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## INTERSTATE RECOGNITION OF CUSTODY DECREES

## LAW AND REASON V. THE RESTATEMENT

*Albert A. Ehrenzweig\***Introduction*

AFTER days of bitter contest, a weary judge dissolves the marriage bond and, lacking Solomon's sword, allots the child to his mother. Thus the stage is set for the second act of the tragedy. Craving a new life for herself and her child, the mother moves to another state, and the father, seeing his right of visitation thus put in jeopardy, pleads the mother's removal in the original court which, loyal to the more faithful citizen, now awards custody to him. Should a judge of the mother's new home state heed this change? And again, what should be done if the father, disappointed by the original court, uses the first visit to acquire "possession" and himself removes the child to another state? What is any judge to do when faced with vivid descriptions of a child's plight caused by the alleged misdeeds of an absent parent or the "error" of a distant court? Is he to give "full faith and credit" or "comity" to the foreign court's decree and refuse to re-examine the merits of the first award, or should he follow his own discretion in caring for the welfare of the child now within his territory?

The courts' answers have been varied, as varied as human facts and needs. But, increasingly, these answers have purported to follow the *Conflict of Laws Restatement* of the American Law Institute<sup>1</sup> providing that a foreign decree which creates "the status of custodianship" (§144, comment *a*), "will be enforced" if the custody "has been awarded by the proper courts" (§147), i.e., by "a court of the state of domicile of the child" (§§145, 146). In such a case the award whose "merits cannot be re-examined" (comment *a* to §147), can be altered, it is said, only "for reasons which arise after the previous award" (*ibid.*). Have these "rules" ever been the law? Should they be the law?

The custody of children of divorced parents has occupied our courts only for the last one hundred years. At the time Story wrote, judicial custody awards were ordinarily made to guardians, since divorces were rare and usually reserved to the legislature.<sup>2</sup> No wonder

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<sup>1</sup> *CONFLICT OF LAWS RESTATEMENT* (1934).

<sup>2</sup> See, e.g., *Pawling v. Bird's Exrs.*, 13 Johns. Rep. 192 (Sup. Ct. N.Y. 1816), involving a Massachusetts private statute awarding custody upon divorce.

that the problem of recognition of foreign custody awards was treated by Story under the heading of Foreign Guardianships, which included those of parent guardians (the curators of Roman law).<sup>3</sup> In "close analogy of the case of foreign executors and administrators,"<sup>4</sup> the conflicts issue in this field was then, and is today, whether and how far a guardian has "extraterritorial authority." Story, after a full discussion of the laws of other countries,<sup>5</sup> finds the rights and powers of guardians in this country to be "strictly local."<sup>6</sup> However doubtful the origin of this doctrine and its support in authority,<sup>7</sup> it must probably now be considered as generally accepted in this country,<sup>8</sup> though a complete analysis of the case law might yet reveal that most pertinent cases may be rationalized on equitable grounds such as a superior natural right to custody,<sup>9</sup> and though a general trend toward a loosening of Story's rigid formula is unmistakable.<sup>10</sup> The present discussion is limited to foreign decrees awarding custody to either parent.

Conceivably, those parents who in the second half of the last century began to seek and obtain the inclusion of custody awards in judicial divorce decrees, could, in conflicts cases, have continued to be treated as guardians limited to "local" authority. Instead, however, the problem of extraterritorial recognition of such custody awards began to be examined along the same lines as of the divorce decree itself. We find this approach in Minor's text, who considered a custody decree "as

<sup>3</sup> STORY, COMMENTARIES ON THE CONFLICT OF LAWS 411 (1834).

<sup>4</sup> STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 4th ed., 845 (1852).

<sup>5</sup> See LORENZEN AND STUMBERG, CASES AND MATERIALS ON THE CONFLICT OF LAWS, 6th ed., 607, 619 (1951).

<sup>6</sup> STORY, COMMENTARIES ON THE CONFLICT OF LAWS 414 (1834).

<sup>7</sup> Story relied merely on Chancellor Kent's decisions in *Morrell v. Dickey*, 1 Johns. Ch. Rep. 153 (N.Y. 1814) (refusing payment of her infant's legacy to a mother appointed guardian by a Pennsylvania court), and *Kraft v. Wickey*, 4 Gill & Johns. 332 (Md. 1832), failing to concern questions of custody. The same two inconclusive cases have continued to be invoked in guardianship cases, as supporting the "local" theory. See, e.g., *Woodworth v. Spring*, 4 Allen (86 Mass.) 321 (1862); *Jones v. Bowman*, 13 Wyo. 79, 77 P. 439 (1904).

<sup>8</sup> See, e.g., *Morgan v. Potter*, 157 U.S. 195, 15 S.Ct. 590 (1895); *In re Pratt*, 219 Minn. 414, 18 N.W. (2d) 147 (1945).

<sup>9</sup> See, e.g., the leading case of *Foster v. Alston*, 6 How. 406 (7 Miss. 1842), where a mother, remarried and residing in Mississippi, prevailed, though having removed her children "with an armed force," over their testamentary guardian in Tennessee. Significantly, the apparently oldest pertinent case relied on by the guardian and the dissenting judge, *King v. Hopkins and Wife*, 7 East 579, 103 Eng. Rep. 224 (1806), concerned the converse case of a child forcibly taken from his mother. See also *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202 (1862).

<sup>10</sup> LORENZEN AND STUMBERG, CASES AND MATERIALS ON THE CONFLICT OF LAWS, 2d ed., 618 (1951). See also notes, 49 COL. L. REV. 104 (1949); 27 MICH. L. REV. 338 (1928). Some states draw different distinctions between "strict custody" and guardianship. See note, 37 CALIF. L. REV. 455 at 469 (1949).

much a decree in rem as is the divorce itself," the res being the "status" of both parents and children with a "legal situs" at their domicile.<sup>11</sup> Though this approach has been forcefully attacked as purely legalistic and thus meaningless,<sup>12</sup> it continues to haunt us, in Professor Beale's version, in the above stated "rule" of the *Restatement* of the American Law Institute concerning the required recognition of the foreign-"created" status of custodianship.

For this "rule" Professor Beale<sup>13</sup> relies on seven cases, only two of which gave full faith and credit to a foreign decree and that presumably on the mere ground that the child had been unlawfully removed from the custodian.<sup>14</sup> In all other cases recognition of a foreign modification of an existing decree was refused (either because the child's domicile was then in the forum<sup>15</sup> or because of an intervening change of circumstances<sup>16</sup> or because the foreign order itself had refused full faith and credit to the order of the forum).<sup>17</sup>

The 1944 and 1948 collections by the American Law Institute of cases citing the *Restatement*<sup>18</sup> list only thirteen cases among the hundreds of custody cases decided since 1934, the year of the publication of the *Restatement*. And even of this negligible number only two cases gave recognition to a sister state decree,<sup>19</sup> while of the remaining eleven cases, one concerned the decree of a foreign country,<sup>20</sup> five did not even involve foreign custody decrees,<sup>21</sup> one expressly refused to deal with the question of recognition and re-examined the merits,<sup>22</sup> and four cases actually refused recognition, either because of lack of foreign

<sup>11</sup> MINOR, CONFLICT OF LAWS 208 (1901). For a similar statement see RORER, AMERICAN INTERSTATE LAW 183 (1879).

<sup>12</sup> Cf. STUMBERG, CONFLICT OF LAWS, 2d ed., 326 (1951); also Stumberg, "The Status of Children in the Conflict of Laws," 8 UNIV. CHI. L. REV. 42 at 61 (1940).

<sup>13</sup> 2 BEALE, CONFLICT OF LAWS 719, n. 3 (1935). See also Beale, "The Status of the Child and the Conflict of Laws," 1 UNIV. CHI. L. REV. 13 at 24 (1933).

<sup>14</sup> Wilson v. Elliott, 96 Tex. 472, 73 S.W. 946, 75 S.W. 368 (1903); In re Leete, 205 Mo. App. 225, 223 S.W. 962 (1920). See infra text at note 83 et seq.

<sup>15</sup> Groves v. Barto, 109 Wash. 112, 186 P. 300 (1919); Griffin v. Griffin, 95 Ore. 78, 187 P. 598 (1920); Barnes v. Lee, 128 Ore. 655, 275 P. 661 (1929).

