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SUPPORT RIGHTS AND AN OUT-OF-STATE DIVORCE
MONRAD G. PAULSEN*

Whom God hath joined together are sometimes put asunder by a legal proceeding which accomplishes only part of the job. On the surface of things the dissolution of a marriage would not only restore the capacity to remarry but also would alter the property rights and the rights to support which stem from the marriage relationship. Yet certain divorce decrees which do restore the privilege of remarrying fail to destroy a husband’s duty to support his ex-wife as if she were still his spouse in every respect. The result, the Supreme Court of the United States has said, is to make divorce "divisible." The purpose of this paper is to examine some of the problems arising when claims rooted in the marriage status are asserted after an out-of-state divorce valid so far as remarriage is concerned.

A PRE-EXISTING SUPPORT ORDER AND A FOREIGN EX PARTE DECREE

A decree of limited divorce or separate maintenance which, among other things, provides for the making of support payments to the wife often is the first legal step in a disintegrating marriage. The final step, absolute divorce, normally cuts off the obligation to make payments under a separate maintenance decree. However, this result does not always follow if the decree of absolute divorce was granted ex parte. Particularly, is this true if the ex parte divorce decree was granted in a state other than the state which imposed the order of support.

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2. Orders requiring a payment to a wife may be found in (1) a decree of limited divorce, (2) a decree of separate maintenance or (3) some special statutory proceeding which does not fit neatly in categories (1) and (2). For the purpose of this article the distinction will be ignored save as the text refers to the provisions of particular statutes. The terms "support order" and "separate maintenance decree" are used interchangeably to refer to the orders in all of these categories.
3. There is a question whether a state may continue to enforce its support order after a foreign ex parte decree but to terminate it after a local ex parte divorce. The full faith and credit statute merely requires F³ to give the same credit as F² to give its decree but does not, in terms, forbid treating the F¹ decree less favorably than a similar one of F². Discrimination of this sort is perhaps forbidden by the full faith and credit constitutional provision of its own force or the equal protection clause of the Fourteenth Amendment or by the privileges and immunities of Article IV, § 2 of the Constitution. See Morris, Divisible Divorce, 64 Harv. L. Rev. 1287, 1299
Whether a foreign *ex parte* divorce decree terminates an *existing* order for support first raises a conflict of laws question under the law of the state in which the order was entered. Some courts cut off support orders after a foreign *ex parte* decree; others, taking the position that a wife's rights under such a decree are in personam, refuse to do so because the divorcing court lacks personal jurisdiction over the absent wife. The latter view creates a full faith and credit problem in the states which embrace it provided the divorcing state would cut off a support order by its own *ex parte* decree. Nevada judicial proceedings are entitled to no greater effect in New York than in Nevada. This full faith and credit question was answered by the Supreme Court of the United States in its 1948 *Estin* decision.

Mr. Estin and his wife lived together in New York until 1942. In 1943, Mrs. Estin was granted a decree of separation and $180 per month as permanent alimony in a proceeding in which Mr. Estin had entered a general appearance. In January, 1944, Mr. Estin went to Nevada and in May, 1945, a Nevada court, having found that Mr. Estin had been a bona fide resident of Nevada since January, 1944, granted him an *ex parte* divorce.

After the entry of the Nevada divorce decree Mr. Estin ceased paying installments falling due under the terms of the New York separation decree. Mrs. Estin brought an action in the New York courts asking for accrued alimony. Her husband appeared and, contending that his duty to support her was terminated by the Nevada divorce, moved to strike out the alimony provisions of the separation decree. This motion was denied by the courts of the State of New York even though Mr. Estin was admitted to be a bona fide...
domiciliary of Nevada. On certiorari, the New York courts were affirmed by the Supreme Court of the United States.

Mr. Justice Douglas' majority opinion distinguished between different aspects of the marriage relationship. However exacting the requirements of full faith and credit may be, they do not demand that when the state of the domicil of only one spouse enters a decree that thereby all legal incidents of marriage are terminated in every state. The state of either party's domicil may grant a divorce entitled to full faith and credit as to questions of marital status and legitimacy. Yet on the matter of support the state in which the abandoned spouse is domiciled has an important interest which that state may protect.

Furthermore while Nevada divorces may well put an end to a Nevada support order, the New York alimony decree was granted by a court having personal jurisdiction over the parties. The alimony decree is a property interest of Mrs. Estin which cannot be taken from her by a court which does not have jurisdiction over her person. Nevada was without power to terminate Mrs. Estin's rights in the New York decree.

The issue in Estin was whether New York could continue to enforce its order for support payments after a valid *ex parte* divorce. The question remained whether, after *Estin*, states would and could terminate the support decree.

Soon after the 1948 Supreme Court case courts in Pennsylvania and Oregon granted motions to strike from decrees of separate maintenance the provision requiring the husband involved to pay support money. The Pennsylvania opinion merely announces, "...it is well settled in this Commonwealth that a valid divorce decree terminates the duty of a husband to support his wife because of the severance of the marital relationship. . . ."


9. This point of view in *Estin* had been expressed by Mr. Justice Douglas previously. "I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support . . . In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree . . . But I am not convinced that in absence of an appearance or personal service the decree need by given full faith and credit when it comes to maintenance or support of the other spouse or children." Justice Douglas in *Esenwein* v. *Esenwein*, 325 U. S. 279, 281-282 (1945) (concurring opinion).


opinion of Rodda v. Rodda agrees that the marriage relation constitutes the foundation of the support order and therefore when the marriage is destroyed "the order has lost all vitality." But there the position is made to depend not upon the nature of things but upon a reading of the Oregon statute providing for decrees of separation. The statute speaks of the separation of "married persons"; it provides for vacating the decree if the cause for separation no longer exists. To the Oregon Supreme Court the legislative scheme was designed for a situation in which the man and woman were living separately but were nevertheless bound in marriage for all other purposes. If the relationship was destroyed for other purposes, the separation decree with its attendant support order was terminated.

