California Law Review

MEMBER NATIONAL AND WESTERN CONFERENCES OF LAW REVIEWS

Published Quarterly throughout the Year by Students of the School of Law of the University of California, Berkeley, California. Indexed in Index to Legal Periodicals and Public Affairs Information Service.

Subscription Price, $5.00 Current Single Copies, $1.50

Comment

INTERSTATE RECOGNITION OF ALIMONY DECREES

A wife secures a decree which entitles her to continuing alimony or support payments. The husband seeks to avoid the obligation by leaving the state. The legal problem faced by the wife is that of compelling payment despite the removal of the husband from the reach of the court that granted the decree. The traditional remedy available to her has been an action upon the decree in a state in which the husband may be located, relying upon the mandatory effect of the full faith and credit clause of the Constitution[1] to acquire a judgment against the husband which can be enforced by local processes.[2] While the underlying purpose[3] of the full faith and credit clause

[1] U. S. CONST. Art. IV, § 1.

[2] That the framers intended the full faith and credit clause to require an action on a sister state judgment before execution could issue is not certain, but the practice is now settled law. 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 547 (1953); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944). For the *exequatur* method of enforcing a foreign judgment practiced in the civil law system, see Contini, *International Enforcement of Maintenance Obligations*, 41 CALIF. L. REV. 106, 108 (1953).

[3] "The full faith and credit clause . . . altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application." Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943). For a similar statement, see Johnson v. Muelberger, 340 U.S. 581, 584 (1951).

was to resolve just such problems, by compelling nation-wide recognition[4] of the judicial proceedings of each state, a singularly ineffective legal technique has resulted from extension of its provisions[5] to alimony decrees.

FULL FAITH AND CREDIT

The full faith and credit mandate is that judicial proceedings shall be given "the same faith and credit in [a sister state] as they have by law or usage in the courts . . . from which they are taken."[6] Application of this standard to alimony decrees was achieved in the mid-nineteenth century in *Barber v. Barber*,[7] where the Supreme Court first stated the rule that periodic installments of alimony constituted debts of record entitled to full faith and credit as the installments matured. Some doubt was cast on the force of this rule in the subsequent decision of *Lynde v. Lynde*[8] in 1901, which introduced the concept of finality in holding that a "provision for the payment of alimony in the future . . . was not a final judgment for a fixed sum,"[9] and therefore not entitled to full faith and credit in a sister state.

The apparent conflict between these decisions was resolved by the Court in *Sistare v. Sistare*[10] in 1910, which held that decrees for the payment of alimony in the future were entitled to full faith and credit as to past *accrued* installments, if the right to them was "vested," so that they could not be retroactively annulled or modified by the original judgment court. And this result obtained even though the past accrued installments had not previously been reduced to a money judgment in the state of rendition, and regardless of whether a power of prospective modification had been retained there.

But even though full faith and credit is required for such accrued in-

[4] The term "recognition" is used throughout in the conflict of laws sense as denoting the spatial extension of the res judicata effect of a judgment, and particularly the basic effect designated as "merger," by which a judgment for the plaintiff terminates the original cause of action and a cause of action on the judgment takes its place. While "enforcement" is often used as a synonym for recognition in the conflict of laws, such usage is needlessly confusing. The term "enforcement" is therefore restricted in this discussion to the local processes available to a judgment creditor for satisfaction of his judgment. As thus used, recognition of a foreign decree is in every case a prerequisite to its enforcement.

[5] While there has been Congressional implementation of the full faith and credit clause in general terms since 1790, *infra* note 6, the real scope of the clause has been developed by the Supreme Court. "[I]n the absence of provisions more specific than the general terms of the congressional enactment this Court must determine for itself the extent [of the recognition compelled by the clause]." Stone, J., dissenting in Yarborough v. Yarborough, 290 U.S. 202, 213, 215 (1933). For a critical appraisal of this development, see CROSSKEY, *op. cit. supra* note 2, at 554, and for a discussion of results which could be attained by Congressional exercise of the power granted by the clause, see COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 90 (1942).

[6] This implementing statute is now found in 28 U.S.C. 1738, but has been in existence in substantially its present form since 1790. See in general CROSSKEY, *op. cit. supra* note 2; Radin, *supra* note 2; Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945).

[7] 21 How. 582 (U.S. 1859).

[8] 181 U.S. 183 (1901).

[9] *Id.* at 187.

[10] 218 U.S. 1 (1910).

stallments, as a corollary of the determination that an action must first be brought upon the decree,[11] actual enforcement[12] of the new judgment thus obtained depends entirely upon the "local statutes and practice of the state,"[13] rather than upon procedures available under either the terms of the foreign[14] decree[15] or the law of the state of rendition. Nor is a state compelled to make available the identical enforcement procedures which it accords to domestic alimony decrees. The *Barber* case, in initially referring to accrued installments of alimony as "debts of record," intended only to signify that such obligations were not examinable upon the merits when sued upon in sister states.[16] The language has been taken out of context, however, as indicating that only the procedures provided for enforcement of money judgments in general need be accorded.[17]

The trio of early decisions culminating in the *Sistare* case, despite current indications of possible extension,[18] still constitutes the basic outline of compulsory full faith and credit to sister state alimony decrees.[19] It will be noted that this remedy is severely limited in two respects: (1) the breadth of its coverage, and (2) the adequacy of enforcement processes accorded.

(1) As to coverage, the Clause reaches only accrued installments not subject to retroactive modification by the rendering court.[20] Thus accrued installments which are subject to retroactive modification and all future installments[21] are outside the scope of full faith and credit as presently developed. Although analytically distinct, decrees subject to modification in the state of rendition, whether as to accrued or future installments, are classified together as nonfinal judgments, with "lack of finality" being stated as the general reason for not compelling full faith and credit.[22]

(2) As to enforcement processes, the only remedy presently considered to be required by the Clause[23] is execution after first having reduced the

---

[11] *Supra* note 2.

[12] For the meaning given this term, see note 4 *supra.*

[13] Lynde v. Lynde, 181 U.S. 183, 187 (1901).

[14] The term "foreign" is used generally throughout this discussion as a matter of convenience, but only sister state alimony decrees are considered. For a discussion of the problem of international recognition, see Contini, *International Enforcement of Maintenance Obligations,* 41 CALIF. L. REV. 106 (1953).

[15] "The provisions in the foreign decree for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation . . . ." Lynde v. Lynde, 181 U.S. 183, 187 (1901).

[16] Barber v. Barber, 21 How. 582 (U.S. 1859). For the status of judgments as debts of record, see SHIPMAN, COMMON LAW PLEADING 136 (3d ed., Ballantine, 1923).

[17] See, *e.g.,* Henderson v. Henderson, 209 Ga. 148, 71 S.E.2d 210 (1952); Willard v. Rodman, 233 N.C. 198, 63 S.E.2d 106 (1951).

[18] See text at notes 93-98 *infra.*

[19] All three were cited with seeming approval in Barber v. Barber, 323 U.S. 77, 80 (1944).

[20] This discussion is concerned only with continuing payments. As to the full faith and credit required for a foreign decree of lump sum payment for child support, see Yarborough v. Yarborough, 290 U.S. 202 (1933), with vigorous dissent by Stone and Cardozo, JJ.

[21] As to future installments not subject to modification, see note 67 *infra.*

[22] See in general, Comment, *The Finality of Judgments in the Conflict of Laws,* 41 COL. L. REV. 878 (1941).

[23] Since the full faith and credit clause does not purport to prescribe procedures for enforcement, *supra* notes 13 and 15, it might be more exact to say that there is no constitutional objection to providing less effective enforcement processes than are made available for domestic judgments of similar nature, at least if the minimum remedy of execution is made available.

amount in default to a local money judgment. The time, expense and uncertainty involved in locating assets available for execution and in holding an execution sale, as well as the necessity for instituting periodic suits as amounts in default accrue, are serious obstacles to effective enforcement, when contrasted with such enforcement remedies as contempt, which are generally available for domestic orders of alimony or support.[24]

NON-CONSTITUTIONAL RECOGNITION

This twofold deficiency of full faith and credit to foreign alimony decrees has fostered the development in many states of independent conflict of laws rules under which recognition will be extended in appropriate cases, even though not compelled by the Constitution.[25] The California rules of "non-constitutional" recognition received their most definitive formulation in the celebrated *Biewend*[26] case, decided by the California Supreme Court in 1941.

