2912.

MARRIAGE—VALIDITY OF FOREIGN DIVORCE DISCUSSED.

COLUMBUS, OHIO, November 21, 1928.

SYLLABUS:

1. *Marriage is a contract ending in legal status. Divorce is the legal dissolution of this status. An action for divorce, so far as it deals with this status, is a proceeding in rem; and it is essential to the validity of a decree in such an action that the status which is the subject of the action shall be within the jurisdiction of the court that entertains the action.*

2. *The locality of the res, the status of a matrimonial union, with which an action for divorce deals, is the domicile of the parties to the marriage.*

3. *To give validity to a decree of divorce, it is essential that at least one of the parties must be domiciled in the state of the forum.*

4. *The courts of Ohio will recognize as valid, in so far as the marital status of the parties is concerned, a divorce granted by the courts of another state of the United States or by a court of any of the nations within the realm of European civilization, if the court granting the divorce had at the time of the decree jurisdiction of the subject matter and of the parties, even though the divorce be granted for causes not recognized as sufficient under the laws of Ohio, but which are sufficient under the law of the forum.*

5. *When the validity of a foreign divorce is questioned in the courts of Ohio, the Ohio court will inquire into the facts upon which the jurisdiction of the court which granted the divorce is based, and if it be found that said court did not at the time of granting the decree have jurisdiction both of the subject matter and of the parties, the divorce will be held to be void.*

6. *A divorce granted by a court of the Kingdom of the Serbs, Croats and Slovenes, for causes recognized under the law of the Kingdom as sufficient, is valid in Ohio, in so far as it affects the marital status of the parties, if the court granting the decree had at the time jurisdiction of the subject matter and of the parties.*

DR. GEORGE V. TODOROVITCH, *Consulate General of the Kingdom of the Serbs, Croats and Slovenes,* 1819 *Broadway, New York, N. Y.*

RE: No. 14353/28.

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

> "I have the honor to advise you that our Ministry of Justice desires to be informed as to whether a divorce decree issued by a Court in the Kingdom of the Serbs, Croats and Slovenes and affecting American Citizens would be considered valid by the United States Authorities.
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> The specific information requested by the said Ministry is as follows:
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> 1. Are divorce decrees affecting American citizens, issued by Courts of the Kingdom of the Serbs, Croats and Slovenes considered valid by authorities of your state, when—
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> (a) both parties reside in the Kingdom of the Serbs, Croats and Slovenes at the time of divorce.
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> (b) only one party resides in the Kingdom of the Serbs, Croats and Slovenes and the other in your state.

(c) one party resides in the Kingdom of the Serbs, Croats and Slovenes and the other in any different foreign country.

2. When only one party resides in the Kingdom of the Serbs, Croats and Slovenes and the other in your state or in another foreign country, the court of which country has jurisdiction in the divorce case:

3. If, according to the law of your state the court of the Kingdom of the Serbs, Croats and Slovenes has jurisdiction in divorce cases of American citizens as specified under (1) and (2) would a decree be considered valid by your state if the divorce is granted on grounds sufficient under the law of the Kingdom of the Serbs, Croats and Slovenes but not sufficient under the laws of your state."

The question of the validity and effect of a divorce granted by the courts of a foreign country has never been the subject of judicial determination in the State of Ohio, so far as is shown by the official reported decisions of our courts and, so far as I am aware, has never been squarely presented for determination to a court of record in this state. Nor does the statutory law of the state deal with the question.

If, and when, the question is presented for determination, it will be, for the want of established precedent, a case of first impression for the Ohio courts. In that case our courts, as in other matters, will be guided to a great extent by the conclusions reached by courts of other states within the United States, the principles of the English common law as administered by the courts in this country and England, and such collateral and related principles of private international law and comity as are pertinent.