A Massachusetts case, Jelly v. Jelly, in like manner rests upon peculiar statutory language. There the order in question was a support order entered against a husband upon a showing that he had failed, without justifiable cause, to provide suitable support for his wife. Under Massachusetts law the order could be made even if the wife was still living with her husband and performing some of the duties of a wife. The decree was "designed for the protection of the wife while she remained in the status of a married woman."

It has been suggested that a result like that reached in Rodda v. Rodda violates the Due Process clause of the Fourteenth Amendment. The argument runs: (a) the separate maintenance decree is a property of the wife in whose favor it was imposed, (b) property rights cannot be taken away without personal service over the person who owns them, (c) therefore the decree can be taken away only by a court having in personam jurisdiction over the wife. This position is scarcely tenable. It depends upon the assertion that the wife has a "property" right and upon the hope that the meaning of that term will not be examined. In Oregon, the interest a wife has

19. See, for example, Comment, Enforcement of Prior Support Order Following Ex Parte Foreign Divorce, in Selected Essays on Family Law 1109, 1112 (1950): "A court having jurisdiction over the parties would not infringe due process by discontinuing an order for support on grounds of the husband's inability to pay, a changed set of conditions whereby the wife no longer needs financial aid, or other mitigating circumstances. But to terminate such an order solely on the basis of an ex parte foreign divorce seems clearly unconstitutional." This point was raised but expressly not decided in Pope v. Pope, 117 N. E. 2d 65, 66 (Ill. 1954).
under a support order is exactly what the Oregon law says the interest is. If the Oregon law provides that such an interest lasts only so long as the entire marriage relationship continues and that the interest terminates whenever the parties are divorced in any sense then the constitutional rights of the wife are not violated by the termination of the decree after a valid *ex parte* divorce. The law creating her interest provides for the expiration of her rights. The choice between the approaches of *Estin* and *Rodda* respectively is a problem of legislative wisdom and legislative policy and not of constitutional law.

Although supporting cases are found in other states, New York's *Estin* position finds its most elaborately reasoned support in the dissent of *Rodda v. Rodda*. The dissenting judges in two separate opinions point out that public policy is opposed to those who shirk the duty imposed by support orders. Mrs. Rodda was described as broken in health and in need of funds for support. "That one of its citizens may be placed in such a situation by the *ex parte* decree of a sister state is a matter of vital concern to the State of Oregon, and that concern should be a sufficient reason in law to justify its courts in maintaining the integrity of the prior Oregon decree." To cut off the separate maintenance payments is to give the *ex parte* Nevada divorce the effect of an in personam decree. Husbands can run away from their obligations simply by moving to a new state and getting an *ex parte* divorce.

The Oregon dissents resolve the difficulties raised by the statute's use of language referring to "husband" and "wife" and to "married persons" by interpreting the words as merely descriptive of those persons who are appropriate parties to the support order proceeding. Whether the order should be terminated after an *ex

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20. This analysis is supported in Morris, *Divisible Divorce*, 64 Harv. L. Rev. 1287, 1295-1296 (1951).


23. *Id.* at 177, 200 P. 2d at 632.

24. *Id.* at 175, 200 P. 2d at 631. The Oregon statute provides: "A permanent separation of married persons from bed and board may be decreed..." Ore. Laws 1941 c. 408, § 1. The New York statute in question in *Estin* provides: "Where an action for separation from bed and board is brought by the wife..." N. Y. Civ. Prac. Act § 1164.
ex parte divorce is certainly a question not clearly answered by the use of those terms. When the statute was passed an *ex parte* decree granted by a state other than the state of the matrimonial domicil was not entitled to full faith and credit. Therefore, before *Williams I* the support order would have survived the typical *ex parte* migratory divorce decree. Without any great difficulty the courts can continue to enforce the support order under the statute in accordance with the pre-*Williams I* law save only in cases where the full faith and credit clause requires a different result. *Estin v. Estin* makes it clear that the full faith and credit clause does not require the termination of a support order after an *ex parte* foreign divorce.

The statutory language providing for separate maintenance in Illinois has been read to permit the survival of an Illinois maintenance decree. The phrase, “married men or women,” the terms “husbands” and “wives” in the statute were not insuperable obstacles to the survival of a decree after a foreign divorce. The statute was read in the light of the state's “special concern...in securing support for the wife...manifested in other statutes and...decisions intended to enforce the husbands' obligation.” The Illinois court hesitated “to read into this act a requirement so hostile to its general purpose.” The opinion spells out an understanding that the incidents of marriage can be separated if sound policy requires it. This understanding comes easily in Illinois because in that state an *ex parte* divorce does not impair a wife's homestead rights.

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26. “It is true that the Nevada decree has given to Dr. Rodda the status of an unmarried man to the extent that he may lawfully contract a second marriage, but I am of the opinion that sufficient of the doctrines of *Haddock v. Haddock* remains to permit the Oregon court to refuse recognition to that decree as terminating the decree of separate maintenance. Distinguished legal scholars have not hesitated to say that the divorced wife, in such a situation, may be regarded by the state of her domicil, for the purpose of receiving separate maintenance under the previous decree, as if she were still ‘the wife.'” *Id.* at 172-173, 200 P. 2d at 630.


28. *Id.* at 67.

29. *Id.* at 68.

