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FOREIGN EX PARTE DIVORCES AND LOCAL CLAIMS TO ALIMONY

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It will be recalled that in *Williams v. North Carolina*,[1] the Supreme Court of the United States held that the fact of domicile as a jurisdictional factor for divorce may be questioned abroad when the matter of full faith and credit is in issue there. On the same day that this case was decided, a majority of the Court arrived at the same conclusion in the case of *Esenwein v. Commonwealth of Pennsylvania*.[2] Except for the concurring opinion of Justice Douglas, the *Esenwein* case would have no particular significance. The background facts were similar to those in the second *Williams* case. The husband and wife had lived in Pennsylvania. The husband secured a Nevada divorce without, so it was contended, acquiring a domicile in that state. However, the question to be decided was whether the divorce superseded a pre-existing support order granted the wife in Pennsylvania after the separation of the couple and some time before the husband's departure for Nevada, rather than, as in the *Wililams* case, one of liability to criminal prosecution for bigamous cohabitation of a spouse who had secured a divorce in a state where he had not acquired a domicile. To a majority of the Supreme Court the rationale of the *Williams* case applied. The Nevada decree was not entitled to full faith and credit. As a consequence, the decision by the Pennsylvania courts that the support order had not been superseded by the Nevada decree was upheld. To Justice Douglas, who it might be noted joined in the dissent in the second *Williams* case,[3] the matter involved was quite different. He would have required that the Nevada decree be given full faith and credit insofar as the respective personal marital duties of the spouses might be concerned but not insofar as interspousal property claims (including a prior support order) might be involved.

The matter came before the Supreme Court in a more direct form in the case of *Estin v. Estin*.[4] In this case the wife, while the spouses were

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[1] Williams v. North Caraolina, 325 U.S. 226 (1945). The Williams case and its sequences were discussed in an earlier issue of this journal, 33 WASH. L. REV. 331 (1958).

[2] 325 U.S. 279 (1945).

[3] 325 U.S. 226 (1945), Justice Douglas joined in the dissent written by Justice Black. Justice Rutledge also dissented in a separate opinion.

[4] 334 U.S. 541 (1948).

living in New York, obtained a separate maintenance order. Thereafter the husband migrated to Nevada, where he secured a divorce decree which was subsequently set up as a defense to a suit in New York on the prior order for support. Unlike the situation in the *Esenwein* case, it was assumed by the New York courts that the Nevada decree was entitled to full faith and credit. Consequently, the sole issue was whether the local decree for separate maintenance survived the foreign divorce. The New York courts held that it did.[5] A majority of the Supreme Court affirmed. Justice Douglas, who wrote the majority opinion, took the position that the prior order was a property interest of which the wife could not be deprived by the Nevada court without personal jurisdiction over her.[6] He also emphasized the interest of New York in preventing its citizens from becoming public charges. More recently, in 1957, the Supreme Court upheld a New York decision to the effect that an ex-wife may successfully sue her ex-husband for maintenance even though the foreign ex parte divorce was granted prior to the suit. In the case, *Vanderbilt v. Vanderbilt*,[7] the husband and wife had lived in California before separating. The husband secured a divorce in Nevada, the validity of which was not questioned in the New York courts.[8] Pending the Nevada proceedings, the wife moved to New York where the support suit was brought after the Nevada decree had been entered. The justification for permitting the suit was said to be New York's interest in Mrs. Vanderbilt's not becoming a public charge.

The problem of survival of a claim to alimony after a valid divorce is not entirely new. For example, in *Toncray v. Toncray*,[9] decided in 1910, the Supreme Court of Tennessee stated that a Tennessee wife whose husband had left the marital abode and had secured a divorce in Virginia, where he had admittedly acquired a domicile, could successfully sue for alimony in Tennessee even though the validity of the Virginia divorce might otherwise be recognized. However, a majority

[5] Estin v. Estin, 296 N.Y. 308; 73 N.E.2d 113 (1947).