Biewend v. Biewend

In 1918 Mrs. Biewend was granted a Missouri divorce which provided for the payment of $25 a week for the support of herself and four minor children. She apparently made no effort to collect payments under the decree for a period of twenty years. Meanwhile the children reached majority, Mrs. Biewend remarried and was subsequently redivorced, and both parties became California residents and domiciliaries.

In 1938 Mrs. Biewend brought an action in California upon the 1918 decree, and the trial court awarded her a judgment ordering payment of installments accrued during the five years prior to commencement of the action,[27] as well as the payment of $25 weekly in the future. The supreme court affirmed the judgment as to the past accrued amount on the basis of full faith and credit, and conceding that clause to be inapplicable to the future installments, affirmed that portion of the judgment upon the basis of comity.

As the court found that the past accrued installments were not subject to retroactive modification or annulment in the Missouri court, it may be assumed that full faith and credit was required as to that portion of the judgment. But there was no compulsion under the full faith and credit clause or the law of California for requiring payment of future installments.

[24] See text at notes 60 and 61 *infra.*

[25] For a compilation and discussion of the state court decisions, see the Brief prepared by the National Association of Legal Aid Organizations, *Equitable Enforcement of Foreign Alimony and Support Orders,* 34 Mass L. Q. No. 4, 9 (1949). Cases are also noted in 18 A.L.R.2d 862 (1951). For a valuable earlier discussion, see Jacobs, *The Enforcement of Foreign Decrees for Alimony,* 6 LAW & CONTEMP. PROB. 251 (1939).

[26] Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701 (1941).

[27] CAL. CODE CIV. PROC. § 336 then provided a five year statute of limitations on judgments as the basis of actions. Continuing installments which had accrued more than five years prior to commencement of the action were thus deemed to be barred by the statute. In 1953 the period was extended to ten years. Cal. Stats. 1953, c. 1153. See now CAL. CODE CIV. PROC. § 337.5(3).

Practically, there seems no question but that both parties believed the decree for future payments had ceased to affect them. The original award was for the support of *both* the wife and four children, but the four children had long since reached majority, and the subsequent remarriage of the wife would necessarily indicate that she must thenceforth look to her new husband for her own support. Coupled with these circumstances was a twenty year lapse in time which would give the husband every reason to believe the wife was not going to demand payment.[28]

Whatever justification may exist for giving the wife a "vested" right to past accrued installments,[29] it is difficult to avoid viewing the rigid requirement of future payment imposed under a doctrine of non-constitutional recognition as other than a penalty exacted from Mr. Biewend for his inability to appraise the use to which an overly-technical court might put an ambiguous concept.[30]

Comity

Prior to the *Biewend* decision, a series of California cases[31] had adopted a doctrine of recognition of nonfinal alimony decrees, but in all of these previous cases the circumstances apparently dictated relief for a deserving wife,[32] and in none was the result based in express terms upon comity.[33] Thus the *Biewend* decision not only eliminated general considerations of fairness and convenience as determinants of non-constitutional recognition, but introduced the label of comity as descriptive of the result.

---

[28] The Missouri statute of limitations applicable to decrees for continuing alimony payments was ten years at the time the original decree was secured. MO. REV. STAT. § 886 (1929). The court found that the defendant had failed to sustain the burden of showing the statute had run.

[29] While it can be maintained that retroactive modification is an invitation to the husband not to make payments in the hope that the court will subsequently cancel or reduce the amount of the accrued installments, a principal reason for not permitting retroactive modification is to secure full faith and credit to decrees for past due amounts. Cf. Kephart v. Kephart, 193 F.2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). The California legislature, in the 1951 recasting of § 139 of the Civil Code, expressly provided that accrued installments were not subject to modification. While this had long been California law, see, *e.g.*, Keck v. Keck, 219 Cal. 316, 26 P.2d 300 (1933); Parker v. Parker, 203 Cal. 787, 266 Pac. 283 (1928), the amendment was apparently designed to assist foreign courts in determining that California alimony decrees for accrued installments were entitled to full faith and credit.

[30] It is of course possible that undisclosed psychological factors influenced the court, but no such "equities" are apparent from either the majority or dissenting opinions.

[31] Palen v. Palen, 12 Cal. App.2d 357, 55 P.2d 228 (1936); Barns v. Barns, 9 Cal. App.2d 427, 50 P.2d 463 (1935); Straus v. Straus, 4 Cal. App.2d 461, 41 P.2d 218 (1935), *hearing denied*; Creager v. Superior Court, 126 Cal. App. 280, 14 P.2d 552 (1932); Cummings v. Cummings, 97 Cal. App. 144, 275 Pac. 245 (1929), *hearing denied*.

[32] It does not appear in any of these cases, *supra* note 31, that the wife was a resident of California, or that there had been any change of circumstances since the entry of the original decree. While not articulated, there was thus the policy factor favoring recognition of a nonresident wife forced to seek relief in California against a husband who would not have had a defense in the state of rendition.

[33] No terminology was adopted in any of these cases, *supra* note 31, to describe either the underlying bases of the result reached or the result itself, though all expressly or impliedly indicated that the result was not compelled by the constitution. Commencing with Creager v. Superior Court, 126 Cal. App. 280, 14 P.2d 552 (1932), the process of recognition has been described as "establishment" of the foreign decree as a decree of the California court. See text *infra* at note 59 *et seq.*

The comity doctrine pronounced by the court was limited by "the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum,"[34] although it must clearly appear that "enforcement of the right obtained under the laws of another state would be prejudicial to recognized standards of morality and to the general interests of the citizens in the state of the forum."[35] The remarriage of the wife and the coming of age of the minor children did not automatically terminate the right to alimony under Missouri law, and even though "at variance" with California law, this was declared "not perforce inharmonious with local public policy."[36]

The cases and authorities relied upon for this formulation[37] concerned the problem of choice of law,[38] not recognition of judgments, so that it is

[34] Biewend v. Biewend, 17 Cal.2d 108, 113, 109 P.2d 701, 704 (1941).

[35] *Id.* at 113, 109 P.2d at 705.

[36] *Id.* at 114, 109 P.2d at 705. CAL. CIV. CODE § 139 has since 1933 provided that remarriage terminates the support obligation. The 1933 amendment is self-executing, so that no application need be made for termination. Stucker v. Katz, 92 Cal. App. 2d 843, 207 P.2d 879 (1949). As amended in 1951, § 139 now reads, in part, "Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party." Missouri followed what had been the rule in California prior to the 1933 amendment to § 139, that either party could apply for modification or cancellation, but that until modified, the duty to pay installments continued. MO. REV. STAT. § § 1519, 1525 (1939). Decisions of the Missouri courts clearly indicated that a termination would be decreed upon a showing of remarriage. Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); Niedt v. Niedt, 104 S.W.2d 692 (Mo. App. 1937).

[37] Dennick v. Central R. R., 103 U.S. 11 (1880) (wrongful death action based upon the statute of a sister state in which the death had occurred); Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1894) (testing validity of a disposition of personal property valid under the law of the domicile of the owner); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (wrongful death action based upon the statute of a sister state in which the death had occurred); International Harvester Co. v. McAdam, 142 Wis. 114, 124 N.W. 1042 (1910) (testing validity of married woman's contract valid where made); Powell v. Great Northern Ry., 102 Minn. 448, 113 N.W. 1017 (1907) (wrongful death action based upon the statute of a sister state in which the death had occurred); Herrick v. Minneapolis & St. Louis Ry., 31 Minn. 11, 16 N.W. 413 (1883) (personal injury action based upon statute of a sister state in which the injury had occurred); RESTATEMENT, CONFLICTS § 612 (1934); Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656 (1918) ("The term vested right is used throughout this paper in the limited sense of an existing cause of action for money damages, which would, if prosecuted in the jurisdiction where the cause of action arose, result in a judgment for the plaintiff"). The complete irrelevance of these cases and authorities to the problem presented in the *Biewend* case is made apparent by this last quotation, which is sufficiently descriptive of the causes of action involved in the preceding cases, for if the plaintiff in the *Biewend* case had brought her action in Missouri, she would not have received a judgment for the future installments. See note 36 *supra*.