<sup>16</sup> See Woodland v. Woodland, 153 Ga. 202, 111 S.E. 673 (1922).

<sup>17</sup> Dixon v. Dixon, 76 N.J. Eq. 364, 74 A. 995 (1909). See infra note 158.

<sup>18</sup> RESTATEMENT IN THE COURTS 256 (permanent edition 1945); 1948 SUPPLEMENT 146 (1949).

<sup>19</sup> McMillin v. McMillin, 114 Colo. 247, 158 P. (2d) 444 (1945); White v. White, 160 Kan. 32, 159 P. (2d) 461 (1945).

<sup>20</sup> Hachez v. Hachez, 124 N.J. Eq. 442, 1 A. (2d) 845 (1938).

<sup>21</sup> Butler v. Butler, 83 N.H. 413, 143 A. 471 (1928); Rosenberger v. Rosenberger, (D.C. Cir. 1938) 95 F. (2d) 349; Yarborough v. Yarborough (Stone, J., dissenting), 290 U.S. 202 at 223, n. 19 (1933) (citing §156 of the Proposed Final Draft No. 1, preceding Restatement §148); Lake v. Lake, 63 Wyo. 375, 182 P. (2d) 824 (1947); Ex parte Olcott, 141 N.J. Eq. 8, 55 A. (2d) 820 (1947).

<sup>22</sup> Briggs v. Briggs, 111 Utah 418, 181 P. (2d) 223 (1947).

jurisdiction<sup>23</sup> or of a change of circumstances,<sup>24</sup> or for other reasons.<sup>25</sup> Similar results appear in later cases citing the *Restatement* in support.<sup>26</sup>

The present state of the law must, therefore, be ascertained without regard to the authorities relying upon, or relied upon by, the Restaters. When in 1944 Professor Stansbury examined sixty-odd cases to ascertain what the courts were actually doing, he found that in a substantial majority of cases recognition for foreign custody decrees was refused.<sup>27</sup> And this finding is confirmed in the present analysis of well over one hundred custody cases since decided.<sup>28</sup> Thus it might seem that little attention is being paid to the rigid *Restatement* formula and that courts have in fact exercised their free discretion in the paramount interest of the child's welfare, while paying lip service to the *Restatement*.

Yet any dogmatic formula, even if merely used to disguise discretion, should, if proved incorrect in law or reason, be discarded lest it somehow affect the administration of justice. All too easily, courts in this field in which "words have been the chief trouble-makers"<sup>29</sup> might take language at its face value and, treating freedom to modify a foreign decree as an exception, automatically impose the burden of proof on the parent seeking relief,<sup>30</sup> or, on the other hand, following a few, though isolated, precedents,<sup>31</sup> completely reject any rule limiting their right to disregard foreign proceedings. Such regrettable, necessarily unsatisfactory, extreme conclusions could perhaps be avoided if an analysis of dogmatic and case history should furnish us with a rule expressing existing and desirable law more faithfully than does the *Restatement*.

<sup>23</sup> *In re Saunders*, 76 Cal. App. (2d) 635, 173 P. (2d) 818 (1946).

<sup>24</sup> *Young v. Roe*, 265 App. Div. 858, 37 N.Y.S. (2d) 714 (1942), *affd.* 290 N.Y. 823, 50 N.E. (2d) 235 (1943); *In re Adoption of Wyant*, 72 Ohio App. 249, 51 N.E. (2d) 221 (1942).

<sup>25</sup> *Langan v. Langan*, (D.C. Cir. 1945) 150 F. (2d) 979.

<sup>26</sup> See, e.g., *In re Brown*, 90 Cal. App. (2d) 651, 203 P. (2d) 799 (1949) (explainable under a "clean hands" doctrine, *infra* at note 112); *Frick v. Kaufman*, 310 Ky. 829, 222 S.W. (2d) 185 (1949) (semble); *Daugherty v. Nelson*, (Mo. App. 1950) 234 S.W. (2d) 353; *In re Hughes*, 73 Ariz. 97, 237 P. (2d) 1009 (1951) (lack of foreign jurisdiction).

<sup>27</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 *LAW & CONTEMP. PROB.* 819 at 828 (1944).

<sup>28</sup> See *infra* note 32 et seq.

<sup>29</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 *LAW & CONTEMP. PROB.* 819 at 826 (1944).

<sup>30</sup> Cf. STUMBERG, *CONFLICT OF LAWS*, 2d ed., 329 (1951); GOODRICH, *CONFLICT OF LAWS*, 3d ed., 421 (1950). See also Goodrich, "Custody of Children in Divorce Suits," 7 *CORN. L.Q.* 1 (1921); Stumberg, "The Status of Children in the Conflict of Laws," 8 *UNIV. CHI. L. REV.* 42 (1940); Beale, "The Status of the Child and the Conflict of Laws," 1 *UNIV. CHI. L. REV.* 13 (1933).

<sup>31</sup> See *infra* notes 51 et seq.

In view of the distinctive policies governing, and problems arising as to, the recognition of decrees of sister states, these decrees will be analyzed separately, leaving decrees of foreign countries to a subsequent discussion.<sup>31a</sup> An attempt at formulating what I believe to be the "true rule" will be preceded by a critical analysis of the case law in its traditional classification under the headings of "jurisdiction" and "change of circumstances."

## I. THE SHADOW OF THE RESTATEMENT

### A. *Nonrecognition of Foreign Awards*

1. "*No jurisdiction.*" "Running through the custody cases . . . is a persistent assumption that some one state must have exclusive jurisdiction. . . ."<sup>32</sup> Professor Stansbury found in 1944 that about one-half of those cases refusing to enforce the foreign decree did so asserting a jurisdictional defect in that decree.<sup>33</sup> We find a similar proportion in the cases since decided.

Random analysis shows that this "jurisdictional" approach, far from being dictated by logical necessity, is generally chosen in legalistic support of more pertinent considerations, such as the unreliability, from the standpoint of the child's welfare, of "migratory divorce" decrees<sup>34</sup> or of custody awards made in the child's absence.<sup>35</sup>

This observation applies in particular to those cases constituting the great majority of the decisions refusing to enforce foreign decrees on jurisdictional grounds, i.e., to those cases where the denial of recognition concerned the modification by a foreign court of its own custody decree after the child's unlawful removal from its territory. Clearly a court, having before him a child only recently entrusted to his mother

<sup>31a</sup> See my forthcoming article, "International Recognition of Custody Decrees," 2 AM. J. COMP. L. (1953), which is, in substance, based on my report to the Fourth Congress of the International Bar Association, July 1952, published by the Spanish Bar Association as "El renoncimiento de los mandamientos de custodia extranjeros en los Estados Unidos."

<sup>32</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW & CONTEMP. PROB. 819 at 830 (1944).

<sup>33</sup> *Id.* at 826.

<sup>34</sup> Cf. *De Kraft v. Barney*, Fed. Cas. No. 18,288 (1862), one of the earliest cases of this type. See also *Petition of Vetterlein*, 14 R.I. 378 (1884); and for a recent decision *Hanson v. Hanson*, 150 Neb. 337, 34 N.W. (2d) 388 (1948).

<sup>35</sup> Cf. *Callahan v. Callahan*, 296 Ky. 444, 177 S.W. (2d) 565 (1944); *Elkins v. Elkins*, 268 App. Div. 938, 51 N.Y.S. (2d) 277 (1944), app. den. 268 App. Div. 1072, 52 N.Y.S. (2d) 939 (1944); *Boor v. Boor*, 241 Iowa 973, 43 N.W. (2d) 155 (1950). See also *Daugherty v. Nelson*, (Mo. App. 1950) 234 S.W. (2d) 353, stressing the fact that the child had been taken into Nebraska only for the purpose of giving that state jurisdiction (at 358).

by a foreign judge after full hearings in the presence of both parties, will be reluctant to recognize a later decree of that judge in the father's favor issued primarily, if not exclusively, on the ground that the mother had "fled" the jurisdiction. Judge Goodrich, however, in cases of this type in which "lack of jurisdiction" is so often invoked to "legalize" common sense, finds it "difficult to see how the first court's power is lost as long as the question of custody remains to be passed upon."<sup>36</sup> Omitting a long array of recent cases which have denied such "power,"<sup>37</sup> Judge Goodrich mentions three cases as supporting his position,<sup>38</sup> two of which were decided prior to 1890 and, besides, failed to concern the recognition of a foreign modificatory decree.<sup>39</sup>

Whether or not justifiable on authority, the jurisdictional language borrowed from the law of divorce will be found misleading and unnecessary once it is recognized that the courts, on the one hand, will use this language as just one of the several techniques to support their claim to full discretion in custody matters, and on the other hand, will refrain from such language where other equitable reasons require the recognition of foreign decrees. This proposition will be more fully established, I hope, by the present case analysis. But this much should be clear at the outset: in divorce cases we are now witnessing the gradual breakdown of that requirement of one spouse's domicile in the state of the divorcing forum, which the courts, without any basis in the Constitution, have come to assume following the "res" analogy

<sup>36</sup> GOODRICH, *CONFLICT OF LAWS*, 3d ed., 423 (1949).