[6] 334 U.S. 541 (1948) (Frankfurter and Jackson, dissenting). Justice Jackson took the position that if under New York law a New York divorce could terminate a pre-existing maintenance order, a foreign divorce entitled to full faith and credit would necessarily have the same effect.

[7] 354 U.S. 416 (1957).

[8] See Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956). The petitioner had reside din Nevada prior to his marriage. He returned to Nevada from California after the spouses were separated, and still resided there at the time of the New York suit by Mrs. Vanderbilt. Mr. Vanderbilt's prior and present connection with Nevada was held to be sufficient to justify a holding that he was domiciled in Nevada. The first Williams case controlled. So the Nevada decree was entitled to full faith and credit.

[9] 123 Tenn. 476, 131 S.W. 977 (1910).

of the state courts have, at least prior to the first *Williams* case, held to the contrary, usually, but not always, through interpretation of local statutes in such a manner as to permit recovery of alimony only as an incident to suit for divorce.[10] If the foreign divorce was valid for purposes of full faith and credit, local suit for support could not be brought. Therefore there could be no claim for alimony. Even so, it should be kept in mind that prior to the first *Williams* case an ex parte divorce not granted at the matrimonial domicile did not have to be given full faith and credit. A court could give effect to the claims of a local wife against a migrant husband simply by refusing to recognize a divorce secured by him abroad, even though he might have acquired a domicile there. There was therefore relatively little occasion to consider the matter of survival of a duty to support. The first *Williams* case changed the picture. Now if the wife's claim to alimony does not survive a divorce, a husband by migrating to another state and securing a divorce there can defeat any claim that the wife might otherwise have to support. With this changed picture in mind, both courts [11] and legislatures have given attention anew to the general problem of survival. New York is one of the states which provided by statute for survival of alimony over a prior ex parte divorce. Suit by Mrs. Vanderbilt was, of course, under the New York statute.[12]

It might be urged that a wife whose husband has migrated and brought a suit for divorce abroad could protect her claim to support by intervening in the foreign proceedings to contest or to counterclaim for alimony. However, if she did, she would run the risk of an adverse decision by a court whose views with respect to alimony might not be as receptive as would those at her domicile. The husband might even sue for divorce in a state where under local law the courts could under no circumstances grant alimony. For example, one can easily imagine a situation in which a New York husband, after learning of the Texas

[10] See, Annot., 28 A.L.R.2d 1378 (1953); See also McCoy v. McCoy, 191 Iowa 973, 183 N.W. 377 (1921). *Cf,* Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953) (dissenting opinion of Traynor, J). See also Meredith v. Meredith 204, F.2d 64 (D.C. Cir. 1953) in which it was held a trial court in the District of Columbia would not award maintenance independently of divorce; Hobson v. Hobson, 221 F.2d 839 (D.C. Cir. 1953) where the wife sued the husband for support in the District of Columbia after he had obtained an exparte divorce in Florida. It was said, "the court has general equity powers, which are not supplanted by the statute, and which are broad enough in appropriate circumstances to support a grant of maintenance after an exparte divorce." (two judges dissented). For a relatively recent article see PAULSEN, *Support Rights and Out-of-State Divorce,* 38 MINN. L. REV. (1954).

[11] See Annot., 28 A.L.R.2d 1378 (1953).

[12] N.Y. CIV. PRAC. ACT. § 1170-b (as amended); 6A N.Y. CIVIL PRACTICE § 1170-b (Gilbert-Bliss Supp. 1956). See also Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956).

law concerning alimony, migrates to Texas, where after residence for the locally required period, he sues for divorce. Under Texas law there is no alimony whatever.[13] Even though the wife appears to claim it, she would not be successful, because, irrespective of the circumstances, a Texas court cannot grant it. Of course, if the wife appears in the foreign proceedings, she would be bound everywhere by whatever decision the foreign court might make.[14] The New York legislature in enacting the statute authorizing local suit for alimony, which was before the New York courts and the Supreme Court in the Vanderbilt case, while it probably did not have specifically in mind the Texas extreme, seems to have given consideration to the inconvenience and hazards involved if the respondent spouse were required to claim alimony abroad in order to secure it at all. In any event, the New York legislature and the New York courts were of the opinion that the State of New York had a legitimate claim to assertion of protection to a New York wife without regard to whether her interest in alimony is called property or whether her protection is justified by vague talk in terms of New York's interest in the wife not becoming a public charge.