[38] The rules of conflict of laws governing the choice between a rule of domestic law or a rule of foreign law in the decision of a particular case are based upon different policies and considerations than those developed to govern recognition of foreign judgments, absent of course the intervention of constitutional compulsion. A contract or tort action brought in the forum may have such significant contacts with a foreign state that it is necessary out of fairness to the parties to select from the law of that state a rule for decision which the parties impliedly or expressly intended to apply, or which was in force where the events giving rise to the action took place. The specific question in most of the cases relied upon in the *Biewend* decision, cited in note 37 *supra*, was whether a mere dissimilarity between the law of the forum and the law of the foreign state should suffice to deny access to the forum, not application of a particular foreign rule of law, but the underlying considerations are similar. See in general as to the policy determining choice of law, Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV.

not surprising that the court produced a comity doctrine which failed to give more substantial weight to local public policy,[39] which ignored the changed circumstances of the parties during the 20 year period prior to the action,[40] and which disregarded the fact that the parties were "citizens in the state of the forum."[41] Since the result was not required out of fairness to the parties and was not compelled by the full faith and credit clause, which is said to have replaced comity as the basis of recognition of sister state judgments,[42] the precise function of the *Biewend* comity doctrine is open to inquiry.

Comity was used by the court as descriptive of the result it reached, with no indication of the underlying policy motivation. The least ambiguous meaning of the term is courtesy between sovereigns, but it is unlikely that this would be an accurate description of the result. Nor may the result be described as promoting uniformity of decision, protecting the expectations of the parties, or as fostering reciprocal treatment of California decrees, since the Missouri authorities clearly showed that the decree would have been terminated there on application by a party.[43]

Indeed, the portion of the judgment requiring future payment was characterized by the dissent[44] as contrary to "good morals, social principles, natural justice, and fair play"[45] and "against the public policy of this state."[46] The result in the case may most likely be attributed, however, to a more "far-reaching" view of public policy tacitly assumed by

1072 (1953); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, 36 MINN. L. REV. 1 (1951); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TULANE L. REV. 4, 17–25 (1944).

[39] Since choice of law is basically predicated upon a policy of protecting justified expectations arising out of acts or occurrences which form the basis for the action, it is not illogical to refuse to allow a mere dissimilarity between the law of the two states to defeat those expectations. But where recognition of a judgment is concerned, the merits of the claim on which the judgment was based are not open to examination. The principles of relevance determining choice of law are thus largely inappropriate, and absent over-riding constitutional compulsion, the public policy of the state must to a great extent replace them.

[40] The rules governing choice of law have been developed largely in the ordinary contract and tort situation where the cause of action would be barred by the running of the statute of limitations in a relatively few years. See cases cited note 37 *supra*, relied upon in the *Biewend* case. The recognition of an alimony decree, on the other hand, may, as in the *Biewend* case, come about many years after entry of the original decree due to the continuing nature of the award.

[41] Since choice of law problems may readily arise in litigation between residents, as e.g., upon a contract made or to be performed elsewhere, there is no necessity for a distinction drawn upon that basis. But where non-constitutional recognition of judgments is involved, factors of convenience turning upon the residence of the parties may well be selected as determinative standards for application of the state doctrine.

[42] "The Full Faith and Credit Clause . . . substituted a command for the earlier principle of comity . . . " Estin v. Estin, 334 U.S. 541, 545 (1948) "[T]he Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity'." Williams v. North Carolina, 325 U.S. 226, 228 (1945).

[43] For the Missouri law in force at the time of the *Biewend* decision, see cases cited note 36 *supra*.

[44] Carter, J., dissenting in Biewend v. Biewend, 17 Cal.2d 108, 117, 109 P.2d 701, 706.

[45] *Id.* at 117, 109 P.2d at 707.

[46] *Ibid.*

the majority out of judicial concern over the growing problem of migration of those owing duties of support,[47] inducing the adoption of a blanket doctrine of recognition to be applied irrespective of circumstances.[48]

Uniform Reciprocal Enforcement of Support Law

Whatever may have been the desirability at the time of the *Biewend* decision of a sweeping judicial doctrine to forestall the possibility of this state becoming "a welcome oasis for the carefree fugitive from all family responsibilities,"[49] this broad policy has now been set by the legislature. The 1951 enactment of the Uniform Reciprocal Enforcement of Support Law,[50] coupled with its immediate widespread adoption in other states,[51] has eliminated need for a judicial doctrine addressed to over-all state policy.

But enactment of the Uniform Act has not eliminated the necessity for reliance upon the antecedent case law. Not only does the Act leave in force existing remedies,[52] but where the "duty of support"[53] stems from a prior decree rendered in another state, California courts, when California is the "responding state,"[54] will still be faced with the constitutional question of full faith and credit. And California courts must still determine the question of whether and to what extent refusal of enforcement may be made, whether modification of the decree is permissible, and if so, under what law—that of the state of rendition[55] or of California. These and other questions arising under the Act as it relates to proceedings based upon a duty of support which has been previously adjudicated in another state

[47] See Commissioners' prefatory note, *Uniform Reciprocal Enforcement of Support Law,* 9A U.L.A. 1952 Pocket Part; *Progress Report of the Senate Interim Judiciary Committee* [Calif.] 11 (1951).

[48] Since both the obligor and obligee had migrated in the *Biewend* case, it is an interesting speculation whether the then rife hostility toward depression emigrants was a factor in producing the result, as one more step in stemming the influx. See Note, *Depression Migrants and the States,* 53 HARV. L. REV. 1031 (1940).

[49] *Cf.* Dooling, J., dissenting in Dimon v. Dimon, 244 P.2d 972, 982, 983 (1952), *reversed,* .....Cal.2d....., 254 P.2d 528 (1953).

[50] Cal. Stats. 1951, c.694, contained in CAL. CODE CIV. PROC. §§ 1650–1681, *repealed* Stats. 1953, c.1290, and re-enacted with changes. Now comprises CAL. CODE CIV. PROC. § § 1650–1690. The amended act was likewise a product of the National Conference of Commissioners on Uniform State Laws. For text of both acts, see 9A U.L.A. 1952 Pocket Part. For a discussion of the amendments, see Report of the California Commission on Uniform State Laws 5 (1952).

[51] The Act was approved by the National Conference in 1950, and by the end of 1952 had been enacted in 31 states, including California. The amended Act was approved by the National Conference in 1952. 9A U.L.A. 1952 Pocket Part. See in general Comment, *The New Uniform Support of Dependents Act,* 45 ILL. L. REV. 252 (1950).

[52] CAL. CODE CIV. PROC. § 1654 states that "The remedies provided in this title are in addition to and not in substitution for any other remedies."

[53] CAL. CODE CIV. PROC. § 1653 (6) defines "duty of support" as including "any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise."

[54] CAL. CODE CIV. PROC. § 1653 (3) defines "responding state" as "any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced." The "initiating state" is defined in § 1653 (2) as "any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced."

[55] If the state of rendition is not also the initiating state, the choice of law problem may involve three states.

are not satisfactorily answered by a reading of the statute alone,[56] and must in part at least be determined by reference to pre-existing decisions.

The likelihood of widespread use of the Act should alone induce a re-examination by our highest court of the *Biewend* comity doctrine in relation to the Act, and a more precise formulation of the scope and effect of the recognition to be accorded nonfinal decrees. And since the Act is limited in its operation to situations in which one party is not within the state,[57] opportunity is further presented for distinct treatment of foreign decrees which fall within the Act, as to which a construction of the Act must govern results, and foreign decrees outside the Act, either because it has not been invoked[58] or because both parties reside in California, as was the situation in the *Biewend* case.