<sup>37</sup> See e.g. *Keneipp v. Phillips*, 210 Ark. 264, 196 S.W. (2d) 220 (1946); *Gregory v. Jackson*, 212 Ark. 363, 205 S.W. (2d) 471 (1940) (though purportedly based on a change of circumstances); *In re Saunders*, 76 Cal. App. (2d) 635, 173 P. (2d) 818 (1946); *Hamilton v. Sourjohn*, 332 Ill. App. 279, 75 N.E. (2d) 42 (1947); *Marlar v. Howard*, 312 Ky. 209, 226 S.W. (2d) 755 (1950); *Abbott v. Abbott*, 304 Ky. 167, 200 S.W. (2d) 283 (1947) [but cf. *Beutel v. Beutel*, 305 Ky. 683, 205 S.W. (2d) 489 (1947)]; *People ex rel. Turk v. Turk*, 86 N.Y.S. (2d) 139 (1949); *Lacy v. Hitzemann*, (Tex. Civ. App. 1945) 190 S.W. (2d) 764. See also supra note 15; and subsequent to Goodrich's text, *In re Hughes*, 73 Ariz. 97, 237 P. (2d) 1009 (1951). But see, e.g., *Bowman v. Bowman*, 313 Ky. 806, 233 S.W. (2d) 1020 (1950).

<sup>38</sup> GOODRICH, *CONFLICT OF LAWS*, 3d ed., 424, n. 90 (1949), citing *Wakefield v. Ives*, 35 Iowa 238 (1872), infra notes 39, 167; *Stetson v. Stetson*, 80 Me. 483, 15 A. 60 (1888); *State ex rel. Nipp v. District Court*, 46 Mont. 425, 128 P. 590 (1912).

<sup>39</sup> *Wakefield v. Ives*, supra note 38 (concerning recognition of an original decree based on service by publication); *Stetson v. Stetson*, supra note 38 (concerning the forum's jurisdiction and not involving a foreign decree). The former case may have to be considered as overruled by *Kline v. Kline*, 57 Iowa 386, 10 N.W. 825 (1881), where the court, without attempting to distinguish the *Wakefield* case, declared that, while service by publication was sufficient to support a divorce decree, it was not the proper basis for a custody decree regarding children absent from the state. The court even intimated that it might refuse to recognize a foreign custody decree if the children had been within the awarding state at the time of the decree, apparently on the ground that "jurisdiction in rem" was not sufficient in such cases to compel full faith and credit. See infra notes 60, 146.

now so generally abandoned.<sup>40</sup> We should be reluctant, for this if no other reason, to introduce the problems and solutions in the law of divorce jurisdiction into the field of custody which is necessarily governed by different policies. Indeed, the "res" or status ideology, though still entrenched in the *Restatement* and Judge Goodrich's text,<sup>41</sup> has lost ground more readily and thoroughly in that field than in the law of divorce. For, as Professor Stumberg, after a careful analysis of the case law, concluded more than ten years ago, "technical concepts of jurisdiction based on domicile and upon theoretical interest by a state in its own domiciliaries seem far removed from problems of child welfare."<sup>42</sup>

Professors Stansbury and Stumberg suggest that residence-in-fact has replaced domicile as a test of jurisdiction and that judicial acknowledgment of this fact would resolve the apparent conflict in the decisions.<sup>43</sup> I believe, however, that the ultimate remedy must be sought at the source of the conflict: even those courts which on principle will give full faith and credit to foreign custody decrees are in no way compelled by the Constitution to require, or be satisfied with, the existence in the sister state of either domicile or residence. Indeed, we are glad to find in more recent decisions that what Professor Stansbury still refers to as "an occasional recognition" of multistate jurisdiction<sup>44</sup> in custody cases has been steadily gaining ground.<sup>45</sup> This

<sup>40</sup> Against this analogy persuasively Stumberg, "The Status of Children in the Conflict of Laws," 8 *UNIV. CHI. L. REV.* 42 at 59 (1940).

<sup>41</sup> GOODRICH, *CONFLICT OF LAWS*, 3d ed., 422 (1949).

<sup>42</sup> Stumberg, "The Status of Children in the Conflict of Laws," 8 *UNIV. CHI. L. REV.* 42 at 62 (1940).

<sup>43</sup> Cf. STUMBERG, *CONFLICT OF LAWS*, 2d ed., 327, 329 (1951); Stumberg, "The Status of Children in the Conflict of Laws," 8 *UNIV. CHI. L. REV.* 42 at 58 (1940), relying on the celebrated case of *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). But see Rheinstein, "Jurisdiction in Matters of Child Custody," 26 *CONN. B.J.* 48, 60 (1952), stating that "in this country the concept of domicile has been so modified that it has come to all practical effects to be equivalent with residence." See also notes, 81 *UNIV. PA. L. REV.* 970 (1933); 30 *N.C.L. REV.* 282 (1952); GOODRICH, *CONFLICT OF LAWS*, 3d ed., 423 (1949), who still claims on the authority of Professor Beale and two inconclusive cases [*Pieretti v. Pieretti*, 13 N.J. Misc. 98, 176 A. 589 (1935) (foreign country, residence under statute); *Glass v. Glass*, 260 Mass. 562, 157 N.E. 621 (1927) (residence under statute)], that exclusive domicile jurisdiction is "the view of the majority of the cases."

<sup>44</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 *LAW & CONTEMP. PROB.* 819 at 831, n. 94 (1944), citing *Stafford v. Stafford*, 287 Ky. 804, 155 S.W. (2d) 220 (1941); *White v. Shalit*, 136 Me. 65, 1 A. (2d) 765 (1938); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S.W. (2d) 165 (1938).

<sup>45</sup> See Justice Traynor in *Sampsell v. Superior Court*, 32 Cal. (2d) 763 at 778, 197 P. (2d) 739 (1948): "... courts of two or more states may have concurrent jurisdiction over the custody of a child." Cf. notes 47 *MICH. L. REV.* 703 (1949); 22 *So. CAL. L. REV.* 293 (1949). See also, e.g., *Lynn v. Wright*, 252 Ala. 606, 42 S. (2d) 490 (1949); and *Wilmot's Guardianship*, (Ariz. 1952) 248 P. (2d) 995.



theory which authorizes the courts of one state to pass upon a child's custody without regard to whether the court of a sister state has done so or is authorized and willing to do so, is, of course, equivalent to the abandonment of any "jurisdictional test" of recognition.

2. "*Change of circumstances.*" Increasingly hesitant to base their decision to re-examine the merits of a foreign court's custody decree on the lack of that court's jurisdiction, even those courts applying a jurisdictional approach often choose to justify their ruling on the alternative ground of a change of circumstances since the foreign decree.<sup>46</sup> Indeed, such a finding appears in virtually all decisions refusing to recognize foreign divorce decrees, even including those denying any duty of recognition. It is this practice which apparently has resulted in the doctrine, petrified in the *Restatement* that a foreign custody decree, while enforceable if "awarded by the proper courts," may be re-examined "for reasons which arise after the previous award."<sup>47</sup>

It seems clear, however, and it has been stressed repeatedly, that this limitation enables any court to reach the desired result by either finding or denying a change of circumstances. For, as the highest court of Connecticut has pointed out in a much-quoted statement, "a finding of changed conditions is one easily made when a court is so inclined," so that "the recognition extraterritorially which custody orders will receive or command is liable to be more theoretical than of great practical consequence."<sup>48</sup> The danger inherent in the use of any such artificial formula will appear where this formula proves inadequate notwithstanding its flexibility. Thus a California court, modifying a foreign decree, felt constrained to invoke a rule to the effect that the required change of circumstances may refer to facts prior to that decree.<sup>49</sup> Whatever the merit of this interpolation the justification by a "change of circumstances" of a decision granting or denying recognition or enforcement to a foreign custody decree is rarely more than a manner of speech supporting a preconceived result.

