without proper service and representation. The German commentators (*loc. cit.*) rightly observe that it is doubtful whether German public policy should have been invoked here since the husband was an American citizen domiciled in New Jersey and the wife had lost her German nationality by her marriage. The decree would not have been recognized in New Jersey, however, if properly attacked, and could be disregarded for this reason in Germany.

Summing up, therefore, it can be said that there might be instances where the German courts would recognize a Mexican decree but mail order decrees will not be admitted and one-day residence decrees will most probably be considered equally void in the eyes of German justice.

ITALY

RICCARDO GORI-MONTANELLI AND DAVID A. BOTWINIK *

The subject, "Enforcement of Foreign Divorce Decrees in Italy," can only be considered in light of that country's Catholicism. Since the unification of Italy, civil authorities have accepted and incorporated into law the Catholic religious tradition that marriage is an institution of vital importance to society, dissoluble only by death (Art. 149, Italian Civil Code). In 1929, the principle embodied in Art. 149 was further formalized in the Concordat between Italy and the Holy See.[1] Art. 34 of the Concordat provides that:

> The Italian State wishing to again give the institution of marriage, which is the basis of the family relationship, a dignity consistent with the Catholic traditions of its people, recognizes all civil effects of the sacrament of matrimony as regulated by common law.

The Concordat therefore permits marriages performed by a priest of the Catholic Church according to the canon law to be recorded in

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[1] Signed February 11, 1929 and ratified by Law No. 810 on May 7, 1929.

the Italian Vital Statistics Registry and gives them the same validity as if they had been performed before the Italian civil authorities.

As a consequence of the public policy expressed in Art. 149 and in the Concordat, Italian courts do not have the power to grant a divorce.

While they do have the power to recognize and give effect to a foreign judgment of divorce, they exercise the power with due regard to Italian public policy, and recognize foreign divorce decrees only in limited circumstances.

A foreign judgment of divorce is given effect in Italy in the same manner as any other judgment. It must be rendered executory by the *delibazione* proceeding covered by Art. 797 of the Civil Procedure Code.[2]

The Italian Government subscribes to the theory in *Trammel v. Vaughan,* 158 Mo. 214, "that there are in effect three parties to every marriage, the man, the woman, and the state." [3] In every *delibazione* proceeding involving a matrimonial judgment, the State Attorney appears in the role of protector of the marriage. He is given all the powers which private parties have,[4] and has the right to appeal.[5]

The power to appeal by the State Attorney was very limited until 1950 when the Civil Procedure Code was amended to permit an appeal by the State Attorney not only to the court where the decision was rendered, but also to the Supreme Court of Cassation. The amendment also gives the State Attorney of the Court of Cassation the right to take an appeal if the local State Attorney decides not to. The 1950 amendment to the Code of Civil Procedure was avowedly aimed at halting the liberal trend shown by certain courts of appeal in enforcing foreign divorce decrees. With the justification of national uniformity in interpretation of the law, the Italian Government thereby eliminated the possibility that the liberal views expressed by certain

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[2] See Gori-Montanelli and Botwinik, "Enforcement in Italy of Judgments Obtained under 'Long Arm' and 'Single Act' Statutes," 1964 *Proceedings of the Section of International Commercial Law,* American Bar Association, p. 227.

[3] Quoted with approval by Judge Scileppi in his dissenting opinion in Rosenstiel v. Rosenstiel, 16 NY 2d 64.

[4] Art. 72, Code of Civil Procedure.

[5] Inasmuch as applications for enforcement of foreign judgments are submitted to the competent court of appeal, the next appeal is to the Supreme Court of Cassation.

local judges or State Attorneys would loosen the national anti-divorce policy.[6]

The practical effect of the State Attorney's appearance in proceedings to enforce foreign divorce decrees has been to prevent their enforcement insofar as Italian citizens are concerned. Foreigners are treated differently.

Italy has ratified the Hague Convention on Divorce of June 12, 1902.[7] Italy has also entered into a number of bilateral treaties with several countries containing clauses providing for the reciprocal recognition of judgments. Under Article 7 of the Convention, the member states obligate themselves to recognize a divorce or separation decreed by a competent court, provided the provisions of the Convention have been observed. Italian courts held that by ratifying the Hague Convention, the Italian State agreed to limit the principle of indissolubility of marriage to Italy and permit the recognition of foreign divorce decrees granted by courts of proper jurisdiction when divorce is permitted by the personal law of the spouses.

With this general background, we can now consider in depth the manner in which the Italian courts treat proceedings for enforcement of foreign matrimonial decrees. Whether the decree is one of annulment or divorce, there is a basic distinction between the treatment of Catholic and civil marriages.

Annulment

Canonical Marriages

In ratifying the Concordat with the Holy See in 1929, Italy, besides reiterating its acceptance of the principle of the indissolubility of marriage, whether canonical or civil, as a basic tenet of its legal system, gave full civil recognition to a marriage ceremony performed by a priest of the Catholic Church.[8] The parish priest, before performing the marriage, must carry out certain formalities, required by the Italian law, such as the publication of the marriage notice in the local City Hall for a specified number of days, and the reading of the text

[6] Mario Miele, *Scritti di Diritto Matrimoniale*, Padova, 1964, pp. 178, 183 and 289; Montel, "Italy: Recognition of Foreign Annulment and Divorce Decrees," 4 *Am. J. Comp. Law* (1955) 439-443.

[7] Law 527 of July 7, 1905.

[8] Law No. 847 of May 27, 1929 "Provisions for the Implementation of the Concordat of February 11, 1929 between the Holy See and Italy for the part concerning marriage."

of three articles of the Italian Civil Code on the rights and duties resulting from the marriage. Once the marriage is performed, the parish priest notifies the competent civil authorities so that the marriage can be registered in the Vital Statistics Registry. This type of marriage is known as *matrimonio concordatario,* that is, marriage according to the Concordat, and is by far the most common type of marriage in a country where about 99 percent of the population is registered as Catholic.

Non-Catholics who wish to be married before a minister of their own religion, and their religion being one recognized and accepted by the Italian Government, may do so provided they obtain a written authorization from the civil authority otherwise competent to perform the ceremony. Provided the requirements set by Italian Law are met,[9] such marriages are recorded in the Italian Vital Statistics Registry and have full civil law validity.

The other type of marriage is the one performed by the competent Italian Civil authority and is known as the civil marriage.

The importance of the Concordat, as far as the recognition of matrimonial judgments is concerned, lies in Art. 34, the fourth paragraph of which states:

> Litigation involving the annulment of a marriage and the dispensation from a marriage "ratio et non consumato" (performed but not consummated) are reserved to the jurisdiction of ecclesiastic courts and institutions.

This reservation of exclusive jurisdiction to the ecclesiastical courts in all cases involving the annulment of a marriage *concordatario* deprives all civil judicial authorities whether Italian or foreign of jurisdiction over the subject matter. Italian courts, requested to give recognition and effect in Italy to a foreign judgment annulling a marriage performed in Italy in accordance with the provisions of the Concordat, have constantly refused to do so because the foreign judgment lacks a basic condition for recognition set forth in Article 797(1) C.p.C., *i.e.,* that the Court granting judgment must have had jurisdiction according to the concepts of the forum where recognition is sought. According to the concepts of the Italian forum, only ecclesiastical courts have jurisdiction over the matter.[10]

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[9] Law No. 1159 of June 29, 1929, "Provisions regarding the exercise of religious activities by religions admitted in the State and marriages performed by ministers of said religions."

[10] Court of Cassation, Decision of January 30, 1961, No. 171, Gonelli v. De Blosis, 1961 Settimana della Cassazione 236.

Courts have interpreted Article 34 of the Concordat to exclude the jurisdiction of foreign civil courts not only when the marriage was performed in Italy before a priest of the Catholic Church, and thereafter recorded in the Italian Vital Statistics Registry, but also when the marriage was performed abroad by a Catholic priest and was valid for all civil effects according to the law of the country of performance. If such a marriage had been annulled by an ecclesiastic court abroad having jurisdiction according to the canon law, then the annulment decree would be recognized in Italy and given exequatur by a civil court.[11]

While Italian courts do not give any suggestion of abandoning the line of precedents which prevents recognition of foreign annulment decrees of Catholic marriages, there are Italian writers who have criticized the judicial interpretation given to Article 34 of the Concordat.[12] They are of the opinion that Article 34 never was intended to insert in the Italian legal system a rule which denies the jurisdiction of foreign judges in cases involving the annulment of religious marriages. Since Article 34 does not explicitly state that Italy recognizes the exclusive jurisdiction of ecclesiastic courts in its relationship with other foreign jurisdictons, the exclusivity thereof applies only to the relationship between Italy and the other contracting party of the Concordat: the Holy See. One of the general principles of international law in the interpretation of Treaties (and the Concordat is an international treaty) is that they should be interpreted literally, without limitation or extension.[13] If there is any doubt as to the real meaning of the wording, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted.[14] By applying these rules to Article 34 of the Concordat, one should conclude that there is no explicit restriction on the right of Italian courts to recognize the jurisdiction of foreign courts to annul canonical marriages.[15]

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[11] Court of Appeal of Rome, July 14, 1960, NcC. *i.e.*, 1960 Archivio Ricerche Giuridiche, III, 19 (m).

[12] Mario Miele, pp. 134-140.

[13] Publication of the Permanent Court of International Justice, Series B, No. 11, p. 39.

[14] Publications of the P.C.I.J., Series B, No. 12, p. 25.

[15] In *Scritti di Diritto Matrimoniale,* p. 139, Prof. Miele notes that "the excessive interpretation of Art. 34 and of the Italian enabling legislation has its basis in the particular political environment which prevailed in Italy immediately

Civil Marriages

Marriages performed in accordance with the Italian Civil Code by the proper authority are outside the purview of the Concordat and there is no limitation in the jurisdiction of Civil Courts on the subject of their annulment. The question of the recognition of foreign annulment decrees is therefore regulated by the general rules set forth in Article 797 C.P.C. It does not make any difference whether the parties involved are Italian or foreign. If they are Italian, the important consideration will be that of determining whether the foreign court had jurisdiction over them.

In a decision rendered in 1962 involving the recognition of a United States decree annulling a civil marriage, the Supreme Court of Cassation denied recognition on the ground that the parties were Italians and the only connection with the jurisdiction of the foreign judge was its acceptance by the defendant husband. The court stated that if the defendant, an Italian citizen, had been domiciled or resident in the foreign jurisdiction, the foreign judge would have had jurisdiction in accordance with the Italian concepts.[16] In the particular case, the defendant had accepted the foreign jurisdiction by voluntary appearance through an authorized attorney, and the court, while recognizing that voluntary appearance is a basis for jurisdiction under Article 4(1) C.P.C., concluded that the particular type of power of attorney given by the defendant to his attorney was not broad enough to be considered to create a "general agent" of the defendant in the foreign jurisdiction.[17]

This decision by the Supreme Court of Cassation must be related to previous decisions of the same court [18] which held that voluntary acceptance was not sufficient to establish foreign jurisdiction. At least in this case, the court did admit, as an obiter dictum, that voluntary

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after the Concordat: an environment which influenced the judges more than the writers, although some judges took a position in favor of the recognition of foreign annulment decrees, notwithstanding the contrary view of the Supreme Court of Cassation."

[16] Article 4(1) C.P.C. provides for the jurisdiction of the Italian courts over foreigners domiciled or resident in Italy.

[17] Court of Cassation, July 21, 1962, No. 2011, Procuratore Generale v. Santorio, 1963 Foro Italiano, I, 797.

[18] Decision No. 2086 of July 22, 1960, Foro Italiano, I, 1302; decision No. 2026 of September 18, 1961, 1961 Foro Italiano, I, 1618; decision No. 1596 of June 20, 1962, 1962 Foro Italiano, I, 1248.

acceptance could create foreign jurisdiction provided the proper power were given to the agent representing the defendant in the foreign jurisdiction.

Another problem which arises in the recognition of a foreign decree annulling the civil marriage of Italian citizens is the conflict with the Italian public order by a decision in which the foreign judge does not properly apply the Italian law. According to Article 17 of The Preliminary Dispositions of the Italian Civil Code, all matters pertaining to the status and persons and family relationships are governed by the law of the State to which the persons belong. Therefore, the grounds on which a foreign judge bases his annulment must be acceptable to Italian law (Articles 117-129 of the Civil Code). If they are acceptable by the forum where the judgment was rendered but inadmissible in Italy, the Italian judge denies recognition. Supposedly, once the Italian judge recognizes that the grounds on which the foreign judge based the annulment are in substance those accepted by the Italian law, his examination should stop there. Italian courts, on the contrary, have enlarged their examination to scrutinize the sufficiency of the evidence submitted to the foreign judge. This invasion of the procedural field of the foreign court finds its basis in the fear of Italian courts that annulments of Italian marriages abroad might be granted as a result of consensual arrangements between the parties.

Italian courts hold that the rights and duties arising from a marriage cannot be alienated by mere consent of the parties. Therefore, Italian courts refuse to enforce judgments involving such rights and duties in which ex parte affidavits were used as the only evidence on which the judge based his decision. In a 1959 decision,[19] the Supreme Court of Cassation reversed a lower court decision which recognized the validity of an annulment decree rendered by a Swiss court of a civil marriage between two Italians. Although the Swiss court was found to have proper jurisdiction over the parties, the Court of Cassation found the decision in conflict with Italian public policy because the defendant had merely admitted the allegations of his wife's complaint, and the Swiss judge, rather than reaching an independent determination, had decreed the annulment on the strength of

[19] Court of Cassation, June 15, 1959, No. 1835, Procuratore Generale v. Farando, 1959 Giustizia Civile I, 1186.

the statements by the parties.[20] In another 1959 decision,[21] the Supreme Court of Cassation reversed the decision of the lower court and denied recognition of a Swiss court annulment decree on the grounds of mental incapacity. The incapacity had been proved only by a technical report prepared by an expert named by the parties. Although the evidence had been found sufficient by the Swiss court, the Court of Cassation found that it was in violation of Italian provisions regulating evidence in matrimonial cases, "which, being strictly connected with the relationship which must be proved, have the character of provisions of substantive law and, as such, are removed from the application of the lex fori which regulates the trial."

Divorce

Canonical Marriages

For the same reasons described above, under the heading of annulments, a foreign divorce decree involving a marriage *concordatario* recorded in the Italian Vital Statistics Registry, is not given exequatur by Italian courts whether the parties to the marriage are Italian or foreigners.[22]

The Court of Cassation, in a 1962 decision,[23] refused recognition to a divorce decree issued by a British court because the marriage had been performed in Italy by a Catholic Priest in accordance with the Concordat.

The court reached this conclusion brushing aside the argument that the British court had proper jurisdiction over the marriage because of the foreign nationality of the parties, and stated that, according to the principles of jurisdiction prevailing in the Italian legal system referred to in Article 797(1) C.P.C., the only courts entitled to decide on the dissolution of a canonical marriage are the ecclesiastical courts.[24]

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[20] The text of the decision is also reported in full in Miele, p. 301, with Miele's comments thereon.

[21] Court of Cassation, November 25, 1959, No. 3475, Procuratore Generale v. Dragan, 1959 Repertorio, 1484, 113.

[22] Court of Cassation, October 13, 1955, No. 3126, Moore v. Fabbroncino, 1960 Repertorio 1958, 126, Court of Cassation, December 14, 1960, No. 3248, Bottini v. Moley, 1961 Giustizia Civile I, 421.

[23] Court of Cassation, March 20, 1962, No. 559, Roccasecca v. Titterton, 1962 Giustizia Civile, I, 843.

[24] Court of Cassation, June 11, 1959, No. 1785, Hager v. Rebutti, 1959 Giustizia Civile, I, 1708.

The number of cases which continue to reach the Supreme Court of Cassation involving this point of law indicates that there is a contrast of opinion and that some lower courts have adopted at times a more liberal approach by giving recognition to foreign divorce decrees. Also among the writers there is a strong current in favor of recognition of divorce decrees rendered by a foreign judge having jurisdiction over non-Italian parties. The same argument regarding the limited application of Article 34 of the Concordat, used in the case of foreign annulment decrees of canonical marriages, is used for foreign divorce decrees. According to the writers, the issue is not one of doubting the tenets of the Catholic faith in the matter of the sacramentality of marriage, but simply that of determining whether these rules of canon law have been made part of the Italian matrimonial law to the point where they have invaded the Italian international jurisdiction, so as to prevent the recognition of foreign divorce decrees. They conclude by giving a negative answer to the question.[25] Until now, however, the Supreme Court of Cassation has been rather constant in its decisions which follow an interpretation of Article 34 of the Concordat and Article 797 (1) C.P.C. leading to an effective limitation in the recognition of foreign divorce decrees of canonical marriages even when the parties are non-Italians.

Civil Marriages

The indissolubility of marriage, as we have noted above, is not a principle which the Italian legal system adopted merely as a result of the 1929 Concordat with the Holy See. It is a principle which was sanctioned in Article 148 of the 1865 Civil Code and is repeated in Article 149 of the 1942 Civil Code: "A marriage cannot be dissolved except by the death of one of the spouses." Therefore, divorce is inadmissible in Italy and a foreign divorce decree is against public policy if both or only one of the parties involved are Italian citizens.

A basic distinction must be made, therefore, between divorces involving foreign and Italian citizens.

Divorces Involving Foreign Nationals. Before the signing by Italy of the 1902 Hague Convention on Divorce, it was debated whether Italian courts could give recognition to a foreign divorce decree even if non-Italian parties were involved. The point was

[25] Miele, p. 161; Fedozzi, *Il Diritto Internazionale Privato,* Padova, 1939, p. 479; Udina, *Sentenze di Divorzio fra Stranieri e Matrimonio Concordatario,* 1948, Foro Italiano, I, 182.

made that divorce was against Italian public policy and recognition was to be denied even when divorce was admitted by the national law of the spouses and the foreign court had jurisdiction over the marriage. By becoming member of the Hague Divorce Convention, Italy admitted that divorce was not against public policy, at least if decreed by a court of a country member of the Convention having jurisdiction over parties whose national law permitted divorce.

It was still debated whether Italian courts should give recognition to divorce decrees rendered by Courts of countries not members of the Hague Convention. The Supreme Court of Cassation gave an affirmative answer to the question in a 1939 case,[26] and again in three cases decided in 1961 [27] and in 1962.[28] The Court of Cassation confirmed this line of precedents in another case decided in 1963. This was an appeal taken by the State Attorney of the Court of Appeal of Rome, who argued that the exequatur given by the lower court to a divorce decree rendered by a British court should have been reversed because it was in violation of Italian public policy. As Great Britain was not a member of the Hague Convention, the public prosecutor argued that Italy was not obligated to give recognition to its divorce decrees and the principle of indissolubility of marriage sanctioned in Article 149 of the Civil Code should be maintained. The Court of Cassation, in affirming the lower court decision, noted that by ratifying the Hague Convention, Italy agreed to recognize foreign divorce decrees of other signatory countries and by doing so had decided to remove from the concept of public order a divorce between non-Italians and that it would be clearly illogical to continue to see a violation of public order when the foreign divorce of non-Italians was rendered in a country not member of the Hague Convention.[29]

Public order, therefore, can be invoked if the divorce obtained abroad involved parties one or both of which are Italian citizens. In the case of an Italian woman who married a U.S. citizen and who resided for more than a year in the U.S., an Italian court refused recog-

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[26] Court of Cassation, July 13, 1939, No. 2546, 1939 Foro Italiano, I, 1097.

[27] Court of Cassation, February 6, 1961, No. 243, Valborg v. De Mistura, 1961 Foro Italiano, I, 430.

[28] Court of Cassation, May 19, 1962, No. 1147, Prez v. Garih, 1962 Giustizia Civile, I, 1196; Court of Cassation, July 10, 1962, No. 1816, Procuratore Generale v. Iseppi, 1962 Settimana Cassazione 771.

[29] Court of Cassation, November 23, 1963, No. 3020, Procuratore Generale v. Corinaldesi, 1963 Foro Italiano, I, 280.

nition to a divorce decree obtained in the United States because the Italian woman, who had not acquired United States nationality *iure matrimonii,* had not lost Italian nationality.[30] In a case in which an Italian woman had automatically acquired foreign nationality *iure matrimonii,* and lost her Italian nationality, the recognition was granted.[31]

It is clear that when the parties are both foreigners, and the marriage was either performed in Italy or abroad, public order will not be invoked to prevent recognition of a foreign divorce decree. A problem arises, however, where there has been change of nationality for the specific purpose of obtaining a divorce outside of Italy in order to avoid the effects of Italian law, since a change of nationality changes the personal law of the party and a divorce would be granted under the new personal law of the parties rather than under Italian law. The attitude of Italian courts, and some of the writers towards this type of divorce, described as "fraudulent" because it is based on a fictitious change of nationality, has been that of opposition to the validity of the divorce decree. This attitude is similar to that of other countries with anti-divorce policy.[32] The 1963 decision of the Court of Cassation already referred to above (pp. 16, 17) made reference to the argument of fraud raised by the public prosecutor and accepted the finding of facts made by the lower court to the effect that, in that case, there was no possibility of fictitious change of nationality by the husband who had been an Italian national. The lower court had found that the husband had obtained the foreign nationality "a long time before the filing of the divorce action" and had constantly resided and was still residing in the forum of the country of judgment, a residence which was readily explained by the professional activity of the person in question.

This possibility that Italian courts will enter into an examination of the possible element of fraud and the possible fictitiousness of the change of nationality by the parties involved gives an idea of the difference of the situation between the recognition of foreign divorces

[30] Court of Cassation, November 23, 1963, No. 3020, Procuratore Generale v. Corinaldesi, 1963 Foro Italiano, I, 280.

[31] Court of Appeal of Firenze, May 13, 1960, Gerbi v. Frampton, 1969 Giurisprudenza Toscana, 529.

[32] See Rabel, *The Conflict of Laws: A Comparative Study* (2d ed. 1958) Vol. I, Ch. 12.

in Italy and that which has been inaugurated by the New York cases of *Rosenstiel v. Rosenstiel* and *Wood v. Wood.*

In New York, courts seem to have abandoned even the possibility of examining the nexus between person and place to determine whether it is of such permanence as to create a domicile sufficient to give jurisdiction to the foreign court. In Italy, while domicile remains an element of the jurisdiction of the foreign court, the basic element is given by the personal law of the parties and that is determined by nationality. Aside from the practical consideration that nationalities are not changed with the same ease as domicile, there is always another aspect which couples bent on a consensual "bilateral" divorce must weigh: the possibility that the court will examine their change of nationality and consider it fictitious. One may be certain that the State Attorney will not leave any leaf unturned to show, if possible, that the divorce was obtained *in fraudem legis.*

Some of the Italian writers criticize the search by Italian courts of the existence of nationality of the spouses. As long as the acquisition of the nationality of the divorce forum is effective, as long as the divorce is decreed by a judge who has jurisdiction in the international sense, and the decree does not contravene public policy, there is no reason for the Italian judge to refuse recognition. The use of the exequatur proceeding to include an investigation of possible fraudulent motives is an unreasonable extension of the purpose of the proceeding.[33]

Mexican Divorces

The rules hereinabove discussed indicate that Mexican divorces of the type recognized by the New York Court of Appeals in *Rosensteil v. Rosensteil* and *Wood v. Wood,* 16 N.Y. 2d 64, would not be given recognition in Italy if either party to the divorce were an Italian national. While New York courts accept Mexican divorces as a valid method of avoiding the restrictions of the present New York divorce law, Italian courts cannot be so liberal. They are required to follow a public policy which prohibits divorce, and therefore cannot give recognition to a divorce which is in effect an evasion of that policy, no matter what the validity of the divorce would be in another jurisdiction.

[33] Miele, pp. 162-164; Fedozzi, p. 273 *et seq.*