The first step in such a revaluing of the California doctrine is a determination of the specific effect which is deemed to follow from the recognition of foreign nonfinal alimony decrees. The effect of such recognition is unfortunately obscured because of the failure of the California courts to distinguish adequately between two fundamental issues: (1) whether recognition should be extended, and (2) the effect of such recognition, including the means of enforcement thereby made available. Confusion of these essentially diverse issues is due in part at least to indiscriminate reliance upon the term "establishment" to describe results reached under one or both separate issues.

Establishment as a California Decree

As a synonym for recognition, establishment of a foreign decree as a decree or judgment of the California court may mean no more than its reduction to a local judgment by an action brought for that purpose.[59] But the significant use of the term "establishment" in the California cases has centered on the means of enforcement. A *domestic* order for payment of alimony may be enforced by execution in the same manner as an ordinary

[56] The addition of CAL. CODE CIV. PROC. § 1689 in 1953 may have mooted the question of whether the foreign decree can be modified. That section provides that "Any order of support issued by a court of this State when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both."

[57] The mechanics of the Act contemplate a two-state procedure. But the simplified approach adopted in the Act does point the way toward eventual simplification of alimony and support proceedings conducted wholly within the state.

[58] If, as § 1689 *(supra* note 56) indicates, a foreign decree continues as a separate coexisting obligation, the plaintiff is afforded a remedy-shopping opportunity. By relying on the previously existing remedy of an action brought upon the foreign decree, if modification of the decree is not permitted in local courts, a greater recovery may often be accorded than would result from proceedings under the Act, since § 1689 seems to contemplate the possibility of a lesser recovery than is provided by the terms of the decree.

[59] See, *e.g.*, Cyr v. Cyr, 206 Cal. 8, 10, 272 Pac. 751, 752 (1928), an action upon a foreign decree for accrued installments of alimony which were not subject to retroactive modification in the state of rendition: . . . "[T]he amount payable . . . had become a finality long prior to the commencement of the present action in this state. It was therefore like any other money judgment enforceable in this state through an action for its establishment herein."

money judgment.[60] But additionally, a *domestic* alimony order may be enforced by equitable proceedings not available for enforcement of money judgments,[61] and of foremost importance, by means of the contempt process.

Since full faith and credit is only compelled as to installments for fixed and final sums,[62] which are readily reduced to local money judgments, execution provides a logical, if not necessarily an adequate means of enforcement.[63] It is not surprising, then, that the first cases extending recognition to nonfinal decrees were faced not only with the issue of whether recognition should be extended, but since they involved decrees for payment of future installments, were also faced with the issue of the means of enforcement to be afforded. For unlike enforcement of judgments whose recognition was compelled by the Constitution, execution was not the only or the logical means of enforcing judgments for future installments.[64]

The first two California cases were *Cummings v. Cummings*[65] and *Creager v. Superior Court*.[66] Both relied upon the Mississippi case of *Fanchier v. Gammill*[67] for the proposition that a foreign decree for future installments of alimony could be enforced in the same manner as a domestic decree, although only the *Creager* case adopted the "establishment" terminology employed in *Fanchier v. Gammill*.[68] The *Creager* opinion noted, however, that the foreign decree was only established as a California decree *for purposes of enforcement*.[69]

---

60 CAL. CODE CIV. PROC. § 1007 provides that "Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment." Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954 (1889) held this provision applicable to alimony orders issued under CAL. CIV. CODE § 139. The 1951 recasting of § 139 expressly included execution as a method of enforcement.

61 CAL. CIV. CODE § 139 provides, in addition to execution, for enforcement by "such order or orders as in its discretion [the court] may from time to time deem necessary." CAL. CIV. CODE § 140 authorizes the requiring of security and the appointment of a receiver or "any other remedy applicable to the case."

62 See text at note 10 *supra*.

63 For availability in California of proceedings supplemental to execution in enforcement of a judgment initially originating as an alimony award, see Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953 (1936).

64 See notes 60 and 61 *supra*.

65 97 Cal. App. 144, 275 Pac. 245 (1929).

66 126 Cal. App. 280, 14 P.2d 552 (1932).

67 148 Miss. 723, 114 So. 813 (1927). This case held that the full faith and credit clause compelled recognition of the foreign decree, so that only the issue of the means of enforcement had significance. The decree involved was not subject to prospective modification by the rendering court, but by its terms was to terminate upon remarriage. The United States Supreme Court has not passed upon the question of full faith and credit to future installments of alimony not subject to modification, but under the "vested right" to the installments language of *Sistare v. Sistare*, 218 U.S. 1 (1910), it is improbable that full faith and credit would be required since nothing is yet due in any sense. As present practice seems generally to retain a power to modify decrees as to future installments, the problem is not likely to be pressing. See 2 VERNIER, AMERICAN FAMILY LAWS § 106 (1932).

68 148 Miss. 723, 737, 114 So. 813, 814 (1927): the foreign decree "should be established and enforced . . . in the same manner, and to the same extent, as it could have been enforced by our court if originally obtained in our state."

69 126 Cal. App. 280, 283, 14 P.2d 552, 553 (1932).

The *Creager* case also indicated that equitable sanctions might not be available for accrued installments reduced to a money judgment, as contrasted with a decree for future installments that had been established as a California decree.[70] The California Supreme Court in *Bruton v. Tearle*[71] expressly disapproved this suggestion, stating that equitable sanctions were available for enforcement of a money judgment based upon accrued installments of alimony, regardless of whether or not the action was technically one to establish the judgment as a California judgment.[72] Despite this express disavowal, a California district court of appeal[73] has subsequently relied upon the *Creager* case for the proposition that equitable sanctions were only available for enforcement of a foreign alimony decree where it was established as a decree of the California court for continuing payments.[74]

The last terminological element in establishment of a foreign decree as the decree of the California court was added by *Palen v. Palen*[75] in 1936. In upholding recognition of a nonfinal foreign decree, the court stated that it was established as the decree of the California court with the *same force and effect* as if it had been rendered in California.[76]

The California Supreme Court in the *Biewend* case made no effort to unravel the lower court decisions involving establishment of foreign decrees as California decrees, but simply restated their results with seeming approval: " . . . the California courts have in numerous cases ordered that a foreign decree for future payments of alimony be established as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply."[77] Thus the supreme court in terms appeared to have discarded the establishment-for-purposes-of-enforcement approach, and viewed establishment as a process of recognition which in effect converted the foreign decree into a domestic decree.

Keeping in mind this general background of the California doctrine, which in terms purports to equate foreign and domestic decrees, an inquiry is next in order into the limitations upon the exercise of such an independent state doctrine of recognition.

---

[70] "Petitioner's contention [that the decree cannot be enforced by contempt] would have some force if the plaintiff had merely used the Nevada decree as the basis for obtaining an ordinary money judgment for accrued installments of alimony in an action at law against petitioner." Creager v. Superior Court, 126 Cal. App. 280, 283, 14 P.2d 552, 553 (1932).

[71] 7 Cal.2d 48, 59 P.2d 953 (1936).

[72] *Id.* at 55, 59 P.2d at 956.

[73] Handschy v. Handschy, 32 Cal. App. 2d 504, 90 P.2d 123 (1939).

[74] "Plaintiff herein merely uses the Illinois decree as the basis for obtaining an ordinary judgment for accrued installments of alimony in an action at law . . . The judgment . . . is a mere money judgment, and enforceable not as a judgment in alimony as the original judgment in Illinois could be enforced, but simply as a money judgment, similar to a judgment *ex contractu*." *Id.* at 510, 90 P.2d at 126.

[75] 12 Cal. App. 2d 357, 55 P.2d 228 (1936).

[76] *Id.* at 358, 55 P.2d at 229.

[77] Biewend v. Biewend, 17 Cal.2d 108, 113, 109 P.2d 701, 704 (1941).

LIMITATIONS UPON NON-CONSTITUTIONAL RECOGNITION

While the *Biewend* case asserted only the limitations imposed by state policy,[78] it is at least not a self-evident proposition that the due process clause of the Constitution permits unqualified recognition of a nonfinal judgment at the expense of the defendant.[79] Paraphrasing the language of Chief Justice Stone in a different context,[80] "no constitutional question would be presented if [California] chose to be generous to the [plaintiff] out of the general funds in its Treasury. But here it is [the defendant] who is required to provide further payments . . ."[81]

As a starting point it may be assumed that as to some foreign judgments a state may accord greater effect than it is compelled to do by the Constitution. While never squarely passed upon, the Supreme Court has said that "a state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel."[82] This conclusion has been reiterated by individual justices,[83] and seems never to have been controverted.