3. "*Independent' investigation: the Kansas rule.*" It is apparently for this reason that the courts of several states have abandoned any

<sup>46</sup> See, e.g., *Welker v. Welker*, 325 Mass. 738, 92 N.E. (2d) 373 (1950). Cf. GOODRICH, *CONFLICT OF LAWS*, 3d ed., 423 (1949).

<sup>47</sup> See *supra* p. 345. For cases to the contrary see 9 A.L.R. (2d) 623 (1950).

<sup>48</sup> *Morrill v. Morrill*, 83 Conn. 479, 77 A. 1, 6 (1910). See also STUMBERG, *CONFLICT OF LAWS*, 2d ed., 328 (1951). Stumberg, *id.* at 329, n. 23, suggests, however, that changed conditions should induce refusal of recognition "only exceptionally."

<sup>49</sup> *In re Svoboda's Guardianship*, 92 Cal. App. (2d) 136, 206 P. (2d) 672 (1949). Cf. this writer's comment in 2 *SURVEY OF CALIFORNIA LAW* 120 (1950); and in general 9 A.L.R. (2d) 623 (1950); *infra* note 95.

pretense of recognizing foreign decrees on grounds of either full faith and credit or comity, and have claimed complete discretion in re-examining the merits of such decrees. While as late as 1944 Professor Stansbury mentioned only three cases under this third category in recognition cases,<sup>50</sup> the reports of the past few years are replete with such decisions.

This approach<sup>51</sup> has been adopted most emphatically by the Supreme Court of Kansas. As recently as 1951 this court reviewed its practice to this effect in the case of *Moyer v. Moyer*<sup>52</sup> and, while enforcing a California decree, protested its complete freedom to disregard foreign awards. The court quoted with approval the following statement in *Wear v. Wear*<sup>53</sup>: "As between the parents themselves, they may be bound by a former adjudication . . . but the state, in its relation of *parens patriae*, looks to the welfare of the child at the time the inquiry is being made, and for that purpose former adjudications between parents is evidenciary [sic] only and not controlling."<sup>54</sup> This construction of a prior custody decree as not being *res judicata* as to the child goes back to the much cited case of *In re Bort*<sup>55</sup> where the Kansas court, as early as 1881, expressly repudiated the application of the full faith and credit clause to foreign custody decrees in relation to the child. Since both the *Wear* and the *Bort* cases have since been approved and applied in several other Kansas cases,<sup>56</sup> there can be no doubt but that complete freedom in the examination of foreign custody decrees is still the rule in Kansas.<sup>57</sup>

<sup>50</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW & CONTEMP. PROB. 819 at 829, n. 75 (1944); *People ex rel. Herzog v. Morgan*, 287 N.Y. 317, 39 N.E. (2d) 255 (1942); *Cooke v. Cooke*, 67 Utah 371, 248 P. 83 (1926); *Ex parte Burns*, 194 Wash. 293, 77 P. (2d) 1025 (1938).

<sup>51</sup> Explanations vary greatly. It is said that custody decrees are not "final," that they concern personal rather than property rights, that the child's interests are paramount, that the state is a necessary party, or that the child was not a party to the prior award. For authorities and criticism see note, 53 HARV. L. REV. 1024 at 1029 (1940). Cf. note 80 UNIV. PA. L. REV. 712 at 717 (1932), advocating the Kansas rule, which in note 81 UNIV. PA. L. REV. 970 at 973 (1933), is called "wrong under any civilized conflict of laws principles."

<sup>52</sup> *Moyer v. Moyer*, 171 Kan. 495, 233 P. (2d) 711 (1951).

<sup>53</sup> *Wear v. Wear*, 130 Kan. 205, 285 P. 606 (1930).

<sup>54</sup> *Id.* at 224. The court cited *Avery v. Avery*, 33 Kan. 1, 5 P. 418 (1885), and *In re Hamilton*, 66 Kan. 754, 71 P. 817 (1903).

<sup>55</sup> *In re Bort*, 25 Kan. 308 (1881). See note, 80 UNIV. PA. L. REV. 712 (1932).

<sup>56</sup> Without referring to *In re Bort*, the court in *Rodgers v. Rodgers*, 56 Kan. 483, 43 P. 779 (1896), stated: ". . . it will not be claimed that the title to land or the custody of children in one state can be settled by the decree of the courts of another . . ." (at 488). See *Woodall v. Alexander*, 107 Kan. 632, 193 P. 185 (1920); *Kruse v. Kruse*, 150 Kan. 946, 96 P. (2d) 849 (1939); *White v. White*, 160 Kan. 32, 159 P. (2d) 461 (1945).

<sup>57</sup> But cf. STUMBERG, CONFLICT OF LAWS, 2d ed., 330 (1951), stating that *In re Bort*, 25 Kan. 308 (1881), was modified by *White v. White*, 160 Kan. 32, 159 P. (2d) 461

While some states similarly inclined may have abandoned this liberal approach presumably under the weight of contrary authority,<sup>58</sup> at least one prominent court has recently indicated its willingness to restore its earlier repudiation of full faith and credit to foreign custody decrees. In *Boardman v. Boardman*<sup>59</sup> the highest court of Connecticut has, with apparent approval, referred to the practice of "a number of courts" which feel entitled to modify a foreign custody decree in the interest of the child's welfare "even without proof of a change of circumstances."<sup>60</sup> And the Court of Appeals for the District of Columbia seems to entertain the same view,<sup>61</sup> as do probably the courts of Florida,<sup>61a</sup> Nebraska,<sup>61b</sup> New Jersey<sup>62</sup> and Pennsylvania<sup>63</sup> as well as those of New York.

(1945). In the latter case, the court, however, while giving effect to a foreign decree in a case involving an obvious attempt at evasion, and paying lip service to the *Restatement*, expressly approved *In re Bort*, supra, as well as *Wear v. Wear*, 130 Kan. 205, 285 P. 606 (1930), and *Kruse v. Kruse*, 150 Kan. 946, 96 P. (2d) 849 (1939). *Moloney v. Moloney*, 163 Kan. 597, 185 P. (2d) 167 (1947), being based on estoppel, is not to the contrary. Nor is *Moloney v. Moloney*, 167 Kan. 444, 206 P. (2d) 1076 (1949), which, while purporting to approve the *Restatement* rule, actually denies recognition because of changed circumstances.

<sup>58</sup> See, e.g., *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E. (2d) 884 (1949), where the North Carolina court, relying on *Ex parte Means*, 176 N.C. 307, 97 S.E. 39 (1918), ignored the "free discretion" case of *In re Alderman*, 157 N.C. 507, 73 S.E. 126 (1911). But cf. *In re Biggers*, 228 N.C. 743, 47 S.E. (2d) 32 (1948), citing the *Alderman* case with approval (infra note 139); *Allman v. Register*, 233 N.C. 531, 64 S.E. (2d) 861 (1951) (infra note 72); and *Gofford v. Phelps*, 235 N.C. 218, 69 S.E. (2d) 313 (1952).

<sup>59</sup> *Boardman v. Boardman*, 135 Conn. 124, 62 A. (2d) 521 (1948). Noted in 24 N.Y. UNIV. L.Q. REV. 615 (1949); 13 ALBANY L. REV. 75 (1949); 23 CONN. B.J. 68 (1949); Graveson, "Boardman v. Boardman through English Eyes," 23 CONN. B.J. 173 (1949); Rheinstein, "Jurisdiction in Matters of Child Custody," 26 CONN. B.J. 48 (1952).