At the outset it should be noted that some confusion arises in considering the question of divorces granted in jurisdictions other than the one where their validity and effect are brought into question, for the reason that text writers on American Law, as well as the courts in this country, treat the several states of the United States as being foreign to each other as regards the jurisdiction of their courts, and divorces granted in one of the American States are spoken of in text books, digests and court decisions as "foreign divorces", as well as those divorces granted by the courts of a foreign country. However, the validity and effect of divorces granted by the courts of another state of the American Union and those granted by the courts of a foreign country are tested by different rules, although the underlying principle of these tests is identically the same aside from the constitutional guarantee contained in the Constitution of the United States, Article IV, Section 1, to the effect that:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

It was held by the Supreme Court of the United States in *Haddock* vs. *Haddock,* 201 U. S. 562, that a state is not required, by reason of Article IV, Section 1, of the Federal Constitution quoted above, to recognize a divorce granted by the courts of another state, although it might do so if it sees fit. The courts of Ohio do give full faith and credit to divorces granted in the other states, subject to their scrutiny as to the jurisdiction of the court pronouncing the decree, as will hereafter appear. This is stated by the court in the case of *Spaulding* vs. *Spaulding,* 11 O. App., 143, 146, as follows:

"Under the law of Ohio, this state does give faith and credit to such decisions to the extent of recognizing the validity of the divorce even though it may not be forced to do so under the Constitution."

Although the courts in this state apply the provisions of the Federal Constitution according full faith and credit in each state to the "judicial proceedings" in every other state to proceedings for divorce, yet, even as to these proceedings in a sister state, the proceedings of the court of the sister state will be inquired into to determine its jurisdiction in the premises, and, if it be found that the court granting the divorce did not have jurisdiction of the subject matter and of the parties, the decree will not be recognized as valid. Thus in the case of *Van Fossen* vs. *The State,* 37 O. S., 317, a divorce granted by a court in Colorado for an offense committed in that state, where the husband and wife were temporarily resident, though found by the jury to be legally domiciled in Ohio, was declared to have "no force and effect in this state," notwithstanding its efficacy in Colorado; and the conviction of the husband of bigamy for marrying another woman here was sustained. There can be no question but that this principle would be extended if the case should arise to divorces granted by the courts of a foreign country. The question of the jurisdiction of a court is always open to inquiry and a decree rendered without jurisdiction must necessarily be void.

Although we do not have the benefit of any decided cases directly in point, an examination of the Ohio cases involving consideration of divorces granted in sister states of the American Union, and the principles of law therein set out, leads to the conclusion that a divorce granted by a court in the Kingdom of the Serbs, Croats and Slovenes having jurisdiction of the subject matter and of the parties will be given full force and effect in Ohio the same as those granted in sister states, in so far as the decree of divorce affects the marital status of the parties.

Marriage is a contract ending in legal status. Divorce is the legal dissolution of this status. An action for divorce, so far as it deals with this status, is a proceeding in rem; and it is essential to the validity of a decree in such an action that the status which is the subject of the action shall be within the jurisdiction of the court. It is undoubtedly competent for the sovereign power of any state or country to confer upon its tribunals such jurisdiction in matters of divorce as it deems proper and a decree pronounced by a competent tribunal under authority so conferred would necessarily be held valid and binding within the territorial limits of the state or country whose tribunal it was, but what effect, if any, would elsewhere be given to such a decree depends mainly upon whether the jurisdiction of the court pronouncing it has been conferred and exercised in accordance with the generally received principles of international law. In accord with this view, Jacobs in his work on the Law of Domicile, states on page 68:

"The test, therefore, of the validity, as to jurisdiction, of a *domestic* divorce is anything which the law making power chooses to enact while the test as to jurisdiction of the validity of a *foreign* divorce is, according to the generally received view, the domicile of the parties. The place of the celebration of the marriage is immaterial and so, according to almost all the authorities, is the place of the commission of the offense."

See also Story on Conflict of Laws, Section 229a.