General Due Process Limits

One limitation on the power of the states is certain, however. The due process clause forbids recognition of a judgment rendered in violation of procedural due process.[84] This restriction is based upon the invalidity of the judgment in the rendering state,[85] and suggests that a general due

[78] See text at notes 34–36 *supra.*

[79] But see Cummings v. Cummings, 97 Cal. App. 144, 152, 275 Pac. 245, 248 (1929), *hearing denied,* where the court noted that "appellant's complaint is not of the failure of our courts to recognize a judgment of a sister state as required by the full faith and credit clause . . . His contention is that the trial court gave too much faith and credit . . . Hence there is no federal question involved." Increased federal control over state conflict of law rules may be foreshadowed in the recent publication of CROSSKEY, *op. cit. supra* note 2. For prediction of future impact of this work, see Durham, *Crosskey on the Constitution: An Essay-Review,* 41 CALIF. L. REV. 209 (1953).

[80] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (involving full faith and credit to an award of workmen's compensation under the law of one state as a bar to an additional recovery under the law of another state).

[81] *Id.* at 442.

[82] Milwaukee County v. M. E. White Co., 296 U.S. 268, 272 (1935) (state court judgment for taxes sued upon in another state).

[83] Rutledge and Black, JJ, dissenting in part on another question in Griffin v. Griffin, 327 U.S. 220, 236, 247 (1946): "The full faith and credit clause commands states in certain instances to recognize the judgments of sister states; it does not prohibit them from doing so in other instances."; Frankfurter, J., dissenting in the same case on another question, *id* at 250: " . . . a State . . . may as a matter of conflict of laws go beyond what is required by the Full Faith and Credit Clause."

[84] Griffin v. Griffin, 327 U.S. 220, 229 (1946): " . . . due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process." The dissenting opinions *(supra* note 83) disagreed with the majority on whether there was in fact a violation of procedural due process in the rendering state, not on the question of whether recognition could be extended despite such a defect. The opinion does not indicate whether recognition of such a judgment would be a violation of procedural or substantive due process. While the distinction is an artificial one, it would appear to be a procedural due process violation in the state of recognition. For a statement and application of the same rule in a case involving a judgment of a foreign country see Boivin v. Talcott, 102 F. Supp. 979 (N.D. Ohio 1951).

[85] Griffin v. Griffin, 327 U.S. 220, 232 (1946), "Since by virtue of the due process clause the

process limitation might be formulated in terms of forbidding the giving of greater effect to the judgment in the state of recognition than it would be entitled to in the original judgment state.

Most state courts which recognize nonfinal alimony decrees have drawn the line between decrees for accrued installments and for future installments, extending recognition only to the latter.[86] Since a presently enforceable judgment based upon accrued installments would foreclose resort to the rendering state for modification of those amounts, it might be considered that the recognizing state would be granting absolutely what the rendering court gave conditionally, thus according greater effect than would be accorded in the state of rendition. Recognition of a decree for future installments, on the other hand, does not foreclose resort to the state of rendition for prospective modification. The California cases extending recognition to nonfinal decrees have all involved future payments,[87] but a district court of appeal in *Gough v. Gough*,[88] in a dictum, asserted the applicability of the *Biewend* doctrine to a decree for accrued installments subject to retroactive modification. As the court in the *Gough* case found no showing of sufficient ground for modification under the law of the rendering state, it may perhaps be explained on the ground that no greater effect would have been given the decree, practically, than it would have had in the rendering state.[89]

At least one state court[90] has held, as to accrued installments, that so long as the installments had not been modified and no application to modify had been made, the foreign decree was entitled to full faith and credit.[91] While the full faith and credit holding was incorrect in view of the "vested right" language of the *Sistare* case,[92] it was given impetus by the Supreme Court in *Barber v. Barber*,[93] in 1944, where the question was expressly left open. The majority found it "unnecessary to consider whether a decree or judgment for alimony already accrued, which is subject to

judgment is ineffective in [the state of rendition] . . . it cannot be made the instrument for enforcing elsewhere the obligation purportedly adjudicated by it."

[86] See note 25 *supra*. The leading case regarding decrees for accrued installments subject to modification is Holton v. Holton, 153 Minn. 346, 190 N.W. 542 (1922).

[87] Cases prior to the *Biewend* decision are collected note 31 *supra*. Subsequent cases include Young v. Young, 100 Cal. App. 2d 85, 223 P.2d 25 (1950) (refusal of recognition based on pleading defect); Toohey v. Toohey, 97 Cal. App. 2d 84, 217 P.2d 108 (1950) (allowing *nunc pro tunc* correction of foreign decree established in California to show future installments included); Tomkins v. Tomkins, 89 Cal. App. 2d 243, 200 P.2d 821 (1948) (refusal of recognition based on pleading defect); McDonald v. Butler, 68 Cal. App. 2d 120, 156 P.2d 273 (1945) (recognition under full faith and credit refused as to both accrued and future installments subject to modification, with no indication whether relief might have been available upon the basis of comity.) For a decision allowing establishment of a foreign property settlement agreement in California, see Smith v. Smith, 115 Cal. App. 2d 92, 251 P.2d 720 (1952), *hearing denied*.

[88] 101 Cal. App. 2d 262, 225 P.2d 668 (1950), *hearing denied*.

[89] *But cf.* Ehrenzweig, *Comment on Gough v. Gough*, 3 SURVEY OF CAL. LAW 143 (1951).

[90] Holton v. Holton, 153 Miss. 346, 190 N.W. 542 (1922).

[91] See text at notes 6–10 *supra* for the scope of full faith and credit.

[92] Sistare v. Sistare, 218 U.S. 1 (1910), discussed *supra* at note 10.

[93] 323 U.S. 77 (1944).

modification or recall in the forum which granted it, but is not yet so modified, is entitled to full faith and credit until such time as it is modified."[94] Justice Jackson concurred in a separate opinion,[95] urging extension of full faith and credit "without limitation as to finality."[96]

A further weakening of the rigid finality concept as a bar to full faith and credit appeared in *Griffin v. Griffin*[97] in 1946, where the Court again left open the question of extending full faith and credit to accrued installments subject to modification.[98] But the Court did retreat from the suggestion in the *Barber* case that recognition might be compelled unless and until modification had been sought in the original judgment state.

In the part here material, the *Griffin* case involved an action in the District of Columbia upon a New York judgment for arrears of alimony. Pursuant to New York law at that time,[99] the judgment had been docketed in an *ex parte* proceeding on motion of the wife for the full amount of accrued installments. No notice or opportunity to appear had been afforded the husband. The Court construed New York law as authorizing retroactive modification of accrued but unpaid installments,[100] but with formal entry of the *ex parte* judgment for arrearages terminating the right to apply for such relief.

Right to Present Mitigating Defenses

The majority[101] held that because of the lack of notice and opportunity to appear "and to the extent that petitioner [husband] was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of a judgment for accrued alimony, there was a want of judicial due process . . . "[102] The defenses which the Court held could not be cut off included defenses going to discharge of the obligation, such as payment, but more significant for present purposes, included defenses of changed circumstances which would have been available under New York law for modification or cancellation of the accrued installments.

On remanding the case to the lower court, the majority reserved the question whether, upon further proceedings there, the wife could reframe

---

94 *Id.* at 81.

95 *Id.* at 86.

96 "Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceedings' without limitation as to finality." *Id.* at 87.

97 327 U.S. 220 (1946), noted in 34 CALIF. L. REV. 760 (1946).

98 327 U.S. 220, 234 (1946).

99 Since the judgment involved in the *Griffin* case, N.Y. CIV. PRAC. ACT § 1171-b has been added by Laws, 1939, c.431, amended, Laws, 1940, c.226, to provide for "such notice to the husband as the court may direct."