30. *Ibid.* Courts have usually measured the effect of a divorce on interest in land by the law of the place where the land is rather than looking to the law of the divorcing state. E.g., *Ross v. Ross*, 79 F. Supp. 716 (S.D. Cal. 1948); *Eberle v. Simonek*, 24 N. J. Super. 366, 94 A. 2d 535 (1953). In *Epstein v. Epstein*, 193 Md. 164, 66 A. 2d 381 (1948), it was hinted that a foreign *ex parte* decree would not destroy a Maryland tenancy by the entireties: “Maryland is the sole mistress of the devolution of Maryland land. No judgment or decree except a judgment or decree of a Maryland Court, state or federal, can operate upon title to or possession of, Maryland land.” *Id.* at 175, 66 A. 2d at 385. However, in *Millar v. Millar*, 200 Md. 14, 87 A. 2d 838 (1952), the court held that a valid *ex parte* decree destroyed the marriage and hence under Maryland law the tenancy was severed.
The New York Estin result is generally supported by commentators in discussions of the policy question presented by the case. Almost none would permit a husband to move away from his responsibilities. To permit ex parte divorces may be necessary in fairness to those persons who are married to out-of-state spouses and who wish to be divorced. On the other hand fairness to the out-of-state spouse requires that separate maintenance provisions not be terminated without personal jurisdiction. Otherwise a wife may be required to make a costly appearance far from home to protect her only source of income. Of course, flexibility is desirable in any long range provision for support payments. Sensible flexibility, however, is not achieved by a mechanical rule which destroys a support order automatically at the moment the parties regain the capacity to remarry. The objective is best attained in other ways. Under Estin the husband may still apply to the New York courts for a reduction in the sum to be paid upon the showing of changed circumstances.

In Georgia a provision for temporary alimony failed to survive an ex parte Texas decree. The Georgia court relying on the Estin case understood that the full faith and credit clause did not require that the Georgia order be cut off by the Texas divorce. However, in Georgia temporary alimony is granted only for the wife's support during the pendency of suit for a divorce or permanent alimony. The court held that because the Texas courts had already divorced the couple a Georgia divorce or order for permanent alimony could not be granted and therefore no basis existed for the temporary alimony decree. Certainly if there is no possibility of permanent alimony in Georgia after an ex parte foreign decree the result seems fair enough. But if Georgia were a state which would permit a suit for alimony after the divorce the outcome of this case would make little sense. A woman who is entitled to alimony ought to receive support for the period during which she seeks to establish her right. In short whether a decree for temporary alimony survives should depend upon the possibility of getting alimony for the first time after a valid ex parte decree, a subject to which we shall turn later.

In California the alimony provisions of the interlocutory decree

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[31] Comment, Enforcement of Prior Support Order Following Ex Parte Foreign Divorce, in Selected Essays in Family Law 1109, 1114-1116 (1950); Morris, Divisible Divorce, 64 Harv. L. Rev. 1287, 1302-1303 (1951); Paulsen, Migratory Divorce, 24 Ind. L. J. 25, 51-52 (1948); Note, 48 Col. L. Rev. 1083, 1090 (1948); 61 Harv. L. Rev. 1454 (1948); 16 U. Chi. L. Rev. 151 (1948). Some of the cases following Estin and commented upon in this article are discussed in Rames, Divisible Divorce and Subtractable Support, 6 Wyo. L. J. 277 (1952).


are the final adjudication of support rights and not affected by the entry of the final decree.\footnote{Wilson v. Superior Court, 31 Cal. 2d 458, 189 P. 2d 266 (1948).} A foreign \textit{ex parte} divorce obtained after the interlocutory but before the final decree in no way changes the obligations of the husband under the former.\footnote{Campbell v. Campbell, 107 Cal. App. 2d 732, 328 P. 2d 81 (1951).}

The \textit{Estin} case has been limited in New York to situations in which the husband was the plaintiff in the \textit{ex parte} divorce. In \textit{MacKay v. MacKay},\footnote{279 App. Div. 350, 110 N. Y. S. 2d 82 (1st Dept 1952), noted in 27 N. Y. U. L. 513 (1952) ; 26 St. Johns L. Rev. 346 (1952).} the Appellate Division in New York held that the rights under a separate maintenance decree were destroyed when the wife obtained the Reno divorce. The decision is of a divided court. Two of the five judges make the argument, curious in the light of \textit{Estin}, that because the wife was estopped to attack the divorce decree the marriage was dissolved and that, therefore, the support order was destroyed.\footnote{\textit{Id.} at 353, 110 N. Y. S. 2d at 85.} In the eyes of the concurring judge, the wife is estopped from getting further benefit under the order but he objects to statements by his brothers which root the right to support in an existing marriage relationship.\footnote{\textit{Id.} at 355-356, 110 N. Y. S. 2d at 88.}

The two dissenting justices would apply \textit{Estin} to the case without regard to the wife's position as plaintiff in the \textit{ex parte} proceeding.\footnote{\textit{Id.} at 358. 110 N. Y. S. 2d at 90.} The estoppel principle has no application because the husband has not acted in reliance upon the wife's conduct and, more importantly, the right asserted is not merely a private right but one upholding a New York maintenance order, "in which the State has a vital interest."\footnote{\textit{Id.} at 360, 110 N. Y. S. 2d at 92.} The dissenters list several affirmative reasons which argue for the survival of the maintenance decree. The Nevada divorce court had no jurisdiction over the husband and hence was unable to make any provisions respecting support. The State of New York has an interest in securing support payment for a domiciliary who is the divorced wife of a domiciliary. The present case and \textit{Estin}, taken together, present an anomaly: a supposedly guilty wife is treated more favorably than one supposedly innocent.\footnote{"...we shall have the anomalous result that in a case where the husband resorts to a foreign court and secures a divorce on constructive service against a nonappearing wife (presumably for her fault), an earlier separation decree in the wife's favor providing for her support survives to protect the wife's rights to alimony, whereas in the case of a wife who resorts to a foreign state to secure a divorce in a like manner (presumably for the fault of the husband), we deprive her of similar protection and leave her without effective provision for her maintenance." \textit{Id.} at 361, 110 N. Y. S. 2d at 93.}

Like the Oregon rule concerning survival of support order, the
application of the estoppel principle suffers from the vice of inflexibility. It apparently would deny the continued protection of a support order to any wife who was a successful plaintiff in an *ex parte* divorce. A woman may have sound reasons for wanting a divorce and yet have real need for support as well as a strong moral claim for its continuation. The fact of a wife's divorce may well be one circumstance which a court would consider in modifying or terminating a support order but other factors may indicate that the original order should survive.