<sup>60</sup> *Boardman v. Boardman*, 135 Conn. 124 at 137, 62 A. (2d) 521 (1948), citing *In re Bort*, 25 Kan. 308 (1881); *Barnett v. Blakeley*, 202 Iowa 1, 209 N.W. 412 (1926) [noted 25 MICH. L. REV. 536 (1927)] (apparently obsolete in the light of recent authority, infra note 146); *In re Stockman*, 71 Mich. 180 at 193, 38 N.W. 876 (1888) [concerning a guardianship and cited in cases in effect recognizing foreign decrees, such as *Ex parte Peddicord*, 269 Mich. 142, 256 N.W. 833 (1934)]. The court also referred to its own decision to the same effect in *Dunham v. Dunham*, 97 Conn. 440, 117 A. 504 (1922), stating with apparent regret that that decision was not reconcilable with its later decision in *Freund v. Burns*, 131 Conn. 380, 40 A. (2d) 754 (1944). *White v. White*, 138 Conn. 1, 81 A. (2d) 450 (1951), is inconclusive in this respect. See infra note 145.

<sup>61</sup> See *Langan v. Langan*, (D.C. Cir. 1945) 150 F. (2d) 979; *Boone v. Boone*, (D.C. Cir. 1945) 150 F. (2d) 153. See also infra note 132.

<sup>61a</sup> *Little v. Franklin*, (Fla. 1949) 40 S. (2d) 768. For other Florida cases see infra notes 153 and 157.

<sup>61b</sup> See *Application of Reed*, 152 Neb. 819, 43 N.W. (2d) 161 (1950).

<sup>62</sup> *Ex parte Erving*, 109 N.J. Eq. 294, 157 A. 161 (1931) relying on: *In re Alderman*, 157 N.C. 507, 73 S.E. 126 (1911); *Wear v. Wear*, 130 Kan. 205, 285 P. 606 (1930); *Geary v. Geary*, 102 Neb. 511, 167 N.W. 778 (1918) and *People v. Allen*, 105 N.Y. 628, 11 N.E. 143 (1883). Cf. note 32 COL. L. REV. 383 (1932). See also *Hachez v. Hachez*, 124 N.J. Eq. 442, 1 A. (2d) 845 (1938); *Ex parte Olcott*, supra note 21; and *Brown v. Parsons*, 136 N.J. Eq. 493, 42 A. (2d) 852 (1945) relying on the *Erving* case.

<sup>63</sup> *Commonwealth ex rel. Rogers v. Daven*, 298 Pa. 416, 148 A. 524 (1930) expressly

It is true that the court of appeals of the last state in at least one leading decision<sup>64</sup> seemed to establish a rigid requirement of full faith and credit to foreign decrees.<sup>65</sup> Recently, however, the lower courts have shown their inclination to return to the doctrine announced in *People v. Allen*<sup>66</sup> and reaffirmed in *People ex rel. Herzog v. Morgan*<sup>67</sup> according to which, in Judge Loughran's words, a foreign custody decree cannot diminish "the prerogative of the New York Supreme Court as *parens patriae*."<sup>68</sup> In fact these courts have taken pains to stress their freedom from full faith and credit even in those numerous cases in which, for special typical reasons, more realistic than "lack of jurisdiction" or "absence of change of circumstances," they have preferred to make their awards in conformity with foreign decrees, as where they have chosen to enforce stipulations between the spouses<sup>69</sup> or foreign decrees evaded by abduction.<sup>70</sup>

adhering to the Kansas rule, *supra* note 52 et seq. and quoting with approval *In re Alderman*, 157 N.C. 507, 73 S.E. 126 (1911), has apparently never been overruled. The Pennsylvania Annotations to CONFLICT OF LAWS RESTATEMENT §147 consider this practice reconcilable with the *Restatement* doctrine. Cf. to the same effect *Commonwealth ex rel. Graham v. Graham*, 167 Pa. Super. 470, 75 A. (2d) 614 (1950), *revd.* on other grounds 367 Pa. 553, 80 A. (2d) 829 (1951). [The last decision can perhaps be rationalized on the ground that it resulted in the child remaining within the court's jurisdiction.] See in general Sweeney, "Habeas Corpus—Custody of Children," 22 TEMPLE L.Q. 289 (1949). There are, however, some indications of a "clean hands" approach. See *infra* note 143.

<sup>64</sup> *Ansorge v. Armour*, 267 N.Y. 492, 196 N.E. 546 (1935).

<sup>65</sup> Cf. *In re Forbell*, 198 Misc. 753, 103 N.Y.S. (2d) 242 (1950); and *People ex rel. Tull v. Tull*, 245 App. Div. 508, 283 N.Y.S. 183 (1935), *affd.* 270 N.Y. 619, 1 N.E. (2d) 359 (1936) (foreign proceedings instituted by petitioner). Cf. note, 15 BROOKLYN L. REV. 290 at 293 (1949).

<sup>66</sup> *People ex rel. Allen v. Allen*, 105 N.Y. 628, 11 N.E. 143 (1887). See *infra* note 84.

<sup>67</sup> *People ex rel. Herzog v. Morgan*, 287 N.Y. 317, 39 N.E. (2d) 255 (1942).

<sup>68</sup> *Id.* at 320. Cf. *Ehrenpreis v. Ehrenpreis*, 106 N.Y.S. (2d) 568 (1951), erroneously invoking *Ansorge v. Armour*, 267 N.Y. 492, 196 N.E. 546 (1935), for this proposition. See also *infra* notes 69, 70, 72.

<sup>69</sup> Cf. *In re Bagon*, 277 App. Div. 1056, 100 N.Y.S. (2d) 745 (1950); *Application of Finston*, 275 App. Div. 928, 90 N.Y.S. (2d) 201 (1948); *Kudrna v. Kudrna*, 88 N.Y.S. (2d) 53 (1949); *In re Hellman*, 266 App. Div. 290, 42 N.Y.S. (2d) 53 (1943), *affd.* 291 N.Y. 792, 53 N.E. (2d) 368 (1944); *People ex rel. Michael v. Michael*, 188 Misc. 901, 69 N.Y.S. (2d) 694 (1947); *Ex parte Kananack*, 272 App. Div. 783, 69 N.Y.S. (2d) 889 (1947). Cf. *In re Harless*, 192 Misc. 5, 80 N.Y.S. (2d) 98 (1948) (involving support order); *Application of Jiranek*, 183 Misc. 704, 51 N.Y.S. (2d) 849 (1944), modified on other grounds 269 App. Div. 709, 54 N.Y.S. (2d) 36 (1945) (but invalidating agreement to permit child to elect custodian).

<sup>70</sup> See *Forbell v. Forbell*, 276 App. Div. 785, 93 N.Y.S. (2d) 1 (1949); and again *In re Forbell*, 198 Misc. 753, 103 N.Y.S. (2d) 242 (1950), *affd.* 278 App. Div. 953, 105 N.Y.S. (2d) 992 (1951); *People ex rel. Kniffin v. Kniffin*, 184 Misc. 545, 56 N.Y.S. (2d) 108 (1945). But cf. *Young v. Roe*, 265 App. Div. 858, 37 N.Y.S. (2d) 714 (1942).

### B. Recognition of Foreign Awards

In view of the latitude which courts have claimed and practiced in denying recognition to foreign decrees, rationalization of the cases granting such recognition seems difficult. Indeed, we find the reasons given by the courts to be as varied and shifting as those given for non-recognition, and as badly in need of a more realistic formulation.

Professor Stansbury mentions only one case in which the court in effect enforced a foreign decree by denying its own *jurisdiction*.<sup>71</sup> Though, since then, there have been several similar decisions,<sup>72</sup> courts refusing to re-examine foreign custody awards for reasons further to be analyzed, have, in the vast majority of cases, tacitly or expressly, assumed their, at least concurrent, jurisdiction, and declared themselves bound by such awards by full faith and credit or otherwise, because of the absence of a *change of circumstances*.

Constitutional full faith and credit as a basis of decision appears as early as 1872 when in *Wakefield v. Ives*,<sup>73</sup> custody was awarded in accordance with a foreign divorce decree with express reference to that rule.<sup>74</sup> Equally early a similar compulsion was found outside the Constitution in *Bennett v. Bennett*<sup>75</sup> where, in 1867, a federal district court sitting in Oregon, held a California decree "conclusive upon the parties to it, throughout the United States,"<sup>76</sup> and in those many cases in which "comity" was accorded to foreign decrees.

Since that time the question of the basis of recognition has remained unresolved with the courts interchangeably using available language. The Supreme Court of the United States, in the only case dealing with this problem, has signally failed to decide the issue. In fact, majority opinion and dissent reflect the Court's division on this point.

