly requires that the party attacking a foreign judgment on the ground of lack of jurisdiction bear the burden of proving that point.[8] If the presumption in the new Act has the effect of changing the policy in California, it may again be subject to Constitutional attack. Though the new rule appears to shift only the burden of going forward in the trial, the fact that the presumption will be treated as "evidence" in itself gives rise to further problems.

There has been some argument that the presumption may limit the application of the *Sherrer* case. Thus, it is claimed, that case relied on *res judica* and opportunity to litigate the issue on the plaintiff's domicile in the original divorce action: the new presumption relates to matters occurring after the original action which could not have been raised therein.

It is true that the new Act deals partially with conduct of the plaintiff after the divorce has been obtained. But it still is the question of his domicile at the time of the divorce action that is in issue. That matter was before the court, and if both parties appeared at that time, with full opportunity to be heard on that question, re-litigation on the issue is not available. The fact that new "evidence" has been found in subsequent conduct of a party is immaterial, in the absence of extrinsic fraud.

Thus, it seems clear that under both the general judically developed law, and existing California statutes, the situation was not changed by the enactment of the new California Act, except that the presumption has been added. Even this is subject to serious Constitutional doubts, and is already severely restricted by the *Sherrer* case.

Section 150.3 states the usual rule that the Act shall be interpreted in such a way that the purpose of uniform state laws may be carried

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[7]See 10 CAL. JUR. 744.

[8]*Delanoy v. Delanoy*, 216 Cal. 27, 13 Pac.(2d) 719, 86 A.L.R. 1321 (1932): See *Crouch v. Crouch*, 28 Cal.(2d) 243, 169 Pac. (2d) 897 (1946).

out. Only three other states[9] have adopted the Act.

California alone adopted Section 150.4, which declares the obvious: the Act is subject to the limitations of the Federal Constitution. The weakness and futility of such legislation is officially declared in this section.

Over the years, many courts have developed a flexibility in the treatment of recognition of foreign divorces. They have looked to the facts and circumstances in each case and based their results upon the fairness involved in the particular situation; many divorces are thus recognized even though not within the requirements of full faith and credit. This practice, whether called comity, estoppel, or public policy, has been a healthy one. As recently stated by the Montana Court:

"But an equally compelling reason for [rejecting a] . . . collateral attack upon the divorce decree of the Nevada Court is the decent regard and respect we owe to the judgments of the courts of sister states. Even though the full faith and credit clause of the Federal Constitution does not prohibit a collateral attack . . . the rules of comity . . . [do]."[10]

The wisdom of such procedure in a given case should be left to the court; certainly the legislature should not make a general provision for recognizing all foreign divorces. By the new Uniform Act, the California Legislature has declared that any such recognition is not to be granted unless absolutely required by the Constitution. Thus, perhaps the Act will have some effect upon future judicial action.

Another effect of the Act is apparent. Intentionally or otherwise, it will undoubtedly serve as a "scare law." The people of California may be reluctant to rely on out-of-state divorces, at least until the new law is tested, and its limitations pointed out.

Whatever the strength or weakness of the Act, effective October 1, 1949, it represents an important declaration of policy and deserved more consideration than that accorded it by the California State Senate Judiciary Committee, which sent the bill to the Senate floor "without a word of discussion."[11]

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[9]The best available information indicates that California, Nebraska, New Hampshire and Washington have adopted the Uniform Act. Wisconsin has been seriously considering it also.

[10]In re *Anderson's Estate*, 194 Pac.(2d) 621, 625 (1948), noted in 1 BAYLOR L. REV. 179 (1948).

[11]Associated Press dispatch, Sacramento, April 26, 1949.