Separate maintenance decrees which survive are, of course, entitled to full faith and credit. Therefore, it should be quite clear that if a support decree survives an *ex parte* foreign divorce by the law of the state in which it is rendered it must be given credit everywhere. The effect given the order should be determined by the law of the state from which it is taken not by the law of the forum. The survival of a New Jersey separate maintenance decree depends upon the New Jersey conflicts law dealing with the effect of *ex parte* Nevada decrees even when the problem is raised in a California forum. It make no difference that the California law respecting the survival of its support orders differs sharply from that of New Jersey.

**Support Rights and an In Personam Divorce Decree**

If both parties to a marriage are before the divorcing court a spouse may not later contest the jurisdictional basis of the decree provided the divorcing state does not permit such an attack. Are

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42. "A former wife in the position of plaintiff may have a just claim to support from her husband upon dissolution of the marriage. By the marriage he assumed the obligation of supporting his wife, and he should not be allowed to escape that obligation by conduct which compels her to divorce him. The wife is entitled to her day in court, to have a court of equity pass on the merits of her claim that her former husband should support her." Dimon v. Dimon, 40 Cal. 2d 516, 540, 254 P. 2d 528, 541 (1953) (Judge Traynor dissenting). The recent case, Pope v. Pope, 117 N. E. 2d 65 (Ill. 1954), leaves the way open for the *MacKay* doctrine in Illinois. In its opinion holding that an Illinois support order survives an *ex parte* divorce the court at p. 67 said, "We... put to one side those cases in which divorce was obtained at the instance of the wife."


45. The term "in personam divorce" is used throughout this paper to refer to a divorce granted by a court having personal jurisdiction over both parties.

appearing parties bound in like fashion on the question of alimony? The answer depends upon the conflict of laws rules of the states as well as the requirements of full faith and credit.

The full faith and credit provisions of federal law direct $F^2$ to take a backward glance. $F^2$ must give a divorce decree the "same full faith and credit" as the courts of $F^1$ would do. Further $F^2$ may, within limits, give the $F^1$ decree an effect in $F^2$ greater than that required by the federal mandate.\(^{47}\)

One can be reasonably certain that an alimony decree granted in $F^1$ will, by force of the full faith and credit clause, be conclusive of alimony or support claims in any other state provided (1) both parties are before the $F^1$ court and (2) the $F^1$ decree bars further claims under the $F^1$ law. In such circumstances a wife may not enforce a pre-existing support order nor may she get a later alimony decree in another state. In *Bates v. Bodie*,\(^{48}\) a wife was granted alimony by the courts of Nebraska after an Arkansas court with personal jurisdiction over her had awarded an amount "in full of alimony and all other demands." The Supreme Court held that the Nebraska award violated full faith and credit even though the Nebraska award was to be made wholly out of Nebraska land.

Sometimes the command of the full faith and credit statute that $F^2$ must look to the law of $F^1$ is disregarded. For example in *Isserman v. Isserman*\(^{49}\) the New Jersey Supreme Court dealt with the question of whether its separate maintenance decree survived an in personam Nevada decree of divorce. In its opinion the court said:

"As to the effect of the Nevada decree on the existing decree of the Court of Chancery for maintenance, we reaffirm what we said in the previous appeal in the case, 2 N.J. 1, at page 7, . . . that 'it is difficult to understand by what right the Nevada court undertook to incorporate within its decree a paragraph declaring null and void a decree of the Court of Chancery of New Jersey.' . . . it is for the courts of our State and not those of Nevada to say what effect the Nevada judgment has on existing litigation or orders of the courts of this state."\(^{50}\)


\(^{47}\) That there are limits to the effect which $F^2$ may give the judicial acts of $F^1$ is a topic not fully explored. It is doubtful whether $F^2$ could not treat an $F^1$ separate maintenance decree as an absolute divorce in $F^2$ yet in some sense $F^2$ would merely be giving "greater" effect to the $F^1$ decree than is required. Due process, equal protection, or possibly some other constitutional provision would surely forbid a radical departure in $F^2$ from the purported $F^1$ effect of judicial action.

\(^{48}\) 245 U. S. 520 (1918).


\(^{50}\) Id. at 114, 93 A. 2d at 574.
Of course, the question is not one of New Jersey nor of Nevada but of federal law. Under the full faith and credit statute the New Jersey decree would be terminated because the Nevada effect of a divorce is to terminate separate maintenance decrees.

The New Jersey court in *Isserman* did not commit error in spite of the misconception because the New Jersey support order was, in fact, terminated. The wife was said to have had a right to choose:

"... between relying on her maintenance decree in this State and her cause of action for divorce for desertion with its incidental right of alimony, or contesting her husband's action for divorce in all particulars before the Nevada court. Having done so and the decision having gone against her on the merits both as to the right of her husband to a divorce and her right to alimony, she placed herself in a position where her existing decree of maintenance ceases to have any res adjudicata effect with respect to her husband's duty for support."^{51}

However, the opinion did indicate that the New Jersey support order might survive if the wife, even though personally before the divorcing court, had not applied for alimony.