<sup>71</sup> *Jones v. McCloud*, 19 Wash. (2d) 314, 142 P. (2d) 397 (1943). See *infra* at note 120 et seq.

<sup>72</sup> Cf. *In re Forbell*, 198 Misc. 753, 103 N.Y.S. (2d) 242 (1950) (*supra* note 70); *In re Morgan*, 192 Misc. 352, 80 N.Y.S. (2d) 472 (1948), modified on other grounds 301 N.Y. 127, 93 N.E. (2d) 336 (1950); *Farrell v. Ellsworth*, 52 N.Y.S. (2d) 513 (1944); *Allman v. Register*, 233 N.C. 531, 64 S.E. (2d) 86 (1951) (*supra* note 58); *Sadler v. Sadler*, 234 N.C. 49, 65 S.E. (2d) 345 (1951); *supra* notes 69 and 70.

<sup>73</sup> *Wakefield v. Ives*, 35 Iowa 238 (1872). This approach seems to have been retained in Iowa. See *infra* note 166.

<sup>74</sup> *Id.* at 240. See also 1 WHARTON, CONFLICT OF LAWS, 2d ed., 530 (1905). There has been much early doubt as to the effect of the full faith and credit clause upon foreign judgments. Cf., e.g., *Pawling v. Bird's Exrs.*, 13 Johns. Rep. 192, 205 (Sup. Ct. N.Y. 1816).

<sup>75</sup> *Bennett v. Bennett*, 3 Fed. Cas. 212 (1867).

<sup>76</sup> *Id.* at 214.

In *New York ex rel. Halvey v. Halvey*<sup>77</sup> the Court, affirming a New York order which had modified a Florida custody award, denied violation of the full faith and credit clause of the Constitution on the narrow ground that Florida law would have permitted this modification and "what Florida could do modifying the decree, New York may do."<sup>78</sup> Expressly reserving decision "whether the power of New York to modify the custody decree was greater than Florida's power,"<sup>79</sup> the Court refrained from examining the applicability of the full faith and credit clause to custody decrees as such. Justice Frankfurter, however, while concurring on other grounds, would have expressly denied New York courts the right "on independent consideration" to modify the Florida decree without reliance on "changed circumstances,"<sup>80</sup> thus implying his acceptance of full faith and credit to custody decrees of sister states.<sup>81</sup>

That Justice Frankfurter's proposition would not, any more than the majority's presumably contrary approach, solve the problem has been pointed out above. Even formal recognition of full faith and credit to foreign custody decrees would leave courts quite free to disregard such decrees at will, with neither "jurisdiction" nor "change of circumstances" rationalizing the division of authority. Only a *factual* analysis of the case law can reveal the courts' real motivation and thus promote the understanding and the predictability of their decisions. This analysis is here attempted.

## II. THE TRUE RULE

### A. "Clean Hands"

We have seen, and it should be obvious, that custody decrees require special treatment for purposes of foreign recognition. Not only are such decrees subject to change at any time but consideration for the child's welfare precludes the settlement of a dispute between hostile spouses from becoming binding on their child which has lacked independent representation in these proceedings. The primary principle in this field should be, therefore, and is in fact, the court's discretion exclusively governed by the child's welfare. Contrary to the *Restatement* rule, neither full faith and credit nor comity can be expected or

<sup>77</sup> *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903 (1947).

<sup>78</sup> *Id.* at 614.

<sup>79</sup> *Id.* at 615.

<sup>80</sup> *Id.* at 616, 617.

<sup>81</sup> But cf. Justice Stone's dissent in *Yarborough v. Yarborough*, 290 U.S. 202 at 213, 214, 54 S.Ct. 181 (1933).

given at the expense of this discretion beyond the weight given to prior domestic decrees.

There is one type of case, however, in which a deviation from this principle by the practice of "comity" seems required in the interest of both the child and society, and where the Kansas rule of full discretion does not represent either existing or desirable law. This is the case of the parent who, dissatisfied with a custody award, seeks a redetermination of the issue in the court of another state. To encourage such scheming is clearly harmful particularly where the second court's jurisdiction has been obtained in bad faith. It is true that the parent's wrong by itself should not preclude a solution dictated by the child's interest, and many courts have so said. But as Professor Stansbury suggested, even without regard to any wrong done, "stability of environment . . . in itself is an important factor in the welfare of the child."<sup>82</sup>

That this factor has been widely taken into account is generally conceded. But what is not known is the predominant significance of this factor in custody cases, revealed by the case analysis here undertaken. It appears from this analysis that, on the one hand, in most cases in which courts have refused to re-examine foreign custody decrees, the spouse seeking such re-examination was a fugitive from the state issuing such decree; and that, on the other hand, this element was usually absent where courts consented to the use of their independent discretion. It is here, and only here, that the *Restatement* rule may claim validity.

Thus, it is not surprising to find that the very cases relied on by Professor Beale for his (general) recognition rule were decided against a spouse defying the foreign court.<sup>83</sup> So was the early recognition case of *People v. Allen*<sup>84</sup> where the court's apprehension that the father might "again surreptitiously remove the children to another State"<sup>85</sup> probably determined the court in refuting the Kansas doctrine of free discretion. In the even earlier case of *Taylor v. Jeter*<sup>86</sup> the court had expressly refused to avail itself "of a tort to wrest from [the court] of

<sup>82</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW & CONTEMP. PROB. 819 at 829, n. 76 (1944).

<sup>83</sup> *Supra* note 14.

<sup>84</sup> *People ex rel. Allen v. Allen*, 40 Hun 611 (N.Y. 1886), appeal dismissed on other ground 105 N.Y. 628, 11 N.E. 143 (1887).

<sup>85</sup> *People ex rel. Allen v. Allen*, 40 Hun 611 at 621 (N.Y. 1886); *supra* note 66.

<sup>86</sup> *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202 (1862). For more recent Georgia cases see *infra* note 133.

a sister State a jurisdiction properly appertaining" to it.<sup>87</sup> And analysis of the subsequent practice permitted Professor Stansbury to report that in more than one-half of the cases examined by him in which the custody orders of a sister state were respected and carried out, the child had been abducted from the complaining parent or brought into the forum in defiance of such orders,<sup>88</sup> or retained by the resident parent on the occasion of a casual visit or health pilgrimage to the forum.<sup>89</sup> Professor Stansbury's additional finding that, on the other hand, the bulk of the cases in which recognition of a foreign custody decree was refused without the showing of changed circumstances, concerned foreign divorce decrees attempting to affect either a custody lawfully held by a resident of the forum or concerning a resident child,<sup>90</sup> further supports the assumption that the petitioner's "clean hands" are the most important criterion for the application for any one of the tools available to courts desirous of re-examining the merits of a foreign decree.

In recent years decisions granting full faith and credit or comity to decrees of foreign courts disobeyed by the losing parent have been numerous. In fact, such decisions constitute about two-thirds of the approximately fifty cases which since 1944 (the year of Professor Stansbury's conclusions) have wholly or partly refused re-examination of foreign decrees. If these cases are added to those in which re-examination was actually decided upon, substantially less than fifteen per cent of recent custody cases can be held to support the *Restatement* rule requiring on principle recognition of foreign decrees.

<sup>87</sup> 33 Ga. 195 at 203.

<sup>88</sup> Stansbury, "Custody and Maintenance Law Across State Lines," 10 LAW & CONTEMP. PROB. 819 at 829 (1944), citing the following cases: *Burns v. Shapley*, 16 Ala. App. 297, 77 S. 447 (1917); *State v. Black*, 239 Ala. 644, 196 S. 713 (1940); *Ex parte Livingston*, 108 Cal. App. 716, 292 P. 285 (1930); *Drake v. Drake*, 187 Ga. 423, 1 S.E. (2d) 573 (1939); *Stafford v. Stafford*, 287 Ky. 804, 155 S.W. (2d) 220 (1941); *Evens v. Keller*, 35 N.M. 659, 6 P. (2d) 200 (1931); *Chapman v. Walker*, 144 Okla. 83, 289 P. 740 (1930); *Jones v. McCloud*, 19 Wash. (2d) 314, 142 P. (2d) 397 (1943). See also *supra* note 14.