It was held in an early case in Ohio, *Cooper* vs. *Cooper,* 7 Ohio, Pt. II, page 238, that a decree of divorce rendered by a court of another state, unless void for want of jurisdiction or obtained by fraud as to proof of plaintiff's domicile, is a

bar to a subsequent suit by the defendant for the same relief; and it is my opinion that the same rule may be extended to divorces granted by the courts of the Kingdom of the Serbs, Croats and Slovenes, although our courts would, if the question were brought before them, inquire into the validity of such a divorce in so far as it might be affected by a want of jurisdiction on the part of the court granting the divorce, or by fraud or collusion of the parties, if that fraud or collusion should affect the conferring of jurisdiction on the court granting the divorce.

It has been held in the case of *Miller* vs. *Miller,* 128 N. Y. Supp. 787, and I believe the principles in that case would be followed in Ohio, that a foreign rabbinical divorce, if valid where granted, will be recognized in this country upon grounds of comity or international law unless it is against the public policy or morality of the state. The fact that a rabbinical divorce granted here would have no validity or that the divorce may have been for a cause not recognized by our laws does not require the court to adjudicate against its validity. If it does not appear, however, that the rabbi had jurisdiction to grant divorces, the alleged divorce is void. *Sokel* vs. *Poe,* 212 Ill. 238.

It was formerly held in England, where the divorce laws have always been rather strict, that the decree of a foreign court dissolving a marriage which had been consummated in England was void even though the parties at the time of the marriage and of the divorce proceedings were both domiciled in the country of the forum. This was upon the theory that marriage celebrated in England could not be dissolved except by act of Parliament. This doctrine has been overturned and now the courts in England and Canada recognize the validity of a divorce granted by a court of the country wherein the parties were legally domiciled at the time when the proceedings were taken, and even though the decree was founded upon causes which would not be considered sufficient in an English court.

Many questions may arise when the validity of a foreign divorce is brought in question, such for instance as to whether the jurisdiction of the foreign court may be presumed, or whether it must be shown affirmatively, the force and effect to be given to the record itself with reference to jurisdictional facts, whether jurisdictional facts shown on the face of the record may be contradicted by extrinsic evidence, questions relating to the application of the doctrine of estoppel to foreign divorces, and similar questions. These are matters which have never been passed upon by the courts of Ohio, and I do not venture an opinion with reference thereto.

Upon the whole, it is my opinion, after examining the reported cases in Ohio involving the validity of divorces granted by the courts of sister states, which are very few in number, and the discussions touching upon the underlying principles of divorce contained in other cases, without further citation, that a divorce granted by the courts of the Kingdom of the Serbs, Croats and Slovenes will be recognized as valid in Ohio so far as it pertains to the marital relation of the parties, providing the court granting the divorce had at the time jurisdiction of the subject matter and of the parties, and that the test of that jurisdiction, so far as it relates to the subject matter of the controversy, is the domicile of the parties to the marriage at the time the jurisdiction of the court is invoked. If the validity of such divorce were questioned in our court, the only issue involved in such an inquiry would be whether or not the foreign court had jurisdiction in the premises, and, if it were found by our court that the foreign court did not have proper jurisdiction, the divorce would be declared invalid for all purposes.

The jurisdiction necessary to confer on a foreign court the power to grant a divorce that will be recognized in the State of Ohio consists of jurisdiction both

