

1940

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### Recommended Citation

Frederick L. Kane, *Recognition of Foreign Divorce Decrees In New York-Krause V. Krause*, 9 Fordham L. Rev. 242 (1940).

Available at: <https://ir.lawnet.fordham.edu/flr/vol9/iss2/4>

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## Recognition of Foreign Divorce Decrees In New York-Krause V. Krause

### Cover Page Footnote

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## COMMENTS

### RECOGNITION OF FOREIGN DIVORCE DECREES IN NEW YORK— KRAUSE V. KRAUSE

A vigorous dissenting opinion in an important appeal often foreshadows a shift or trend in doctrine or policy. Such was the dissenting opinion of Justices Holmes and Brandeis in the case of *Evans v. Gore*<sup>1</sup> involving the constitutionality of the taxation of judicial salaries. That opinion presaged what seems now to have been the inevitable change of policy of the Supreme Court nineteen years later.<sup>2</sup> Minority opinions often merely restate the formulae of an old faith, while the process of building up and rationalizing the new faith is going on, as reflected in some dissents of the conservative members of the Supreme Court in the past several years. In such dissents the minority signifies its intellectual inability to assent both to the premises and the conclusions of the majority. Less frequently a dissenting opinion, conceding that the conclusion of the majority might make for better law, declares that principles which are embedded in the law may not be abandoned to accomplish an expedient or even a just result in the individual case without at least a frank avowal of the abandonment of such principles. This seems to be the function of the minority opinion in an interesting case—*Krause v. Krause*<sup>3</sup>—recently decided in the New York Court of Appeals on the question of the recognition of foreign decrees of divorce.

In that case the plaintiff sued her husband in New York for a legal separation. The defendant-husband pleaded as a defense that his marriage with the plaintiff was void because of his incapacity. It appeared that he had been previously married and that while retaining his residence in New York had gone to Nevada and obtained a decree of divorce on constructive service. He subsequently married the plaintiff and lived with her for six years. The question before the Court was the validity of his defense.

The decision was that the defense was not valid. The majority opinion, written by Judge Finch, states that, although the divorce obtained by the defendant in Nevada is unquestionably invalid in New York, the defendant is precluded from questioning its validity; that "it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred" and that the result in the case imports "complete observance of not only the interest of the State in the protection of the first marriage, but also of the other interest of the State that marriage obligations shall not be lightly undertaken and lightly discarded."<sup>4</sup>

The view of the minority of the Court, as reflected in the dissenting opinion of Judge Loughran, is that the defense is valid; that the reasoning of the majority is inconsistent with previous decisions of the Court of Appeals, which

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1. 253 U. S. 245 (1920).

2. *O'Malley v. Woodrough*, 307 U. S. 277 (1939).

3. 282 N. Y. 355, 26 N. E. (2d) 290 (1940).

4. *Ibid.*

cannot be distinguished from the instant case. It divides the cases relating to foreign divorce decrees in which the principles of equitable preclusion or quasi estoppel have been invoked into two categories. The first category includes matrimonial actions, involving primarily the marital status;<sup>5</sup> the second includes private suits which are not matrimonial actions, although depending upon the validity of foreign decrees of divorce.<sup>6</sup> It is said that the public policy of the State is directly involved in the first class of cases, but not in the second; that the Court has given effect to the real status of the parties in the first class of cases, applying the rigorous New York rule of conflict of laws,<sup>7</sup> and has considered questions of equitable preclusion only in the second class. The conclusion is that the instant case falls clearly within the first category and that consistency requires that the defense be declared valid, because of the invalidity of defendant's foreign divorce and regardless of the apparent hardship to the plaintiff.