100 For a contrary coustruction of the New York law, see Gough v. Gough, 101 Cal. App. 2d 262, 225 P.2d 668 (1950), *hearing denied.*

101 The dissenting opinions, discussed in notes 83 and 84 *supra,* disagreed with the majority on this procedural due process issue.

102 Griffin v. Griffin, 327 U.S. 220, 228 (1946).

her pleadings so as to base her claim upon the original alimony decree instead of the subsequent invalid *ex parte* judgment, allowing the husband to present the defenses available to him under New York law at that time.[103] The Court thus impliedly held that due process does not forbid suit on a foreign alimony decree which is nonfinal by reason of a retention in the original judgment court of the power to modify retroactively accrued installments.

The further implication in holding that the right to modification cannot be cut off without notice and an opportunity to appear is that a state in which recognition of a nonfinal decree is sought must either allow the defendant to raise defenses of changed circumstances before execution can issue or in proceedings to recall execution, or permit the defendant to seek modification in the original judgment court.

Thus, based upon the result in the *Griffin* case, the due process limitations upon the exercise of non-constitutional recognition may be generalized as gnaranteeing a defendant the right to present mitigating circumstances which would be a defense under the law of the state of rendition. Since such a defense would operate to modify or cancel either accrued or future installments, as the case might be, the crucial questions which remain involve modification. In which state may or must the defendant present his defense of changed circumstances in order to secure modification, and what law determines the extent of the relief which can be accorded him?

MODIFICATION

Read literally, the statement in the *Biewend* case that a foreign alimony decree is "established as the decree of the California court with the same force and effect as if it had been entered in this state"[104] indicates that modification would only be permitted in California courts, and that it must be based upon California law instead of the applicable law of the state of rendition. But the result reached in the *Biewend* case belies any such conclusion of substantial equivalence between foreign and domestic decrees in respect to modification.

Modification in Local Courts

Indeed, the district court of appeal[105] in the *Biewend* case determined that there was no power in California courts to modify foreign decrees,[106] but the supreme court failed to pass upon this lower court determination. After discussing the changed circumstances of the parties, which concededly offered grounds for modification under the law of either California[107] or Missouri,[108] the court said that the "remarriage and the coming of age

[103] Griffin v. Griffin, 327 U.S. 220, 235 (1946).
[104] 17 Cal. 2d 108 at 113, 109 P.2d 701 at 704 (1941).
[105] Biewend v. Biewend, 101 P.2d 86 (Cal. App 1940).
[106] *Id.* at 88.
[107] See note 36 *supra.*
[108] *Ibid.*

of the minor children offer grounds for modification of the original decree for which the defendant can make application in the court of original jurisdiction in Missouri. . . . Therefore, the judgment of the [California] trial court ordering the defendant to pay . . . $25 per week in the future . . . is valid and enforceable until such time as the Missouri court modifies its decree."[109] The opinion thus adopted a concept of continuing jurisdiction in the original judgment state, but did not expressly negative the existence of concurrent jurisdiction in California courts. Nor do prior decisions give an unqualified answer to this question of local power to modify foreign decrees.

The first California case[110] extending recognition to a nonfinal decree was not faced with a change in circumstances, but the trial court expressly granted permission to apply for a modification of the California judgment if the original judgment court subsequently modified its decree.[111] The language of the appellate court clearly suggested that modification could have been granted in the trial court, however, at least if the jurisdictional prerequisites existed for an original support action in California.[112]

The problem of local modification was first squarely presented in *Barns v. Barns*.[113] The district court of appeal there held it error to annul the foreign decree as to future installments, even though they were subject to cancellation by the original judgment court. The decree must be "treated as final by the courts of other states until modified in the state of its origin."[114] The reason given was not lack of power, but a doctrine of convenience to prevent conflicting results in different states in which it might be necessary for the plaintiff to bring an action upon the original decree.[115]

Thomas v. Thomas,[116] a California Supreme Court decision, held that a *domestic* decree entered in one county of the state could be established in another county of the state for purposes of enforcement, but could only be modified in the original court. The decision is clearly distinguishable on its facts from those involving foreign decrees, but it is perhaps significant that the holding was based upon analogy to the treatment accorded foreign decrees.

In referring the defendant to a Missouri forum[117] in the *Biewend* case,

---

109 17 Cal. 2d 108 at 114, 109 P.2d 701 at 705 (1941).

110 Cummings v. Cummings, 97 Cal. App. 144, 275 Pac. 245 (1929), *hearing denied*.

111 *Id.* at 144, 151, 275 Pac. 245 at 247.

112 "The [count based upon the future installments] seems to state a cause of action for separate maintenance under our California laws regardless of the New York judgment. That judgment is evidentiary and incidental merely, and unnecessary even, to the . . . cause of action." *Id.* at 144, 152, 275 P. 245 at 248. The implications of this statement seem to have been carried out in a recent Florida case in which it was held that the Florida court could enter a decree, not by way of modification of the nonfinal sister state decree, but by way of "supersession" of its terms. Lopez v. Avery, 66 So.2d 689 (Fla. 1953). If any substantial difference exists between modification of a foreign decree and supersession of its terms, it might prove decisive in a construction of the newly added CAL. CODE CIV. PROC. § 1689, which contains the term "supersede."

113 9 Cal. App. 2d 427, 50 P.2d 463 (1935).

114 *Id.* 427 at 430, 50 P.2d 463 at 465.

115 *Id.* 427 at 431, 50 P.2d 463 at 465.

116 14 Cal. 2d 355, 94 P.2d 810 (1939).

117 See text at note 109 *supra*.

the court did not discuss these prior decisions, but relied upon *Handschy v. Handschy*.[118] But the *Handschy* case involved accrued installments which the court found were not subject to retroactive modification in the original judgment state, so that full faith and credit was mandatory. It is thus not surprising that the court found it had no power to modify them. The court did indicate, however, that modification of future installments might be permissible in California proceedings.[119]

Thus despite the action of the court in the *Biewend* case in expressly referring the defendant to the original forum for modification, the question of whether California courts might, in appropriate cases, permit modification would seem to be an open one. While there is no express statutory provision authorizing modification of foreign decrees, as in some states,[120] such power would seem implicit in the general provisions of Section 1913 of the Code of Civil Procedure.[121]

The constitutional propriety of such action also seems assured. The majority of the Supreme Court in the *Griffin* case impliedly held to this effect in their remand of the case to the district court,[122] while both dissenting opinions stated such a result was proper. Justices Rutledge and Black, dissenting in part, stated that the foreign judgment should be enforced unless "the defendant could show . . . a change in circumstances or other defense sufficient under New York law to require modification or setting aside of the award."[123] Justice Frankfurter flatly said that "mitigating defenses may be set up when the decree for alimony is sued on in a sister State as well as when enforced in the rendering State."[124]

In the subsequent Supreme Court decision of *New York ex rel. Halvey v. Halvey*,[125] dealing with modification of a custody decree, the rule was restated in general terms which purported to cover all sister state judgments:

> So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do . . . . It is clear that the state of the forum has at least as much leeway to disregard the judgment,

---

[118] 32 Cal. App. 2d 504, 90 P.2d 123 (1939).

[119] After setting forth the defendant's contention that modification of the accrued installments should be permitted, the court said, "This cannot be done. This action is not one to establish a foreign judgment in this state for the purpose of enforcing it as a continuing judgment in this jurisdiction . . . ." *Id.* at 509, 90 P.2d 123 at 126.

[120] See, e.g., Fla. Stats. § 65.15 (1941), discussed in Sackler v. Sackler, 47 So.2d 292 (Fla. Sup. Ct. 1950); N.J. Pub. Laws. p. 538 (1938), discussed in Levy v. Levy, 17 N.J. Misc. 324, 9 A.2d 779 (Ch. 1939).

[121] Since § 1913 has been relied upon to permit establishment of non-final foreign decrees as the decrees of California courts (see *infra* note 129), it should permit establishment on such conditions as the court finds necessary to impose. It could be maintained that establishment of the foreign decree converts it into a domestic decree, so that it could be modified under the provisions of CAL. CIV. CODE § 139. *But cf.* Thomas v. Thomas, 14 Cal. 2d 355, 94 P.2d 810 (1939).