"... where there is a failure to apply in the divorce proceeding for alimony in substitution for the support order granted in the maintenance proceeding, this is merely a procedural defect and the decree of divorce alone does not merge or vacate a prior order for separate maintenance."^{52}

Surely this statement is correct only if Nevada would permit the maintenance decree to survive an in personam divorce.

In agreement with the suggestion from *Isserman*, the Ohio courts have held in pre-*Estin* opinions that a foreign divorce proceeding in which both spouses were parties is not res judicata on questions of support if the foreign court did not purport to decide the question of support but merely the matter of marital status.^{53}

On the other hand, the correct approach to the full faith and credit question was employed in *Lynn v. Lynn*,\(^{54}\) a New York case decided after *Estin*.

"In the present case, however, the Nevada court had jurisdiction of the wife's person by reason of her appearance and, consequently, it did have power to determine her right to alimony. If that tribunal had expressly passed upon the matter of

51. *Id.* at 115, 93 A. 2d at 575 (the first set of italics has been added).
52. *Id.* at 114, 93 A. 2d at 575. This portion of the *Isserman* opinion is the principal subject of a casenote, 28 Notre Dame Law. 403 (1953).
54. 302 N. Y. 193, 97 N. E. 2d 748 (1951). It is interesting to note that the New York Court of Appeals has held that a separation agreement will survive an in personam divorce which makes no mention of the agreement. Hettich v. Hettich, 304 N. Y. 8, 105 N. E. 2d 601 (1952).
alimony and had either denied an allowance to the wife or awarded her a sum less than that fixed in the New York judgment, there would be no doubt that the Nevada decree would be controlling over the inconsistent provision of the New York judgment. Since that would be the effect given in Nevada to such a judgment when rendered by a court having jurisdiction of the wife's person...

"Controlling effect must likewise be given to the Nevada decree in this case insofar as the matter of alimony is concerned, even though it makes no provision for alimony and even though the wife made no claim for any support in the action." 56

The Nevada law seemed to cut off a prior support order and also to forbid the granting of alimony after a divorce unless the Nevada decree contained a reservation of jurisdiction; therefore, the Lynn opinion refused to enforce the New York decree in favor of Mrs. Lynn.

The Lynn opinion gives an effect to the Nevada decree which probably goes beyond the demands of full faith and credit. The decree in question contains certain recitals which could serve as a basis for concluding that the Nevada court impliedly reserved jurisdiction to adjudicate the question of alimony at some future time. If that conclusion were sound then New York could also decide the matter of support. Full faith and credit does not require New York to go beyond Nevada in the conclusiveness of the Nevada divorce. The Lynn opinion disposes of this matter with the following:

"At any rate, a reservation of jurisdiction, if one there was, neither keeps alive the alimony provisions of the New York separation decree nor furnishes basis for inferring that the Nevada court intended to leave the matter of support for decision by the court of some other jurisdiction." 56

This would seem to follow only as a matter of New York conflict of laws rules and not by force of federal law.

In short, whether a support order or getting of alimony survives foreign in personam divorce will depend on the law of the divorcing state so far as full faith and credit is concerned. 57 If in the divorcing state the decree cuts off all possibility of future maintenance and alimony, the decree will have that effect universally; on the contrary if the decree does not effect support rights under the F1 law, federal law permits their recognition elsewhere leaving the question to each

55. Id. at 202-203, 97 N. E. 2d at 752.
56. Id. at 204, 97 N. E. 2d at 753.
57. It should be said that every issue which could have been litigated between parties is not concluded between them after they have met in a single action. The res judicata effect of any proceeding will depend upon which issues were before the court expressly or by implication. Freeman, Judgments § 674-675 (5th ed. 1925).
SUPPORT RIGHTS

state’s conflict of laws. The Kentucky opinion, *Cooper v. Cooper*, 58 serves as an instructive example. There a wife was granted alimony after an in personam Florida divorce but the Kentucky court understood that the Florida court themselves did, in some cases, grant alimony after a divorce. “Full faith and credit demands do not require that we give greater effect to the Florida decree, and matters determined thereby, than given it in Florida.” 59 The Kentucky Supreme Court saw no reason under Kentucky conflicts rules to bar the alimony award.

“The position and conduct of the respective parties has been consistent throughout. The appellee has sought to obtain a divorce in Florida and resist the imposition of alimony in Kentucky; the appellant has sought to obtain permanent alimony in Kentucky and resist the divorce in Florida. Both parties looked to the forum of the Florida courts to adjudicate in regard to the marital res exclusively, and looked to the forum of our own courts to adjudicate in regard to rights in and to property within this State and to the question of alimony. The parties were capable to choose between equally competent tribunals. Having done so, and persisted in the choice, their substantial rights will not go in accordance with the weight of court dockets, but by the laws of the chosen forums.” 60

The force of local law may terminate rights to support even though the foreign decree does not purport to do so. Suppose a Florida in personam decree contains a provision that nothing in the decree shall relieve the husband from the support provisions of another state’s prior order. The Maryland Court of Appeals terminated a Maryland separate maintenance order after a Florida decree which contained this sort of reservation. 61 The question the court said was “whether, under Maryland law, the Maryland court is authorized to exercise jurisdiction, by changing or by enforcing, with or without change, the allowances in the decree. . . .” 62 The answer given was, no. The marriage was destroyed by the Florida decree and therefore no base remained upon which to rest the decree of separate maintenance. The Appellate Division in New York with two judges dissenting refused to enforce a New York separate maintenance decree after an in personam Florida decree which ordered the husband to pay the wife “in accordance with the terms”

58. 314 Ky. 413, 234 S. W. 2d 658 (1950), cert. denied, 344 U. S. 876 (1953).
59. Id. at 417, 234 S. W. 2d at 660.
60. Id. at 418, 234 S. W. 2d at 661.
of the New York decree. To the majority the Florida decree was "the new source of the ... obligation of the husband." The upshot of this decision is to deprive a wife of the immediate New York remedies of enforcement and to leave her with the problem of enforcing the Florida decree by starting a new proceeding on the basis of it.