<sup>89</sup> *Foster v. Foster*, 8 Cal. (2d) 719, 68 P. (2d) 719 (1937); *Wear v. Wear*, 130 Kan. 205, 285 P. 606 (1930); *Hachez v. Hachez*, 124 N.J. Eq. 442, 1 A. (2d) 845 (1938); *Kenner v. Kenner*, 139 Tenn. 211, 201 S.W. 779 (1917).

<sup>90</sup> *Ex parte Inman*, 32 Cal. App. (2d) 130, 89 P. (2d) 421 (1939); *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 27 P. (2d) 1038 (1933); *Duryea v. Duryea*, 46 Idaho 512, 269 P. 987 (1928); *Kruse v. Kruse*, 150 Kan. 946, 96 P. (2d) 849 (1940); *Ex parte Peddicord*, 269 Mich. 142, 256 N.W. 833 (1934); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S.W. (2d) 165 (1938); *Elliott v. Elliott*, 181 Ga. 545, 182 S.E. 845 (1935); *MacNeill v. McElroy*, 193 Ga. 55, 17 S.E. (2d) 169 (1941); *McAdams v. McFerron*, 180 Miss. 644, 178 S. 333 (1938); *Bourn v. Hinsey*, 134 Fla. 404, 183 S. 614 (1938).



An analysis of the case laws of those states in which the recognition of foreign custody awards has been most frequently or significantly litigated in recent years will illustrate the increasing relevance of what I have termed the doctrine of "clean hands."

### B. California

Since the supreme court of the state, in its recent foreign custody decision of *Sampsell v. Superior Court*,<sup>91</sup> despite much excellent language, failed to decide the full faith and credit issue, the lower courts have continued to rely for guidance on *Foster v. Foster*<sup>92</sup> which since 1937 has been the leading authority in this field.

In that case the supreme court, refusing to modify a South Dakota decree dividing custody between the two parents, approved several statements which seem to support the proposition that "a decree of a court of one state having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and, subject of course to the right of the parties to show a change of circumstances or conditions, entitled to recognition in another state."<sup>93</sup> Though, moreover, the trial court's assumption that "the decree of the South Dakota court was entitled to full faith and credit"<sup>94</sup> was held correct "on ample authority," the supreme court does not seem to have thought in terms of constitutional compulsion. This becomes entirely clear from the court's remark that this rule was not "absolutely iron-clad" but that there might be cases in which, even in the absence of a change of circumstances, "the welfare of the child might require that the previous order of custody be changed."<sup>95</sup> It is apparently by virtue of this limitation that the District Court for the Second District

<sup>91</sup> *Sampsell v. Superior Court*, 32 Cal. (2d) 763, 197 P. (2d) 739 (1948), recognizing "concurrent jurisdiction" in interstate cases. But see as to intrastate conflicts *Greene v. Superior Court*, 37 Cal. (2d) 307, 231 P. (2d) 821 (1951). Cf. my comments in 1 SURVEY OF CALIFORNIA LAW 99 (1949); 2 id. 121 (1940); 3 id. 144 (1951).

<sup>92</sup> *Foster v. Foster*, 8 Cal. (2d) 719, 68 P. (2d) 719 (1937). See in general, note 37 CALIF. L. REV. 455 (1949).

<sup>93</sup> *Foster v. Foster*, 8 Cal. (2d) 719 at 727 (1937), quoting with approval the quotation, in *In re Livingston*, 108 Cal. App. 716, 292 P. 285 (1930), of *In re Marshall*, 100 Cal. App. 284, 279 P. 834 (1929).

<sup>94</sup> *Foster v. Foster*, 8 Cal. (2d) 719 at 728 (1937).

<sup>95</sup> *Ibid.* See also *Lerner v. Superior Court*, (Cal. 1952) 242 P. (2d) 321 at 324, assuming that a "California decree would receive the same respect in other states that foreign custody decrees receive in our courts."

felt justified in *Dotsch v. Grimes*,<sup>96</sup> to affirm the modification of an Ohio decree without requiring proof of a change of circumstances, relying inter alia on the language of the supreme court in *Titcomb v. Superior Court*,<sup>97</sup> approved in the *Foster* case,<sup>98</sup> to the effect that in the absence of a change of circumstances the court "may," rather than "must," refuse to decree a change of custody.<sup>99</sup> And we should note in this connection that several older cases claiming the court's free discretion unhampered by full faith and credit have never been disapproved.<sup>100</sup> In the light of this interpretation of the *Foster* case those decisions of the courts for the First<sup>101</sup> and Second<sup>102</sup> Districts, which have relied on the *Foster* case as postulating full faith and credit for foreign decrees, require a rationalization to be gained only from a further factual analysis. It is submitted that this analysis supports the "clean hands" approach here suggested.

Beginning in 1945 with *Guardianship of Cameron*,<sup>103</sup> California courts, in most if not all cases in which foreign custody decrees were recognized or enforced, have so held against a spouse defying the foreign decree. This was true in *In re Kyle*,<sup>104</sup> as it was in *In re Bauman*,<sup>105</sup> where Judge Peters pointed out expressly that "the

<sup>96</sup> *Dotsch v. Grimes*, 75 Cal. App. (2d) 418, 171 P. (2d) 506 (1946).

<sup>97</sup> *Titcomb v. Superior Court*, 220 Cal. 34 at 39, 29 P. (2d) 206 (1934).

<sup>98</sup> *Foster v. Foster*, 8 Cal. (2d) 719 at 728 (1937).

<sup>99</sup> *Dotsch v. Grimes*, 75 Cal. App. (2d) 418 at 420, 171 P. (2d) 506 (1946).

<sup>100</sup> *In re Kyle*, 77 Cal. App. (2d) 634, 176 P. (2d) 96 (1947), giving full faith and credit in a case of abduction, disposes of three of these cases [*Anthony v. Tarpley*, 45 Cal. App. 72 at 79, 187 P. 779 (1919); *Warren v. Warren*, 127 Cal. App. 231, 15 P. (2d) 556 (1932); *In re Culp*, 2 Cal. App. 70, 83 P. 89 (1905)] as containing mere dicta to the opposite effect. See also *Di Giorgio v. Di Giorgio*, 87 Cal. App. (2d) 576, 197 P. (2d) 213 (1948), failing to discuss authority and never relied on subsequently in a conflicts case (*infra* note 161).

<sup>101</sup> *In re Dean*, 90 Cal. App. (2d) 177, 202 P. (2d) 845 (1949); *In re Bauman*, 82 Cal. App. (2d) 359, 186 P. (2d) 384 (1947); *In re Kyle*, 77 Cal. App. (2d) 634, 176 P. (2d) 96 (1947).

<sup>102</sup> *In re Brown*, 90 Cal. App. (2d) 651, 203 P. (2d) 799 (1949); *Koebrich v. Simpson*, 87 Cal. App. (2d) 848, 197 P. (2d) 820 (1948); *In re Memmi*, 80 Cal. App. (2d) 295, 181 P. (2d) 885 (1947); *Guardianship of Cameron*, 66 Cal. App. (2d) 884, 153 P. (2d) 385 (1944).

<sup>103</sup> *Guardianship of Cameron*, 66 Cal. App. (2d) 884, 153 P. (2d) 385 (1944), relying on *Foster v. Foster*, 8 Cal. (2d) 719, 68 P. (2d) 719 (1937), and *In re Wenman*, 33 Cal. App. 592, 165 P. 1024 (1917).

<sup>104</sup> *In re Kyle*, 77 Cal. App. (2d) 634, 176 P. (2d) 96 (1947), relying on *Foster v. Foster*, 8 Cal. (2d) 719 (1937) (mother unlawfully retaining children).

<sup>105</sup> *In re Bauman*, 82 Cal. App. (2d) 359, 186 P. (2d) 384 (1947), relying on *Foster v. Foster*, 8 Cal. (2d) 719 (1937), and *In re Kyle*, 77 Cal. App. (2d) 634 (1947).