[122] Griffin v. Griffin, 327 U.S. 220, 235 (1946).

[123] *Id.* at 247.

[124] *Id.* at 249.

[125] 330 U.S. 610 (1947).

to qualify it, or to depart from it as does the state in which it was rendered.[126]

Proceedings in Which Local Modification Is Available

Since the court in the *Biewend* case did not reach the question of permitting modification of the foreign decree in California courts, the appropriate proceedings in which to seek such relief is likewise an open question. But if modification is permissible in California courts, the *Biewend* decision might be construed only as holding that the trial court need not permit modification in the action brought upon the decree, leaving the defendant free to seek modification in California courts subsequent to formal entry of the judgment, either prior to execution or in proceedings to recall execution.[127]

The only decision casting light on whether the defendant could later present the identical objections which he raised or might have raised before entry of the judgment is the *Creager* case,[128] involving a foreign decree for future installments subject to modification. The defendant sought a writ of prohibition to restrain the lower court from enforcing the order for payment by contempt. The writ was denied, but the opinion does not indicate whether the petitioner had attempted to present mitigating defenses bearing on modification in the contempt proceedings.[129]

Thus while the question of whether modification might be permitted in California courts either prior or subsequent to formal entry of the judgment is apparently open, the *Biewend* case made clear that modification need not be permitted in the action brought upon the decree, at least where the defendant might avail himself of his mitigating defenses by resort to the state of rendition. But even though the defense of changed circumstances would be available in that forum, the *Griffin* decision would seem to require that execution on the California judgment be delayed until a modification proceeding had been prosecuted to finality in Missouri or until a reasonable

---

[126] *Id.* at 614–615. More "leeway to disregard the judgment" where both parties have become domiciled in the state of recognition is suggested by express reservation of the question in Yarborough v. Yarborough, 290 U.S. 202, 213 (1933) "whether South Carolina would have power to require the father, if he were domiciled there, to make further provision for the support ... of his daughter" who had become domiciled there, despite a "final" decree of lump sum payment for her support rendered in another state. Recent state court decisions involving local modification of foreign support orders include Lopez v. Avery, 66 So. 2d 689 (Fla. 1953); Barclay v. Marston, 123 N.Y.S. 2d 196 (N.Y. Dom. Rel. Ct. 1953).

[127] Such relief might conceivably be allowed in proceedings to recall the writ, gain a stay of execution, enjoin prosecution of the writ, or set the execution sale aside. As to recall of the writ issued in proceedings for accrued installments of alimony under CAL. CODE CIV. PROC. § 685, see Parker v. Parker, 203 Cal. 787, 266 Pac. 283 (1928); Hale v. Hale, 6 Cal. App. 2d 661, 45 P.2d 246 (1935).

[128] Creager v. Superior Court, 126 Cal. App. 280, 14 P.2d 552 (1932).

[129] The basis of the prohibition proceeding was an asserted lack of jurisdiction to exceed the requirements of the full faith and credit clause. The court said, "If such recognition exceeds the requirements of the federal Constitution, but is authorized by the laws of this state, petitioner may not complain. Section 1913 of the Code of Civil Procedure ... clearly implies that an action may be maintained in this state to enforce a foreign judgment ..." *Id.* at 283, 14 P.2d at 552, 553. For the similar contention presented in Cummings v. Cummings, see *supra* note 79.

time had elapsed without such proceedings being instituted. This factor added by the *Griffin* case suggests that the question of whether California courts may modify the foreign decree can no longer be evaded by summarily referring the defendant to the state of rendition to secure modification, since that procedure might now entail more difficult problems[130] than allowing modification in California courts.

Continuing Jurisdiction

The tacit assumption in the *Biewend* case of a doctrine of continuing jurisdiction in the Missouri court as giving that court either exclusive or concurrent jurisdiction to modify the decree[131] also requires re-examination in view of the *Griffin* case. The concept of continuing jurisdiction serves a precise function in *domestic* law governing the award and enforcement of alimony. Since the payments required are continuing ones, provision has almost universally been made to reflect changes in circumstances occurring subsequent to entry of the original decree by attributing to the court of original jurisdiction authority to modify its decree, at least prospectively.[132] That a concept of domestic law evolved to reflect changed circumstances could be relied upon in a conflict of laws setting to foreclose resort to local courts for relief *despite* changed circumstances presents a startling anomaly.

An analysis of cases in California[133] and elsewhere[134] which are sup-

130 At least as to future installments, a defendant might well assert the defenses available to him for modification each time legal sanctions to enforce payment were employed, thus compelling repeated determinations of whether a sufficient change in circumstances had come about to require a delay in enforcement for a reasonable period in which the defendant could resort to the state of rendition for modification.

131 See text *supra* at note 109.

132 2 VERNIER, AMERICAN FAMILY LAWS § 106 (1932).

133 The California cases are collected in RESTATEMENT, CONFLICT OF LAWS, CAL. ANNOT. § 76 (1939). Of the 13 cases discussed there, all can be explained as a relaxation of the personal service requirement, either directly or through extension of the concept of quasi in rem jurisdiction.

134 The leading case is Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913), which sustained jurisdiction of a probate court over an absent executor in a supplemental proceeding to establish his personal liability, even though service in the later action was by publication and personal service outside the state. The opinion, by Holmes, J., unfortunately cast the result in terms of continuing jurisdiction, thus tending to obscure the origin and function of the concept in a conflict of laws setting, as distinct from the domestic law concept of continuing jurisdiction. The *Ferry* case was subsequently limited more nearly to its facts of a single estate administration in N.Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518, 522 (1916). The essential nature of the concept in the conflict of laws unintentionally appears in Commonwealth ex rel. Milne v. Milne, 149 Pa. Super. 100, 26 A.2d 207 (1942), where the court relied upon the Ferry case and § 76 of the Restatement (*infra* note 135) for the proposition that "once the jurisdiction of a court attaches, it exists for all times until the cause is fully and completely determined." 26 A.2d at 209. The court then said that "There being jurisdiction it was not necessary to bring the defendant in on supplementary proceedings. All that is required is reasonable notice of the proceedings to give an opportunity to be present and to be heard." 26 A.2d at 210. See, too, Boone v. Wachovia Bank & Trust Co., 82 U.S. App. D.C. 317, 163 F.2d 809 (1947), where the court upheld constructive service on a non-resident trustee on the theory that the action was quasi in rem; Ohlquist v. Nordstrom, 143 Misc. 502, 257 N.Y.S. 711 (1932), *aff'd. without opinion*, 262 N.Y. 696, 188 N.E. 125 (1933), where notice was served on a non-resident defendant outside the state and also upon his resident attorneys in a proceeding to compel contribution from the defendant as a joint tortfeasor. The court didn't discuss the out-of-state notice, but upheld the judgment in the contribution proceeding upon the basis of "continning" authority of the attorneys to receive notice after entry of the judgment in the original tort action.

posed to support a concept of continuing jurisdiction in a conflict of laws setting[135] indicates that it has almost invariably been relied upon to describe the result in certain actions of sustaining personal jurisdiction in subsequent related proceedings over departed defendants upon whom normal service of process could not be made. The result might thus have been more accurately described in terms of an exception to archaic rules of personal jurisdiction,[136] permitting adjudication of personal liability based upon mere notice in the actions affected.

The *Griffin* decision sustains this analysis, and substantially qualifies any concept of continuing jurisdiction in the original judgment court by requiring that the defendant be given notice and an opportunity to be heard whenever new issues arising subsequent to the original proceedings are to be adjudicated, even though they have grown out of the original action. There is thus little reason today to view the power of modification retained by the original judgment court as a factor of decisive import in determining whether modification of the foreign decree should be permitted in local courts.