There is, however, an implication in the *Vanderbilt* case which if followed through should, it is submitted, be given further consideration if or when the matter specifically comes before the Supreme Court. Although Mrs. Vanderbilt seemingly moved from California to New York before the Nevada proceedings were begun, or at least before the divorce was granted, there was in the case an implication that, under the New York statute, even though she had become a resident of New York at any time, whether before the foreign divorce proceedings were begun or even after the decree was entered, the same result would have been reached. It seems to be stretching unreasonably the thesis of a

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[13] In Texas there is no alimony. Though a Texas court has wide discretion in the division of the property of the spouses, under normal circumstances the property, whether community or separate, is not adequate to provide for support. A relatively recent statute authorizes a Texas court to entertain a suit for divorce if the petitioner has been stationed in Texas, as a member of the armed forces for a period of twelve motnhs, without regard to domicile in that state. This statute has recently been upheld by the Texas Supreme Court. Wood v. Wood, No. A7041, Jan. 28, 1959. It can be anticipated that increasing numbers of armed forces personnel stationed in Texas will bring suit for divorce under this statute, particularly when they learn that a Texas court will not grant alimony even if the wife should intervene. If the Supreme Court of the United States holds this statute to be constitutional from a full faith and credit point of view, a grave injustice could be done to the wife, if a claim for support were not allowed to survive in her home state.

[14] See Loeb v. Loeb, 155 N.Y.S.2d 473 (1956), *aff'd* 4 N.Y.2d 54, 152 N.E.2d 36 (1958), in which it was said that "a wife who establishes a separate residence in this state . . . gains nothing unless she establishes something more than convenience." The circumstances surrounding the case, removal from Vermont to New York after a Nevada decree, were held not to justify recovery under the New York statute.

state's interest in its domiciliaries to include those who become residents after the impact of the foreign divorce proceedings has taken place. Furthermore, if this implication is sustained, it could encourage migration to New York by spouses living in other states where the courts may not look upon alimony with the same degree of favor as does New York. The interest in protecting the wife would, where she becomes a resident of New York after the divorce, seem to lie preponderantly with the state where she previously resided.

Justice Frankfurter, who dissented in the *Vanderbilt* case, was of the opinion that the view of the majority conflicts with Supreme Court cases which arose before the end of the era of *Haddock*.[15] These cases include *Thompson v. Thompson*,[16] *Atherton v. Atherton*,[17] and *Haddock v. Haddock*.[18] It is respectfully submitted that this is not necessarily the case. While it is true that in *Thompson* a Virginia divorce granted at the matrimonial domicile was held to preclude judicial separation and alimony in the District of Columbia, the Supreme Court may have only been expressing a District of Columbia policy, i.e., a local federal policy, as to the effect of a valid divorce decree on a claim to alimony.[19] Furthermore, a majority of the court was not then thinking in terms of the effect of a foreign ex parte divorce not granted at the matrimonial domicile, simply because such a decree would not then have had to be given full faith and credit. In *Atherton* the New York courts in honoring Mrs. Atherton's claim to support did so because they were of the opinion that the Kentucky divorce, even though granted at the matrimonial domicile, was not entitled to full faith and credit. Since at the time a claim for alimony did not in New York survive a valid divorce, the sole question was whether the Kentucky decree was effective as a valid one in New York. When the Supreme Court held that the Kentucky decree was entitled to full faith and credit, the New York rule that support does not survive divorce automatically became effective. Again in *Haddock* where a Connecticut divorce decree granted the husband under facts similar to those in *Williams* was held not to be entitled

[15] In the Vanderbilt case Justice Douglas, writing for the majority, conceded that if the Nevada court had had personal jurisdiction over the defendant the situation would have been different. Justice Frankfurter, in his dissent, contended that it had been held in the past that a court having jurisdiction for purposes of divorce could also litigate with respect to alimony, irrespective of jurisdiction in personam.