Assuming the court has personal jurisdiction over both parties it is probably the wisest course for a state to require their property and alimony problems to be resolved by the court which divorces them. The interests of both parties are protected if they are afforded their "day in court"—a full opportunity to urge their respective positions. Many of the issues in the divorce action will be relevant on the question of alimony. The trend of the best thinking on questions concerning the conduct of litigation is to force parties to state related claims in one proceeding.

However wise this proposition may be for the family law of the divorcing state, a second state should not automatically cut off support rights which remain untouched by the law of the state of the divorce, merely because both parties appeared before the courts in the latter state. The Maryland and New York cases above merely succeed in surprising the litigants who find themselves bound by decrees respecting matters with which the decrees do not purport to deal.

### A Decree for Alimony After a Valid Ex Parte Divorce

We have seen that a state without violating full faith and credit

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64. Id. at 815, 113 N. Y. S. 2d at 604. The Florida decree contained the following reservation: "... a decree of absolute divorce in an action instituted by the husband (plaintiff herein) was entered in the Circuit Court of Dade County, Florida. That decree contains the following provisions: 'Ordered, adjudged and decreed that the plaintiff herein be, and he is hereby, required, until the further Order of this Court, to pay to the defendant, for her support and maintenance and that of the infant child of the parties, Lloyd Thayer Marshall, the sum of Forty Five ($45.00) Dollars each week, in accordance with the terms of that certain Judgment of the Supreme Court of the State of New York, County of Nassau, wherein Lloyd Burton Marshall was plaintiff and Helen Marshall was defendant, said Judgment being entered on June 30, 1948, and recorded in the Court House, Mineola, Nassau County, New York, in Liber 228 at page 231 of Judgments being Case No. 445148; and further, the defendant is required to perform, abide by and carry out the Orders, terms, and conditions of said Judgment with respect to the custody of said infant child. This Court hereby expressly retains jurisdiction of this cause for the purpose of making such other and further appropriate Orders with respect to alimony and the support, maintenance, care, custody and control of the infant child, Lloyd Thayer Marshall, as may properly come before this Court.'"

65. Berkowitz v. Berkowitz, 92 N. Y. S. 2d 363 (Sup. Ct. 1949), shows how considerable the surprise element can be. There a husband's ex parte
may continue to enforce a support order after a valid ex parte divorce. May a state grant a decree of alimony for the first time after a divorce? If the state granting the divorce forbids granting post-divorce alimony a full faith and credit question arises.

The Supreme Court's Estin case does not dispose of the matter. In Estin, the decision rested in part on the fact that a support order was outstanding at the time of the husband’s ex parte divorce and so could be characterized as a “property right” which could not be taken away by force of a foreign ex parte decree. Of course, rights to support undefined by decree can be labeled “property” but certainly with greater difficulty.

Moreover, the 1913 opinion, Thompson v. Thompson, stands in the path of the complete acceptance of the “divisible divorce” concept. There a wife sought a separate maintenance decree in the District of Columbia but before the decree was entered the husband obtained an ex parte decree of divorce a mensa et thoro in Virginia, the matrimonial domicile. Under Virginia law the decree foreclosed any right of the wife to receive alimony or maintenance. The Supreme Court therefore held that the Virginia decree, by operation of the full faith and credit statute, barred the wife’s District of Columbia action.

It would be most unfortunate if the Supreme Court should merely permit the wife's domicil to protect her rights under an existing support order and to forbid protection of support rights generally after a valid ex parte divorce. It is the whole problem of support, not merely a wife's rights under a present order which Florida decree provided for payment of alimony. Because the wife attempted to enforce that obligation by contempt proceedings in Florida, the New York court held that she had appeared in the Florida proceedings and therefore had lost her rights under a prior New York support order.

Estin v. Estin, 324 U. S. 541 (1948).

Estin has been treated as completely disposing of the problem raised. Professor J. H. C. Morris in discussing the scope of Estin said, “...it would appear immaterial whether or not the wife's right to support has or has not crystallized in a support order, since in either case the economic problems is the same and should receive the same solution.” Morris, Divisible Divorce, 64 Harv. L. Rev. 1287, 1302-1303 (1951). See also Meredith v. Meredith, 204 F. 2d 64, 66 n. 3 (1953): "While the Estin decision involved merely the enforcement of a maintenance order entered prior to the foreign divorce, its reasoning would seem to be equally applicable to an original grant of maintenance after a divorce. Either may be done consistently with the full faith and credit clause."

But see the statement in Johnson v. Johnson, 119 Colo. 551, 555, 555, 206 P. 2d 597, 599 (1949): "The Nevada decree proceeded as an action in rem and when given effect by the courts of this state, it is only as to the marital status and not as a decree effective on the question of the right of the plaintiff being able to follow her inchoate interest in the property of her husband to the extent of her necessary support."

226 U. S. 551 (1913).
requires separate treatment. The economic disaster caused by a runaway husband is equally serious in either case to the wife who is abandoned.

In his Estin opinion Mr. Justice Douglas distinguished the Thompson case: "This case is unlike Thompson v. Thompson . . . where the wife by her conduct forfeited her right to alimony under the laws of the state of the matrimonial domicile where her husband obtained the divorce, and hence could not retain a judgment for maintenance subsequently obtained in another jurisdiction." This distinction limits the ex parte decrees which cut off alimony rights to the orders of the state in which the parties last lived as husband and wife and, of those, only to the ones which cut alimony rights because of the wife's misconduct. In this light Thompson would apply to few divorces indeed. However, even within this narrow scope, the federal law should not foreclose states from dealing with support matters after an out-of-state divorce decree obtained by one party alone. If there is merit in dealing with support questions separately as a general matter, there is equal merit in the separation even in this narrow area. The economic need, the moral and legal claims for alimony can be adequately and fairly explored only in a proceeding involving both parties.