of the subject matter and of the parties. As hereinbefore noted, it is the generally accepted doctrine that so far as the subject matter of the controversy is concerned, actions for divorce deal with the status of the parties and that jurisdiction in such actions is dependent upon the domicile of the parties at the time the decree is rendered. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects, without the interference of foreign tribunals in a matter with which they have no concern. To give validity to a decree of divorce, therefore, at least one of the parties must be domiciled in the state or country of the forum, otherwise the courts of that state or country have no jurisdiction and the decree will not be given effect in another state or country. This is true according to well recognized authorities, although neither of the parties was at the time domiciled in or a resident of the state where the validity of the divorce is brought in question. Otherwise stated, no valid divorce can be decreed on constructive service by the courts of a state or country in which neither party is domiciled, and such a decree is subject to no recognition in other states. *Lister* vs. *Lister,* 86 New Jersey Equity, 30; *De Meali* vs. *De Meali,* 120 N. Y. 485; *Shure* vs. *Lindsfelt,* 82 Wis. 346; *Van Fossen* vs. *State,* 37 O. S. 317. In a late case in New York, however, *Gould* vs. *Gould,* 235 New York, 14, this doctrine seems to have been ignored. In that case the court, upon principles of comity, recognized and gave effect to a decree of divorce rendered by a court in France, in which country the husband and wife had resided for upwards of five years, although their legal domicile was in New York. The case was decided upon the peculiar facts involved and can hardly be considered as a precedent.

Domicile should not be confused with mere residence. Domicile imports something in addition to mere residence or abode. Coupled with the residence, there must be an intention upon the part of the person to remain. Mere temporary residence will not confer jurisdiction. The residence must be actual and genuine, coupled with the *animus manendi* or intent to remain. If one or the other of the parties to a marriage possesses the necessary domiciliary status within the jurisdiction of a court, that court may be invested with the necessary jurisdiction of the subject matter to grant a divorce. When vested with jurisdiction of the subject matter and jurisdiction of the parties is acquired in accordance with the law of the forum, a divorce thereupon granted will be recognized as valid by the courts of Ohio in so far as it affects the marital status of the parties to the marriage.

In conclusion, therefore, it is my opinion that a divorce granted by a court of the Kingdom of the Serbs, Croats and Slovenes in accordance with the laws of said kingdom and for causes recognized there as valid, after acquiring jurisdiction of the parties in accordance with the law of the forum, will be recognized as valid in the State of Ohio so far as it affects the marital status of the parties, providing that at least one of the parties involved in the controversy was at the time of the granting of the divorce domiciled in said Kingdom.

Any orders of the court made at the time of the granting of said divorce, with respect to collateral matters growing out of the controversy, such as alimony or the fixing of property rights and the custody of children, will be given such force and effect in Ohio as is given to foreign judgments generally in accordance with laws relating thereto, and is beyond the scope of this opinion. It may be noted, however, that a foreign judgment can not be made to affect the title to property located in Ohio; nor will a divorce obtained by one spouse from another who resides in Ohio, in a foreign court, without service other than by publication, in any way affect the property rights of the Ohio resident or deprive him of dower in property located in Ohio. *Mansfield* vs. *McIntire,* 10 Ohio 28; *Doerr* vs. *Forsythe,* Admr., 50 O. S. 726.

It may well be questioned whether or not the effect of divorces granted in a foreign country is in any wise controlled by the terms of treaties existing between the foreign country and the United States of America. In view of the fact that each state of the American Union is sovereign with respect to divorce matters, there is some doubt in my mind whether or not the terms of any treaty could fix the obligation of a constituent state of the American Union with respect to its recognition of a divorce granted in the courts of the foreign country. At any rate, I do not have before me the existing treaties between the Kingdom of the Serbs, Croats and the Slovenes and the United States of America, and whether or not the terms of any such treaty might affect the question here under consideration has not been considered in this opinion, and I do not pass upon the same.

It should also be noted that it is very difficult, within the limits of an opinion of this kind, to touch upon all the questions which may arise in matters of this kind, or to cover all possible phases of the subject even in a general way. To a great extent each case must be considered as it arises in the light of the facts peculiar to it. Also, while in some respects I have in the course of this opinion spoken of foreign countries generally, I do not wish to be understood as saying that the priciples hereinbefore referred to would be given application in cases where relations with a foreign country, whose standard of civilization did not merit it, were involved.