Appropriate comment on the *Krause* decision might embrace discussions not only of Conflict of Laws and Jurisdiction in Divorce, but even Judicial Process and Jurisprudence. Much has already been written concerning the perplexing and somewhat anomalous decisions in the State of New York and their rather uneven trend to a more tolerant attitude to foreign divorce decrees. The policy of the State of New York in refusing to apply the principle of comity was stated by the Court of Appeals in 1879 in *People v. Baker* as follows:

"this principle (of comity) is not applied, when the laws and judicial acts of another State are contrary to our own public policy, or to abstract justice or pure morals. The policy of this State always has been, that there may of right be but one sufficient cause for a divorce *a vinculo*."<sup>8</sup>

The Court also said in that case:

"It is not for the Court to disregard general and essential principles, so as to give palliation."<sup>9</sup>

It was not until 1906 that it was decided that such a policy was not entirely hostile to the full faith and credit clause of the Federal Constitution.<sup>10</sup> The same policy, however, was reiterated in 1920 in the case of *Hubbard v. Hubbard*.<sup>11</sup>

An examination of the more recent New York cases, particularly such cases

5. *Fischer v. Fischer*, 254 N. Y. 463, 173 N. E. 680 (1930); *Lefferts v. Lefferts*, 263 N. Y. 131, 188 N. E. 279 (1933); *Stevens v. Stevens*, 273 N. Y. 157, 7 N. E. (2d) 26 (1937).

6. *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193 (1903); *Brown v. Brown*, 242 App. Div. 35, 272 N. Y. Supp. 877 (4th Dep't 1934), *aff'd without opinion*, 266 N. Y. 532, 195 N. E. 186 (1935); *Hynes v. Title Guarantee & Trust Co.*, 273 N. Y. 612, 7 N. E. (2d) 719 (1937).

7. *Stevens v. Stevens*, 273 N. Y. 157, 7 N. E. (2d) 26 (1937).

8. 76 N. Y. 78, 88 (1879).

9. *Id.* at 87.

10. *Haddock v. Haddock*, 201 U. S. 562 (1906).

11. 228 N. Y. 81, 126 N. E. 508 (1920).

as *Gould v. Gould*,<sup>12</sup> *Glaser v. Glaser*,<sup>13</sup> and the *Krause* case, reveal that whether the judicial exceptions are based upon considerations of equitable preclusion or an actual change in policy, there is no longer the same demand that foreign divorce decrees not measuring up to our standard be rejected. In a current article, Professor Howe has carefully retraced the course of the New York cases to show that recent decisions of the Court of Appeals have been predicated on theories of jurisdiction in divorce other than status and domicile.<sup>14</sup> In this connection it is interesting to note that in the *Krause* case both parties in the invalid Nevada divorce, which is indirectly given effect, were and continued to be residents of the State of New York and that the defendant in the Nevada action did not appear and was not personally served.

Possibly very little remains of the concept of public policy that was stated in the *Baker* case, because the so-called *mores* of that day are no longer ours. The change in *mores* in New York may have been indicated in a more liberal rule for marriage annulments,<sup>15</sup> in the statutory amendment which virtually added incurable insanity as another ground for divorce,<sup>16</sup> or in a certain degree of laxity in the granting of absolute divorce on the ground of adultery. Concerning the failure of the New York Courts to apply the principle of comity with respect to foreign decrees of divorce, and the consequent anomalous results, the Court of Appeals in the *Baker* case stated that it was

"better by an adherence to the policy and law of our own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict."<sup>17</sup>

If recent New York cases involve not merely the relaxation of the general principle, but an abandonment of the old concept of public policy, it seems that the "clash" and "conflict" have been given up.

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#### TAXATION OF INTERSTATE SALES—THE BERWIND CASE

Broad language and well-respected *dicta* for many years buttressed a firm belief that sales in interstate commerce could not be taxed by the state of ultimate delivery without violation of the commerce clause of the Constitution,<sup>1</sup>

12. 235 N. Y. 14, 138 N. E. 490 (1923).

13. 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

14. *The Recognition of Foreign Divorced Decrees in New York State* (1940) 40 COL. L. REV. 373. Cf. *Davis v. Davis*, 305 U. S. 32 (1938) discussed in Vreeland, *Obligatory Interstate Recognition of Divorce Decrees—A New Trend?* (1939) 8 FORDHAM L. REV. 80.

15. *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N. E. 60 (1933).

16. N. Y. DOM. REL. LAW (1928) § 7 (5).

17. *People v. Baker*, 76 N. Y. 78, at 87.

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1. See *Brown v. Maryland*, 12 Wheat. 419, 447 (U. S. 1827); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 497 (1887); *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648 (1921); *Sonneborn v. Cureton*, 262 U. S. 506, 509 (1923).