[16] 226 U.S. 551 (1913).

[17] 181 U.S. 155 (1901).

[18] 201 U.S. 562 (1906).

[19] See note 10 *supra*. *Cf.* Hobson v. Hobson, 221 F.2d 839 (D.C. Cir. 1953) where the court held that the right to support survived a Florida divorce, (two judges dissenting), although it had previously reached a different result with respect to the effect of a Texas decree on a similar question. Meredith v. Meredith, 204 F.2d 64 (1953).

to full faith and credit, the New York courts granted the wife's prayer for judicial separation and maintenance because in their opinion the husband had not secured a divorce decree which was effective in New York. Hence the New York rule of non-survival did not apply. When the Supreme Court affirmed, it did so solely because it concluded that the New York courts did not have to recognize the Connecticut decree as valid in New York. The matter in issue was not one of survival of maintenance over a valid divorce but one of the validity of the divorce. The first *Williams* case created a new problem, one of giving economic protection to a locally domiciled spouse against the effects of a migratory divorce secured by the other spouse in a state where he alone is domiciled. What the New York legislature sought to do was to assure such protection. This the Supreme Court held to be a constitutional objective.

There remains the matter of full faith and credit. When Mrs. Vanderbilt brought her suit in New York she did so by sequestering Mr. Vanderbilt's property there. While a claimant may reach local assets through sequestration or attachment, a judgment or decree against the respondent to be effective at home as well as abroad must be based on jurisdiction in personam.[20] The respondent, if a non-resident, must be served with process in the state. It can be anticipated that in some future case a proper decree in personam will be granted, followed by an attempt to recover on it in another state.

As has already been pointed out, it has long since been well settled that the ordinary alimony decree, at least as to installments past due and not subject to revision, must be given full faith and credit, even though as an original matter a similar decree would not be granted by the courts of the state where enforcement is sought.[21] In a recent California case,[22] recovery was permitted on a New Jersey support decree which antedated a foreign divorce granted ex parte. The California court treated the problem of the survival of the New Jersey decree as one to be controlled by reference to New Jersey law. It found that under that law the decree survived. It then allowed recovery upon a theory that since the decree continued to be effective in New Jersey, it should be treated as effective in California.

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[20] See Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). See also the separate dissenting opinions by Justice Harlan and by Justice Frankfurter. Justice Frankfurter expressed the view that a court having jurisdiction to grant a divorce may also pass on matters of alimony without regard otherwise to jurisdiction in personam.

[21] See Barber v. Barber, 365 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1 (1910).

[22] Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955).

However, the Supreme Court of Washington[23] may entertain a different opinion, since in a recent case it seems to have taken the position that a Massachusetts support order which was granted the wife prior to suit for divorce by the husband in Washington created no more than a Massachusetts duty from the husband to the wife. This duty did not have to be recognized in Washington, since the courts of that state, because of Washington's interest in the obligation of the husband, a local domiciliary, to support his wife, could determine independently the amount of support he should be compelled to pay. The court apparently treated the situation as one involving a problem of giving consideration to the interests of the two states in their local domiciliaries, with each free to emphasize its interest within its own borders. In other words, the Massachusetts interest in the support of the wife justified a support decree in Massachusetts, but that interest could be defeated when it clashed with Washington's interest in what the husband should pay. Consequently, when the claim by the Massachusetts wife was made against a local resident in Washington, the interest of that state in the extent of the obligation of the husband domiciled there prevailed there, in spite of the fact that the husband's duty had already been established by the Massachusetts court.[24] A difficulty with this point of view is that, even though it may be properly said that the Massachusetts duty of the husband to support the wife was based on that state's interest in her plight, that duty, once a support order or decree has been entered, under the traditional point of view becomes merged into a money decree, a debt.[25] The fact that a sister state may originally have had at home its own opposing interest or that it would not have reached a result similar to that reached in the state where suit was originally brought does not authorize denial of full faith and credit.