Other ways for dealing with Thompson are not hard to find. Certainly the opinion can be overruled; be read as a 1913 essay, drained of vitality by the modern post-Williams cases. Moreover, if some of its language is ignored, the decision can be regarded as merely a conflict of laws case for the District of Columbia decided by the highest court for the District.

Upon the assumption that Thompson either will be reduced to insignificance or will be overruled, the problem of getting alimony after foreign divorce becomes a problem of the law of the state in which the suit is brought.

In some states the plaintiff is confronted at the outset with a problem of finding an available remedy. The jurisdiction of courts to grant alimony may exist only as an incident to a divorce proceeding. For example, Dimon v. Dimon, a recent California case commented about the statutes authorizing alimony in California.

"The language of these sections shows a consistent legislative purpose to confine the powers of the court to decree support in any form to the period when actions for divorce, annulment and separate maintenance are pending, including time on appeal and such further time as may be within the scope of the

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71. 40 Cal. 2d 516, 254 P. 2d 528 (1953).
If the wife should not seek alimony but a decree of separate maintenance she may find that statutes authorize such relief only between parties who are married. When a claim for maintenance was made in the District of Columbia after a foreign divorce, Judge Clark of the Court of Appeals for the District wrote:

“This action was brought under Section 415 of Title 16 of the District of Columbia Code. The very language of the statute limits suits for maintenance to parties who are ‘husband’ and ‘wife.’ No interpretation, however liberal, can eliminate those essential prerequisites.”

The central question is whether sound policy permits a wife to claim support money after an ex parte divorce and, if so, whether the existing legal materials dealing with the merits recognize the wife’s claim. It is unfortunate that in any case the matter should turn on arguments about the jurisdiction of courts.

In Dimon v. Dimon the plaintiff sought to avoid the line of California cases which clearly blocked an award of alimony in an independent action by asking for equitable relief rather than statutory alimony. She argued that the courts of equity possessed powers to enforce a husband’s support duties apart from the provisions of statute.

Although Mrs. Dimon failed to persuade the California court, recognition of an inherent equitable power to award support remains the simplest technique employing case law to provide a remedy. No compelling reason exists for holding that the statutory provisions for alimony are exclusive. In some places equitable power has been recognized in respect to matters of alimony and of family support. The exercise of this power is within the spirit of the ancient tradition of equity to find a remedy when a right is given no adequate protection. Mrs. Dimon’s position is supported by the not uncommon state constitutional provisions requiring a remedy for every injury. Finally, of course, the reasons for recognizing a

72. Id. at 520, 254 P. 2d at 529.
73. Meredith v. Meredith, 204 F. 2d 64, 66-67 (D.C. Cir. 1953). Lowry v. Lowry, 256 P. 2d 869, 871 (Kan. 1953), indicates that the Kansas statutes do not permit an award of separate maintenance after a valid ex parte divorce.
74. Bray v. Landergren, 161 Va. 699, 172 S. E. 252 (1934); “... quite apart from any statute, equity will provide a remedy for a violation of the duty of a husband or father to support and maintain his wife or minor children. Such duty has been enforced in this jurisdiction...”, Meredith v. Meredith, 204 F. 2d 64, 67 n. 8 (D.C. Cir. 1953).
75. E.g., “... every man shall have remedy by due course of law for injury done him in person, prospect or reputation.” Ore. Const. Art. I, § 10. A general statute might also be helpful, e.g., Cal. Civil Code, § 1429, “... an obligation arising from operation of law may be enforced in the manner provided by law, or by civil action, or proceeding.”
claim for alimony after *ex parte* divorces are reasons as well for discovering a remedy by which to establish the claim.

The jurisdiction of courts to award alimony after an *ex parte* divorce has been clearly established by statute in a few states. The New York act was passed in 1953 after a considerable tangle. The three New York courts dealing with family questions had all found themselves without jurisdiction to compel support after a valid *ex parte* decree of a sister state.⁷⁶ The new act provides:

"In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife."⁷⁷

In New Jersey, a similar statute labels the wife's award "alimony" and expressly refers to out-of-state divorces.

"Pending a suit for divorce or nullity, 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, and also touching the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just..."⁷⁸

In states which have adopted the Uniform Reciprocal Enforcement of Support Act a plaintiff who uses that procedure would seem to have a remedy under it even though that might not be the case had she begun her action in the forum apart from the act. Section 13 of the 1950 version and Section 20 of the 1952 version of the Uniform Act are identical.

"If the court of the responding state finds a duty of support, it may order the defendant... to furnish support or reimbursement therefor and subject the property of the defendant... to such order."⁷⁹

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⁷⁶. Law Revision Comm., Legis. Doc. No. 65 (K) 13 (N.Y. 1953). This commentary was prepared by Professor William Tucker, Dean of Cornell University School of Law.
If a plaintiff ex-wife is not blocked by the difficulty of finding a remedy, she may still find that no recovery is possible. Some courts have held that any valid divorce decree is res judicata on the question of alimony. This argument is scarcely persuasive in cases where the wife was not before the divorcing court and hence has not had her day in court on the question of support. Nor if the wife was plaintiff in the ex parte proceeding should she be barred by res judicata. No more opportunity was presented to press her claim for support against her absent husband than in a case brought ex parte by her husband. It might be urged that if the wife is plaintiff she has “waived” her right to support. This application of “waiver” requires a wife entitled to a divorce (presumably because of some misconduct of the husband) to choose between (1) the maintenance of rights of support together with a distressing marriage relationship, or (2) a divorce with consequent loss of support. It is not easy to see the value of putting such a choice to anyone.