Law Governing Local Modification

If modification is permitted in California courts, must the local court "apply" the law of the state of rendition, or may it rely upon its own law? The nature of the problem as one involving choice of law might suggest great freedom in this respect, stemming from the failure of the Supreme Court to develop a rigid constitutional doctrine of choice of law.[137] It is submitted that this is illusory,[138] however, since the Supreme Court decisions relating solely to choice of law[139] have generally arisen in a context of full faith and credit to statutes, under the "public acts" language in the

---

135 "If a court obtains jurisdiction over a party to an action, that jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action." RESTATEMENT, CONFLICT OF LAWS, § 76 (1934). While it is perhaps sufficient objection to this Section that the cases do not support such a broad statement (note 134 *supra*), it is particularly objectionable in the context of Section 76 because of the confusion which the Restatement has fostered in our law of jurisdiction by reliance upon one all-embracing concept to encompass the essentially diverse aspects of the local or direct jurisdiction needed to sustain a judgment against due process attack and the indirect jurisdiction (i.e., jurisdiction of the rendering court as redetermined in another state) which is a prerequisite for extending recognition under the full faith and credit clause. See Section 42 of the Restatement for the basic definition of jurisdiction. Extensive general criticism of this definition is made by COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 81 (1942) ("somewhat remarkable provisions") and the basic fallacy of the single concept is ably illustrated by Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COL. L. REV. 221 (1941).

136 For recent developments in the California law of personal jurisdiction see Ehrenzweig and Mills, *Personal Service Outside the State: Pennoyer v. Neff in California*, 41 CALIF. L. REV. 383 (1953); Note, *Suing Foreign Corporations in California*, 5 STAN. L. REV. 503 (1953).

137 See in general Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945).

138 But see Scoles, *Enforcement of Foreign Non-Final Alimony and Support Orders*, 53 COL. L. REV. 817 (1953).

139 The decisions are cited and discussed in detail in the dissenting opinion written by Frankfurter, J., in Hughes v. Fetter, 341 U.S. 609, 614 (1951).

Clause,[140] now incorporated in the implementing statute.[141] As to modification of a foreign alimony decree, the choice of law problem is complicated by the requirement of full faith and credit to judicial proceedings, an area in which substantially different results have been developed.[142]

Both the *Halvey*[143] and the *Griffin*[144] cases indicate that the law applied in modifying a foreign decree must be that of the state of rendition. After holding that the full faith and credit clause did not preclude modification of a nonfinal decree, the Court in the *Halvey* case went on: "It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."[145] Thus the limits of modification would be prescribed by the foreign law, whether or not the state of recognition technically applied its own law or that of the foreign state.[146]

While the position of the Court in the *Halvey* case might seem inconsistent in first holding that full faith and credit did not preclude modification of a nonfinal decree, but that it did set limits on the extent of the modification, it can be explained as another step in the abandonment by the Court of the rigid finality concept, and development of a more relative approach to problems of full faith and credit.

No serious policy problems would ordinarily be posed in permitting modification in California courts of foreign decrees for future installments of alimony, since generally a substantial change in circumstances would warrant modification under the law of either state,[147] thus presenting a similar situation to that respecting modification of foreign custody awards.[148]

---

140 U.S. CONST. Art IV, § 1.

141 28 U.S.C. 1738, approved June 25, 1948. Prior to this revision, the implementing statute made no reference to "acts." The effect of this revision is conjectural. See Hughes v. Fetter, 341 U.S. 609, 613 (1951).

142 "The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another." Stone, C.J., in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 437 (1943). The history of the divergent judicial treatment accorded judgments and statutes is traced in detail in 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 547 (1953).

143 New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947).

144 Griffin v. Griffin, 327 U.S. 220 (1946), discussed at notes 97–103 *supra*. While the Court was concerned with denial of the opportunity to present defenses available for modification under the law of the state of rendition in a subsequent proceeding in the same state, the implication of holding it a violation of procedural due process to cut off that opportunity is that the law of the state of rendition would be similarly determinative even though the subsequent proceeding was an action brought upon the original decree in a sister state.

145 *Supra* note 143 at 615.

146 Whether or not a court in the state of rendition would in fact exercise its discretion to modify a decree in a particular case has been held unmaterial in determining whether modification should be permitted in the state of recognition. Barclay v. Marston, 123 N.Y.S.2d 196 (N.Y. Dom. Rel. Ct. 1953).

147 CAL. CIV. CODE § 139 furnishes the statutory authorization for modification of domestic decrees. See 2 VERNIER, AMERICAN FAMILY LAWS § 106 (1932).

148 See in general, Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 AM. JOUR. COMP. LAW 167 (1953).

A different situation exists in regard to modification in California courts of nonfinal decrees for accrued installments, since California law does not permit domestic alimony decrees to be modified retroactively.[149] Whether this should be taken as an expression of public policy which would forbid modification of foreign decrees for accrued installments is debatable. The problem would be most crucial in a situation where both parties had become California residents or domiciliaries, since permitting modification would distinguish between residents on the accidental basis of the state in which the original decree had been obtained.

In situations involving accrued installments arising under a foreign decree within the Uniform Reciprocal Enforcement of Support Law, a construction of the statute will in large part determine the answer, if in fact the Act permits any modification of the foreign decree.[150] As the obligee in cases arising under the Act would not be a resident of California, there would be less objection to application of the foreign law in any event.

CONCLUSION

The decision of the U. S. Supreme Court in *Griffin v. Griffin* and the recept adoption in California of the Uniform Reciprocal Enforcement of Support Law suggest the need for a re-examination of the policy underlying the result in the *Biewend* case, and a more precise formulation of the rules governing recognition of nonfinal alimony decrees.

The reliance by California courts upon an independent conflict of laws rule which extends recognition even though it is not compelled by the full faith and credit clause seems clearly constitutional, and finds ready support in the fact that full faith and credit has so largely proved inadequate with respect to foreign alimony decrees. It is submitted, however, that employment of the term "comity" as descriptive of an independent state doctrine of recognition should be discarded. Comity not only furnishes no standard of relevancy to determine when recognition should be granted, but, as in the *Biewend* case, tends to obscure the fact that private rights of litigants are involved, not the relationship between states. The term is thus a hindrance in shaping the law in an area in which the law is rapidly growing.[151] While there is perhaps no single term which describes the result accurately, and none is necessary, any terminology employed need stress only the distinction between such recognition and that compelled by the constitution.

Recognition of nonfinal alimony decrees has been qualified by the *Griffin* holding that an opportunity must be presented the defendant to submit mitigating defenses available to secure modification under the law of the ren-

---

149 CAL. CIV. CODE § 139. See also *supra* note 29.

150 See notes 56 and 58 *supra*.

151 For a review of this growth, see in general, Goodrich, *Yielding Place to New; Rest Versus Motion in the Conflict of Laws*, 50 COL. L. REV. 881 (1950). As to developments in California law, see the series of valuable discussions in Annual Survey of California Law under topic Conflict of Laws.

dering state. It is submitted that in appropriate cases, modification of the foreign decree should be permitted in California courts, preferably in the action in which recognition is sought. The due process restriction of the *Griffin* case is thus inapplicable, and the litigation is conducted in the simplest and least time-consuming manner.

While it might prove desirable to retain the actual result of the *Biewend* case, safegnarded by provisions for suspension of enforcement for a reasonable period in which the defendant could apply for modification in the original judgment court, the determination should be based upon considerations of convenience. Where both parties are present in the California court, and there are sufficient substantial contacts with California, recognition should be conditioned upon a full consideration of changed circumstances. If both the law of California and the law of the state of rendition would permit modification under the circumstances presented, modification should be allowed in the California court. If it was deemed contrary to California policy to permit modification of accrued installments, since such treatment is not available as to domestic decrees, recognition could nonetheless be granted, with enforcement suspended until the defendant had been given an opportunity to apply for modification in the original judgment court.

The ultimate solution to the problem of foreign alimony decrees, as well as other problems in our law of domestic relations, may well be achieved by complete abandonment of outmoded adversary concepts and the substitution of what has been termed "extralitigious" proceedings,[152] in which the welfare of the parties will be the primary consideration. Pending such sweeping modernization of our family law, unnecessary obstacles to the welfare of the parties should not be imposed by indiscriminate reliance upon an undefined concept of comity. It may thus be hoped that our highest court will reformulate the doctrine of the *Biewend* case, specifying the determinants and effect of interstate recognition of alimony decrees outside the scope of full faith and credit.

Charles K. Mills

152 See Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 372 (1953).