It was pointed out long ago that if the courts of the several states could, impose their own views as to the proper law to be applied to a case when originally tried abroad, they could, by that much, abrogate the effect of the full faith and credit clause of the Constitution. In *Fauntleroy v. Lum*,[26] for example, the original cause of action arose in

[23] Perry v. Perry, 51 Wn.2d 358, 318 P.2d 968 (1958).

[24] Attention should be called to the fact that what Judge Finley, writing for the Supreme Court of Washington, said was probably unnecessary to the decision, since he came to the conclusion that under Massachusetts law the preexisting support decree would not survive a valid divorce. He was also of the opinion that proper notice had not been given the husband at the time of docketing the judgment for prior support under the original Massachusetts decree. Recovery was allowed for installments in arrears at the time the divorce was granted, but not for those accruing thereafter.

[25] Barber v. Barber, 323 U.S. 771 (1944); Sistare v. Sistare, 218 U.S. 1 (1910); Barber v. Barber 62 U.S. (21 How.) 582 (1858).

[26] 210 U.S. 231 (1907).

Mississippi. In that state an agreement to deal in cotton futures constituted a gambling debt unenforceable under the law there. Suit was brought in a Missouri court for breach of such an agreement. The Missouri court disregarded the Mississippi law and awarded judgment to the plaintiff. Suit on the Missouri judgment was then brought in Mississippi, where full faith and credit was denied on the ground that the Missouri court had not given proper consideration to the Mississippi law. On appeal the Supreme Court held that the Mississippi court was obliged to give full faith and credit to the Missouri judgment even though that judgment was based upon an error with respect to Mississippi law and even though the Missouri court may have wrongfully disregarded a claim for the application of the law of Mississippi. A similar point of view prevailed without dissent in *Roche v. McDonald.*[27] There suit was brought in Washington on an Oregon judgment. The Washington courts refused to enforce the judgment because the Oregon court, so it was found, misapplied Washington law. The Supreme Court of the United States reversed.

While neither of the foregoing cases involved a situation where an attempt was made to enforce abroad a decree for maintenance which had been held to survive divorce, or which, as in the *Vanderbilt* case, was entered after the dissolution of the marriage, they do establish these two underlying principles: First, under the full faith and credit clause of the Constitution, the original cause of action is merged into the judgment; the judgment constitutes the debt; second, even though a court may disapprove the reasons for entering the original judgment, it must be given full faith and credit. Also, as has been previously stated, decrees for alimony, at least insofar as installments past due and not subject to revision are concerned, come within the mandate of the Constitution.[28]

It might be added that the grounds for permissible denial of full faith to sister state judgments have become very narrow indeed. Under the decided cases, such credit may be denied where the foreign court lacked jurisdiction,[29] where jurisdiction was secured through intrinsic fraud,[30]

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[27] 275 U.S. 449 (1927). See also Union National Bank of Wichita v. Lamb, 337 U.S. 38 (1949).

[28] See text accompanying note 21, *supra.*

[29] Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873). *Cf.* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) in which it was held if defendant litigates in the original suit the matter of jurisdiction and the decision goes against him, the question of lack of jurisdiction cannot be raised elsewhere. His only recourse is appeal to a higher court, the Supreme Court of the United States if necessary.

[30] *Cf.* Levin v. Gladstein, 142 N.C. 482, 55 S.E. 371 (1906).

or where the judgment was not on the merits,[31] as where the original suit was dismissed because of the running of the statute of limitations or dismissed because of improper venue or because of lack of jurisdiction. The full faith and credit clause of the Constitution is an expression of national poilcy; as such it has been consistently held to apply where a matter has been litigated by a competent court on the merits. It is extremely doubtful whether the Supreme Court will now permit a departure from the established national policy because of conflicting claims of local state policy.

[31] See Warner v. Buffalo Drydock Co., 67 F.2d 548 (2d Cir. 1933).