If a court agrees that neither by res judicata nor by waiver has a wife in these circumstances lost her right to support, the forum must face the question by what law shall the plaintiff’s right be determined. Should the law of the forum be applied in every case, the wife’s right and the husband’s obligation will depend upon the accident of the place of trial. The law of the wife’s domicil at the time of the divorce is perhaps the most suitable measure of a wife’s interests. If such a choice of law rule were used, the husband in most cases will know by what state’s law he can expect to be judged. Neither his obligation nor his right will then depend upon the future movements of him or his wife.

As a matter of fact almost all the decided cases proceed on the assumption that the forum’s law is to be used. In the proceedings under the Uniform Reciprocal Enforcement of Support Act (1950 version) the duties of support enforced are those “imposed or im-

82. See Morris, Divisible Divorce, 64 Harv. L. Rev. 1287, 1301-1303 (1951).
83. U. L. A. Reciprocal Enforcement of Support Act § 7 (1950). States adopting this act are listed in the 1953 Supplement at 49. Texas has added to the provision: “... but shall not include alimony to a former wife.” Tex. Stat., Rev. Civ. Art. 2328b § 7 (Supp. 1953). The Ohio Supreme Court has refused to enforce the choice of law section of the 1950 version in a case involving an attempt to apply the Pennsylvania law respecting support of parents in Ohio. Under Ohio law the parents have no rights to support in certain circumstances. The parent in question was domiciled in Pennsylvania. The Court held that to subject the Ohio son to Pennsylvania liability would deprive him
possible under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced at the election of the obligee." The 1952 revision of the Uniform Act changed this section to limit choice of law to states in which the obligor was present during the period for which support is claimed. 84

When reference is made to the internal law of the appropriate state that state may, in addition to possible res judicata and waiver difficulties, refuse to grant post-divorce support on the simple ground that there is no longer a legal basis for an award. 85 The marriage is dissolved and therefore there is no ground for alimony. It is at this point that an analysis which distinguishes between the various incidents of marriage—the concept of "divisible divorce"—becomes relevant. It is surely too late in the day to argue that a marriage is a marriage and that one is either married or divorced. The judge and lawyer of today stops at Halfway House without great anxiety. Again the important problem is the question of policy. It has become easy to get ex parte divorces on very liberal grounds. With modern transportation conveniences a husband can move quickly away from his responsibilities.

"If the wife's right to support does not survive such an ex parte decree, she is compelled to protect that right indirectly by making a collateral attack on the decree. There is no reason to drive here to such a cumbersome and perhaps futile extreme. The policy considerations that require recognition of the foreign decree are not present when the question is the right to support. Since the courts have evolved rules of law that allow the husband readily to obtain a divorce, corresponding rules of law must be invoked to protect the wife and prevent injustice. Accordingly, we should give effect to an ex parte foreign decree obtained by the husband insofar as it affects marital status, but declare it ineffective on the issue of alimony, thus accommodating the interests of each state by restricting it to matters of her dominant concern." 86

of equal protection of the laws because all other Ohio citizens are free from responsibility in similar circumstances. Commonwealth v. Mong, 117 N. E. 2d 32 (Ohio, 1954). This approach to the constitutional question would seem to require the choice of the obligor's domiciliary law in support cases.

85. E.g., Cardinale v. Cardinale, 8 Cal. 2d 762, 68 P. 2d 351 (1937); Holdorf v. Holdorf, 198 Iowa 158, 197 N. W. 910 (1924).
86. Judge Traynor, dissenting in Dimon v. Dimon, 40 Cal. 2d 516, 539-540, 254 P. 2d 528, 541 (1953). Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950), is a rather extravagant opinion but does contain some argument in support of granting alimony after divorce.
Many efforts have been made recently to devise legal means for enforcing support obligations across state lines. Another easy-to-forge tool lies at hand—the recognition in more than a few states, that a wife may assert a claim for support in an independent proceeding and without regard to the fact that an \textit{ex parte} divorce has already given her the capacity to remarry.\footnote{Alimony after a valid \textit{ex parte} divorce is permitted in, e.g., Taylor v. Taylor, 242 S. W. 2d 747 (Ky. 1951); Searles v. Searles, 140 Minn. 385, 168 N. W. 133 (1918); Melnyk v. Melnyk, 49 Ohio Ops. 22, 107 N. E. 2d 549 (1952); Cook v. Cook, 56 Wis. 195, 14 N. W. 33 (1882). The cases are collected in Note, 53 Harv. L. Rev. 1180 (1940); 34 Ky. L. J. 149 (1946), and Note, 28 A. L. R. 2d 1396 (1953).}

\footnote{The husband who must pay the alimony awarded in an independent proceeding after an \textit{ex parte} divorce in another state may not be permitted to deduct these alimony payments under the federal income tax law. Deductible payments are those "... imposed ... or incurred ... under such decree ..." or a "... written instrument incident to such divorce...." 26 U. S. C. § 22(K) (1946). If the first phrase refers to the decree of divorce, alimony granted at a later time is not imposed or incurred by that decree and hence would not be deductible. It may be possible to read the first phrase as not limiting the deduction to payments made under a particular decree and therefore 22(K) can be read to permit the deduction of all payments made under any legal compulsion after divorce. See Warren and Surrey, Federal Income Taxation—Cases and Materials 845-846 Note C (1953 ed.). The second phrase referring to a "written instrument" probably is directly exclusive to a separation agreement and not to a court order. The American Law Institute, Federal Income Tax Statute, Feb. 1954 Draft, Vol. 1, p. 51, in section 127 would resolve the difficulty by giving a deduction for payments under obligations imposed "because of marital or family relationship."}