I am of the opinion, therefore, in answer to your specific questions in the order asked:

1. (a) If both parties in a divorce action are domiciled, as distinguished from merely having a residence or place of habitation within the Kingdom of the Serbs, Croats and Slovenes, and are both brought within the jurisdiction of the court in accordance with the laws of the kingdom providing for the institution of suits and the service of process, a divorce granted in said proceeding by a court of the kingdom will be recognized as valid in Ohio in so far as it affects the marital status of the parties.

(b) If the plaintiff in a divorce suit is domiciled in the Kingdom and has resided there the requisite length of time as provided by the laws of the Kingdom to permit the institution of a suit for divorce, and the defendant, whether he lives in Ohio or in any other state of the United States, or in any foreign country, is served with process in said suit, either personally or constructively, in accordance with the laws of the Kingdom, the divorce granted in said suit by a court of the Kingdom of the Serbs, Croats and Slovenes will be recognized as being valid in Ohio in so far as it affects the marital status of the parties.

If the defendant in a divorce suit is domiciled in the Kingdom and is served with process, in accordance with the laws of the Kingdom, and the plaintiff has resided there a sufficient length of time to qualify him under the law to institute suit for divorce, a divorce granted in such suit by a court of the Kingdom of the Serbs, Croats and Slovenes will be valid in Ohio, in so far as it affects the marital relations of the parties.

(c) This question is answered in (b) above.

2. When either party to a divorce suit is domiciled in the Kingdom of the Serbs, Croats and Slovenes and the other party resides in Ohio or another foreign country, and is brought within the jurisdiction of the court of the Kingdom by proper process, the court of the Kingdom of the Serbs, Croats and Slovenes would have jurisdiction in the divorce suit. If either party is domiciled in Ohio and the other party is domiciled in the Kingdom of the Serbs, Croats and Slovenes, the courts of Ohio would also have jurisdiction in a divorce proceeding if proper process is issued out of the Ohio court to bring within its jurisdiction the party

living in the Kingdom of the Serbs, Croats and Slovenes. Whether or not, when one party resides in the Kingdom of the Serbs, Croats and Slovenes, and the other resides in another foreign country, the courts of that foreign country would under any circumstances have jurisdiction to grant a divorce in a proceeding instituted by the one residing in that foreign country, would depend on the laws of that country.

3. Assuming that the court of the Kingdom of the Serbs, Croats and Slovenes has jurisdiction in a divorce case, the fact that a decree of divorce is granted on grounds sufficient under the law of the forum but not sufficient under the laws of this state would not invalidate the divorce.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2913.

DIVORCE—VALIDITY OF DIVORCE GRANTED IN HUNGARY DISCUSSED.

SYLLABUS:

A divorce granted by a court of the Kingdom of Hungary having jurisdiction of the subject matter and of the parties, for causes considered sufficient under the laws of Hungary, and in accordance with the laws of that kingdom, will be considered valid by the authorities in Ohio in so far as the decree rendered in such proceedings affects the marital status of the parties.

COLUMBUS, OHIO, November 21, 1928.

HON. D. C. DE SZENT-IVANYI, *Royal Hungarian Consulate, 1529 Union Trust Building, Cleveland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The Royal Hungarian Ministry of Justice, in order to clarify the jurisdiction of Hungarian courts in divorce proceedings affecting American citizens, requested the Ministry of Hungary at Washington to procure information on the above question.
>
> The Secretary of State, in answer to the request of the Royal Hungarian Minister at Washington for information regarding this subject, suggested that the Consular officers ascertain from the authorities of those states which come within their jurisdiction, the existing law on this subject. Therefore, I beg to ask you whether the divorce decree issued by a Hungarian court and affecting American citizens would be considered valid by Ohio authorities. In accordance with Hungarian Article of Law XXXI of 1894, Hungarian courts may act in divorce proceedings affecting foreigners only if their decree is considered valid in the country of which the foreigner is a citizen. Therefore, in order to prevent the issuance of decrees in cases where same would not be considered valid by American authorities, the Royal Hungarian Ministry of Justice is anxious to receive information on the following points: