COMMENTS

CONFLICT OF LAWS—ENFORCEMENT AND MODIFICATION OF PROSPECTIVELY AND RETROACTIVELY MODIFIABLE FOREIGN ALIMONY DECREES

Worthley v. Worthley, 283 P.2d 19 (Cal. 1955)

After several years of marriage to defendant-husband, plaintiff-wife obtained in New Jersey a separate maintenance decree which under New Jersey law was both retroactively and prospectively modifiable. Thereafter, defendant obtained an ex parte divorce in Nevada based only upon constructive service. The Nevada decree contained no provision with respect to alimony. Subsequent to the divorce, defendant made no further payments of the sums due under the New Jersey maintenance decree. He then moved to California where plaintiff brought suit to enforce the New Jersey decree. In reversing the lower court's judgment for defendant, the Supreme Court of California held that foreign alimony decrees are enforceable in California, and can be modified by a California court to the same extent as by the court which originally rendered the decree.[1]

A foreign decree[2] which is subject to modification is not "final" and generally need not be given full faith and credit.[3] Foreign alimony decrees, insofar as they require payment of past due installments, are final and entitled to full faith and credit,[4] provided that the court which originally rendered the decree *(F-1)* had no power to modify retroactively after the arrival of the maturity date for payment.[5] To

1. Worthley v. Worthley, 283 P.2d 19 (Cal. 1955). The court held that the Nevada decree was entitled to full faith and credit insofar as it determined the marital status of the parties, but that under Estin v. Estin, 334 U.S. 541 (1948), it would not be recognized to the extent that it attempted to adjudicate support rights incidental to that status. *Id.* at 21. See also Barber v. Barber, 62 U.S. (21 How.) 582, 588 (1858).

2. For the purpose of this comment, the term "foreign decree" refers to a decree of a sister-state.

3. HARPER, TAINTOR, CARNAHAN & BROWN, CONFLICT OF LAWS 832 (1950). Several Justices of the Supreme Court, however, have expressed the view that neither the full faith and credit clause nor its legislative implementation [62 STAT. 947 (1948), 28 U.S.C. § 1738 (1952)] requires that the decree be final. Justice Jackson, an advocate of the extension of the full faith and credit clause, said in his concurring opinion in Barber v. Barber, 323 U.S. 77, 86-88 (1944), that full faith and credit is to be given to all judicial proceedings. See also Justice Rutledge's opinion in Griffin v. Griffin, 327 U.S. 220, 236-48 (1946) (dissenting opinion) and that of Justice Frankfurter in New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 616-17 (1947) (concurring opinion).

4. Barber v. Barber, 62 U.S. (21 How.) 582 (1858). The Court treated the past due installments, *until recalled*, as a debt of record and did not consider the specific problem of finality. See also Sistare v. Sistare, 218 U.S. 1 (1910).

5. Lynde v. Lynde, 181 U.S. 183 (1901), would appear to create an inference that if accrued payments were *ever* modifiable, they are not final and therefore are not entitled to full faith and credit. Sistare v. Sistare, 218 U.S. 1 (1910), interprets the *Lynde* case to harmonize with the general rule laid down in the

the extent that such decrees require future payments for support, however, they are not entitled to full faith and credit.[6] The fact that the court of the forum *(F-2)* is *not bound* to give full faith and credit to a modifiable foreign decree, however, does not necessarily mean that the court is *bound not* to enforce it.[7]

The numerical weight of judicial authority has viewed a foreign decree as a "debt of record," the enforcement of which is limited to an action at law for debt.[8] When an alimony decree of *F-1* is sought to be enforced in *F-2*, therefore, it is merely a debt of record which has lost its special equitable characteristics. Thus, it is asserted, if the *F-1* alimony decree is modifiable, it is not a debt of record and will therefore be denied enforcement at law in *F-2*.[9] Since the decree has lost its equitable characteristics, plaintiff's concomitant equitable remedies are consequently forfeit. Under this view, plaintiff is not permitted to maintain an action for the enforcement of a modifiable foreign alimony decree in *F-2*. The circuity of this reasoning is obvious. By affixing the label "debt of record" to all foreign decrees, these courts, by hypothesis, have denied enforcement of any modifiable foreign decree, for alimony or otherwise, since a modifiable decree, by its very nature, is not a debt "of record."[10] Nevertheless, the majority of courts have followed this line of reasoning.[11] The modern trend, however, is toward recognition and enforcement. Courts which recognize such decrees rely on various considerations, e.g., "comity,"[12]

Barber case, *supra* note 4, and holds that if the payments have accrued and the court which rendered the decree has not retained jurisdiction to modify retroactively, then the judgment is final to the extent that the payments have accrued, and is therefore entitled to full faith and credit.

6. Sistare v. Sistare, 218 U.S. 1, 16-17 (1910).

7. See, *e.g.*, Biewend v. Biewend, 17 Cal. 2d 108, 109 P.2d 701 (1941); Cummings v. Cummings, 97 Cal. App. 144, 275 Pac. 245 (1929). See also Jacobs, *The Enforcement of Foreign Decrees for Alimony*, 6 LAW & CONTEMP. PROB. 250, 263-64 (1939); Note, *The Finality of Judgments in the Conflict of Laws*, 41 COLUM. L. REV. 878 (1941).

8. See, *e.g.*, Worsley v. Worsley, 76 F.2d 815 (D.C. Cir. 1935); Grant v. Grant, 75 F.2d 665 (D.C. Cir. 1935). See also Jacobs, *supra* note 7, at 268.

9. *Ibid.*

10. See Jacobs, *supra* note 7, at 272.

11. Cureton v. Cureton, 132 Ga. 745, 65 S.E. 65 (1909); Paulin v. Paulin, 195 Ill. App. 350 (1915); Lape v. Miller, 203 Ky. 742, 263 S.W. 22 (1924); see RESTATEMENT, CONFLICT OF LAWS § 464 (1934). For other cases, see 17 AM. JUR., *Divorce and Separation* § 762 (1938) and (Supp. 1955); Annot., 157 A.L.R. 170 (1945); Annot., 41 A.L.R. 1419 (1926).

12. In general, these courts state that they will recognize the decree on the grounds of comity, but give no further explanation of the term. Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); Sackler v. Sackler, 47 So. 2d 292 (Fla. 1950); Clubb v. Clubb, 334 Ill. App. 599, 80 N.E.2d 94 (1948); Sorenson v. Spence, 15 S.D. 134, 272 N.W. 179 (1937); McKeel v. McKeel, 185 Va. 108, 37 S.E.2d 746 (1946). *Contra*, Cureton v. Cureton, 132 Ga. 745, 65 S.E. 65 (1909); Lape v. Miller, 203 Ky. 742, 263 S.W. 22 (1924); O'Loughlin v.

"public policy,"[13] and express[14] or implied statutory authority.[15] These courts employ the same equitable methods of enforcement as are used to enforce their own alimony decrees.[16]

The division of authority is more acute with reference to the question of whether the court of the forum *(F-2)* has power to modify a foreign alimony decree.[17] Many courts have refused outright to modify.[18] Various reasons have been assigned for this position: (1)

O'Loughlin, 6 N.J. 170, 78 A.2d 64 (1951).

Some of the courts view the doctrine of comity as requiring reciprocity. See, *e.g.*, Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593 (1941). Other courts, however, make no such distinction. Pringle v. Gibson, 135 Me. 297, 195 Atl. 695 (1937); Robison v. Robison, 9 N.J. 288, 88 A.2d 202 (1952), *cert. denied*, 344 U.S. 829 (1952). See RESTATEMENT, CONFLICT OF LAWS § 6, comment *a* (1934) (Where the court of the forum enforces the foreign decree by reason of comity, it applies its own law to the facts, which include the events and the foreign law.).

13. Thus, courts have stated that the husband will not be allowed to evade his support obligations merely by crossing state lines. Kephart v. Kephart, 193 F.2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); McDuffie v. McDuffie, 155 Fla. 63, 19 So. 2d 511 (1944); Clubb v. Clubb, 334 Ill. App. 599, 80 N.E.2d 94 (1948); McKeel v. McKeel, 185 Va. 108, 37 S.E.2d 746 (1946). See also Jacobs, *supra* note 7, at 265; GOODRICH, CONFLICT OF LAWS § 139 (1949). Also, it has been asserted that where the husband is subject to the jurisdiction of the forum, to force parties to litigate in the court which rendered the decree would cause great economic hardship to plaintiff with little corresponding benefit to defendant. O'Loughlin v. O'Loughlin, 6 N.J. 170, 78 A.2d 64 (1951). Additional "public policy" considerations cited include reduction of expense and delay of relitigation in the court which rendered the decree and prevention of multiplicity of litigation. Scoles, *Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 COLUM. L. REV. 817 (1953).

14. See, *e.g.*, CAL. CODE CIV. PROC. § 1913 (1953), Creager v. Superior Court, 126 Cal. App. 280, 14 P.2d 552 (1932).

15. In the principal case, for example, the court gave among other reasons, the policy of the legislature as expressed by the UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT. CAL. CODE CIV. PROC. §§ 1650-90 (Supp. 1954). The act, which has been enacted in forty-four states, [9A U.L.A. 68 (Supp. 1955)], establishes a two-state proceeding whereby the person to whom a duty of support is owed files a simplified petition in the "initiating state." A copy is sent to a proper court of the "responding state" which takes steps to secure jurisdiction of the husband or his property, and which holds a hearing to determine whether a duty of support exists. If such a duty does exist, the responding court may order the defendant to furnish support. Payments made under such an order are then transmitted to the initiating court, which receives and disburses such payments to the petitioner. 9A U.L.A. 74-75 (Supp. 1955). In the principal case, the court asserted that even though the parties did not litigate under the act, they would not be required to go back and forth between the court of the forum and the court which rendered the decree. As a matter of practical convenience the matter could be as easily litigated in California as in New Jersey. 283 P.2d at 24.

16. See, *e.g.*, Rule v. Rule, 313 Ill. App. 108, 39 N.E.2d 379 (1942); Fanchier v. Gammill, 148 Miss. 723, 737, 114 So. 813, 814 (1927); Guercia v. Guercia, 150 Tex. 418, 241 S.W.2d 297 (1951). *Contra*, Henderson v. Henderson, 86 Ga. App. 812, 72 S.E.2d 731 (1952).

Some courts rely on statutory grounds to equitably enforce foreign alimony decrees. ILL. REV. STAT. c. 22, § 42 (1955), Clubb v. Clubb, 334 Ill. App. 599, 80 N.E.2d 94 (1948); MINN. STAT. ANN. § 518.24 (West 1945), Ostrander v. Ostrander, 190 Minn. 547, 252 N.W. 449 (1934). In general, see 27 C.J.S., *Divorce* § 328 (1941); Annot., 109 A.L.R. 652 (1937).

17. Annot., 134 A.L.R. 321 (1941).

18. See, *e.g.*, Biewend v. Biewend, 17 Cal. 2d 108, 109 P.2d 701 (1941) (expressly overruled by the principal case in this respect); Espeland v. Espeland, 111 Mont. 365, 109 P.2d 792 (1941).

If defendant should travel from state to state, the various modifying decrees which plaintiff might be required to obtain in each state would result in "conflicts of authority" and "chaotic conditions."[19] (2) So long as *F-1* does not modify its own decree, *F-2*, as a matter of judicial courtesy, should treat the determination as being final and conclusive and therefore entitled to enforcement without modification.[20] (3) The proceeding in *F-2* is not a suit for a new judgment, but is merely an attempt to put an existing foreign decree in a different form so that it may be locally enforced.[21] (A respect for the judiciary of *F-1* would also appear to be the foundation of this last stated reason.) Some courts which refuse to modify the foreign alimony decree will nevertheless hold the suit in abeyance until the party seeking modification has an opportunity to litigate the question in *F-1*.[22] At least one court, while refusing to modify the decree directly, has accomplished the same result through indirection by refusing to hold defendant for contempt for any amount above that which it considers reasonable.[23]

Recently, a few courts have permitted direct modification when there has been a change in circumstances subsequent to the *F-1* decree.[24] Some jurisdictions distinguish between prospective and retroactive modification,[25] and will modify the alimony decree with respect to future support payments which have not yet accrued, but will deny modification as to payments which have become due and payable. It is submitted, however, that the principal case properly holds[26] that where the foreign decree is retroactively modifiable in *F-1*, there is no real reason why *F-2* should refuse to hear a plea for modification. Courts which do permit modification of foreign alimony decrees on the basis of a change in circumstances, without differentiation between prospective and retroactive modification, rely upon express statutory authority,[27] "public policy" implied from statutes authorizing en-

19. Handschy v. Handschy, 32 Cal. App. 2d 504, 90 P.2d 123 (1939); Barns v. Barns, 9 Cal. App. 2d 427, 50 P.2d 463 (1935); Little v. Little, 146 Misc. 231, 262 N.Y. Supp. 654 (Sup. Ct. 1932); Barclay v. Barclay, 184 Ill. 375, 377, 56 N.E. 636, 637 (1900) (dictum).

20. Howland v. Stitzer, 231 N.C. 528, 58 S.E.2d 104 (1950).

21. Holton v. Holton, 153 Minn. 346, 190 N.W. 542 (1922).

22. Harrison v. Harrison, 214 F.2d 571 (4th Cir. 1954); Levine v. Levine, 95 Ore. 94, 187 Pac. 609 (1920).

23. Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593 (1941).

24. See, *e.g.*, Blauvelt v. Blauvelt, 199 Ark. 710, 136 S.W.2d 201 (1940); *cf.* Schneider v. Schneider, 204 Misc. 918, 920, 125 N.Y.S.2d 739, 742 (Sup. Ct. 1953) (dictum).

25. *E.g.*, Coumans v. Albaugh, 36 N.J. Super. 308, 115 A.2d 641 (Juv. and Dom. Rel. Ct. 1955).

26. 283 P.2d at 24.

27. The New Jersey statute, for example, provides:
Pending a suit for divorce . . . brought in this State or elsewhere, or after judgment of divorce, whether obtained in this State or elsewhere, the court may make such order touching the alimony of the wife . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . . or enforce the performance of the said orders by such other

forcement of such decrees,[28] and upon analogy to child support and custody cases, where modification is generally allowed.[29]

Although the court in the principal case was under no constitutional obligation to recognize the modifiable New Jersey decree, it is submitted that the instant decision is based upon sound policy considerations. It seems unnecessary, unreasonable, and unfair to require plaintiff to travel 3000 miles across the continent to New Jersey from time to time in order to obtain judgments for specific sums so as to satisfy an artificial "finality" requirement. A requirement that the parties return to *F-1* to relitigate the decree because of changes in circumstances places upon the parties additional time delays and increased expenses, which could otherwise be easily obviated. By recognition and enforcement of a foreign decree as such, *F-2* is simply accomplishing the same result as theoretically would have obtained in *F-1* if suit had been brought there.[30] When *F-2*, instead of enforcing the foreign decree as such, adopts the decree *as its own*,[31] or when it takes the view that its decree supersedes[32] the foreign one, the only binding limitations are those which the court imposes upon itself. When a party's claim of a change in circumstances seems on the merits to justify a modification, and where the forum is one of convenience to both parties, *F-2* should recognize and modify a modifiable foreign alimony decree.

EVIDENCE—CONCLUSIVENESS OF A PARTY'S OWN ADVERSE TESTIMONY

Snittjer Grain Co. v. Koch, 71 N.W.2d 29 (Iowa 1955)

Plaintiff brought an action for the purchase price of a corn drier, alleging an oral contract of sale with defendant. While plaintiff's direct evidence would ordinarily have been sufficient to take the case to the jury,[1] he testified on cross-examination that he did not "sell" the corn drier to defendant, but rather that defendant had "ordered"

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lawful ways and means as is usual, and according to the source and practice of the court; orders so made may be revised and altered by the court from time to time as circumstances may require.

N.J. STAT. ANN. § 2:50-37 (Supp. 1951), Robison v. Robison, 9 N.J. 288, 88 A.2d 202 (1952), *cert. denied*, 344 U.S. 829 (1952). See also FLA. STAT. ANN. § 65.15 (1941), Sackler v. Sackler, 47 So. 2d 292 (Fla. 1950).

28. See note 14 *supra*.

29. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614-15 (1947). See also Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); Lopez v. Avery, 66 So. 2d 689 (Fla. 1953); Durfee v. Durfee, 293 Mass. 472, 200 N.E. 395 (1936); Turnage v. Tyler, 183 Miss. 318, 184 So. 52 (1938); Setzer v. Setzer, 251 Wis. 234, 29 N.W.2d 62 (1947).

30. See Jacobs, *supra* note 7, at 273.

31. Palen v. Palen, 12 Cal. App. 2d 357, 55 P.2d 228 (1936); Creager v. Superior Court, 126 Cal. App. 280, 14 P.2d 552 (1932); Sackler v. Sackler, 47 So. 2d 292 (Fla. 1950). See Jacobs, *supra* note 7, at 266.

32. See, *e.g.*, Durfee v. Durfee, 293 Mass. 472, 200 N.E. 395 (1936).

1. Snittjer Grain Co. v. Koch, 71 N.W.2d 29, 31 (Iowa 1955).