'changed circumstances' required by the rule cannot be that the mother has improperly and in violation of a court order removed the child to another state.<sup>106</sup> And the clean hands rationale of recognition was reiterated in the next case of *In re Memmi*<sup>107</sup> where the court found itself "faced with a situation wherein the minor child was brought into this state in defiance of a decree of a court of competent jurisdiction of a sister state."<sup>108</sup> Again, in *Koebrich v. Simpson*,<sup>109</sup> in the same year, full faith and credit under the Federal Constitution was expressly based on the fact that the child "had been brought here wrongfully by petitioner for the purpose of avoiding and circumventing the decree of the New Mexico court."<sup>110</sup> *Foster v. Foster* was distinguished on that ground.<sup>111</sup>

Finally, several cases most recently decided, while not expressly relying on the fact of defiance, mention this fact more or less prominently.<sup>112</sup> Even the District Court for the Third District which so far has shown some reluctance against committing itself to this practice indicated in at least one recent case that it might give decisive weight to defiance to a foreign decree.<sup>113</sup>

No additional case authority seems needed to support the proposition that California courts will recognize and enforce foreign custody

<sup>106</sup> *In re Bauman*, supra note 105, at 364.

<sup>107</sup> *In re Memmi*, 80 Cal. App. (2d) 295, 181 P. (2d) 885 (1947), relying on *In re Wenman*, 33 Cal. App. 592, 165 P. 1024 (1917); *In re Marshall*, 100 Cal. App. 284, 279 P. 834 (1929), and *In re Kyle*, 77 Cal. App. (2d) 634, 176 P. (2d), supra note 104.

<sup>108</sup> *In re Memmi*, supra note 107, at 300.

<sup>109</sup> *Koebrich v. Simpson*, 87 Cal. App. (2d) 848, 197 P. (2d) 820 (1948), relying on *Foster v. Foster*, 8 Cal. (2d) 719 (1937); *Chapman v. Walker*, 144 Okla. 83, 289 P. 740 (1930); *McMillin v. McMillin*, 114 Colo. 247, 158 P. (2d) 444 (1945); *Jones v. McCloud*, 19 Wash. (2d) 314, 142 P. (2d) 397 (1943).

<sup>110</sup> *Koebrich v. Simpson*, supra note 109, at 849.

<sup>111</sup> *Id.* at 850. But cf. *Lerner v. Superior Court*, 242 P. (2d) 321 at 324, where disobedience in the *Foster* case to the South Dakota decree was stressed.

<sup>112</sup> *In re Brown*, 90 Cal. App. (2d) 651, 203 P. (2d) 799 (1949), relying on *Foster v. Foster*, 8 Cal. (2d) 719 (1937); *In re Dean on behalf of Swindall*, 90 Cal. App. (2d) 177, 202 P. (2d) 845 (1949), relying on *In re Bauman*, supra note 105; *Foster v. Foster*, supra; *In re Kyle*, supra note 107.

<sup>113</sup> Application of *Kosh*, 105 Cal. App. (2d) 418, 233 P. (2d) 598 (1951), granting custody to a mother in modification of an Illinois decree, although the mother had departed with the child during the Illinois proceedings. The court pointed out, however, that she was then "under no restraint" from the Illinois court. *Id.* at 423. *In Brown v. Brown*, 104 Cal. App. (2d) 88, 230 P. (2d) 651 (1951), the same court, while refusing recognition notwithstanding the petitioner's malfeasance, was apparently at least partially determined by the fact that the foreign court itself had failed to give full faith and credit to a prior California decree.

decrees without re-examination of their merits mainly, if not exclusively, in view of a malfeasance by the parent seeking such re-examination. But we may also refer to those cases in which courts have refused such recognition or enforcement and insisted on an independent examination of the merits. It will be found that in nearly all such cases the element of malfeasance was absent. Thus, the only recent case where the court, notwithstanding several pronouncements to the contrary, in effect denied the applicability of the full faith and credit clause to custody decrees, modification was sought and obtained by a bona fide resident.<sup>114</sup> This was also true in those three older cases which (though distinguished) were relied on by the spouse opposing recognition in the leading case of *In re Kyle*,<sup>115</sup> as well as in a recent decision of the Fourth District where modification of a Florida decree was granted.<sup>116</sup>

In the light of this highly consistent practice of the California courts, *Foster v. Foster*<sup>117</sup> must, I believe, be read as establishing the principle that foreign custody decrees are subject to an independent re-examination by the California courts in the interest of the child, though this discretion will as a rule not be exercised where the spouse in seeking relief in the courts of California has defied foreign proceedings or decrees. This interpretation of the *Foster* case is further supported by the court's quotation of the "correct rule" in *Crater v. Crater*,<sup>118</sup> according to which in all custody cases "the court, in revising and modifying its decree," inter alia should give weight to "the conduct of the parties."<sup>119</sup>

### C. The Washington Rule

The clearest and most consistent expression, however, has been given to this policy by the Supreme Court of Washington which in an

<sup>114</sup> *Dotsch v. Grimes*, 75 Cal. App. (2d) 418, 171 P. (2d) 506 (1946).

<sup>115</sup> *In re Kyle*, 77 Cal. App. (2d) 634, 176 P. (2d) 96 (1947).

<sup>116</sup> *Di Giorgio v. Di Giorgio*, 87 Cal. App. (2d) 576, 197 P. (2d) 213 (1948).

<sup>117</sup> *Foster v. Foster*, 8 Cal. (2d) 719, 68 P. (2d) 719 (1937).

<sup>118</sup> *Crater v. Crater*, 135 Cal. 633, 67 P. 1049 (1902), quoted in *Foster v. Foster*, supra note 117 at 732.

<sup>119</sup> *Crater v. Crater*, supra note 118, at 634 (Italics added). Support may also be found in Justice Traynor's opinion in *Greene v. Superior Court*, 37 Cal. (2d) 307 at 312, 231 P. (2d) 821 (1951), which though concerning an intrastate conflict and expressly distinguishing interstate recognition, seems pertinent in basing a finding of exclusive jurisdiction on a policy of precluding "search of a court that will alter the custody provisions of a divorce decree." Cf. *ex parte Lukasik*, 108 Cal. App. (2d) 438, 239 P. (2d) 492 (1951).

impressive line of cases has refused to take jurisdiction when requested to modify a foreign custody decree in violation of which the court's action was sought.

The origin and development of this rule was recently reviewed in *Ex parte Mullins*.<sup>120</sup> An Ohio court had granted custody to the mother, limited by certain rights of visitation by the father. When, however, two years later she refused to obey the order to return from a visit to Washington, the Ohio court granted full custody to the father. In habeas corpus proceedings brought by him in Washington the supreme court of that state in a unanimous decision reversed a judgment denying the writ, on the ground that only domiciliary jurisdiction would justify refusal to enforce the Ohio decree; that "all reasonings and ideas of fair play and justice demand a holding that a parent acting in disobedience to an order of a court, cannot secure a new domicile for his or her child",<sup>121</sup> and that "to hold otherwise would be to put a premium upon wrongdoing by allowing a parent to gain an advantage by disobeying the orders of a court."<sup>122</sup> Distinguishing cases seemingly to the contrary,<sup>123</sup> the court mentions, but does not rely on *McClain v. McClain* as the first case taking into account in enforcing a foreign decree at least incidentally,<sup>124</sup> the respondent's malfeasance. For its theory that the disobedient parent, not having acquired a Washington domicile, could not avail himself of the courts of this state to obtain modification of a foreign decree, the court found support in *Motichka v. Rollands*,<sup>125</sup> as it did in *In re Burns*<sup>126</sup> and *Jones v. McCloud*.<sup>127</sup> For its policy against the encouragement of taking children from one jurisdiction to another to defeat a decree of a sister state. And finally,

<sup>120</sup> *Ex parte Mullins*, 26 Wash. (2d) 419, 174 P. (2d) 790 (1946).

<sup>121</sup> *Id.* at 445.

<sup>122</sup> *Id.* at 431.

<sup>123</sup> *Kentzler v. Kentzler*, 3 Wash. 166, 28 P. 370 (1891) (parol evidence as to foreign decree held inadmissible); *In re Groves*, 109 Wash. 112, 186 P. 300 (1919) (no full faith and credit to modification by court of original jurisdiction after lawful removal of child to Washington).

<sup>124</sup> *McClain v. McClain*, 115 Wash. 237, 197 P. 5 (1921) revd. on rehearing 202 P. 173 (1921). The court in that case added (at 174): "Notwithstanding the father's course is to be condemned, yet if we were of the opinion that it were for the best interest of the boy to leave him with the father and stepmother we would so order."

<sup>125</sup> *Motichka v. Rollands*, 144 Wash. 565, 258 P. 333 (1927), followed in *Ex parte Penner*, 161 Wash. 479, 297 P. 757 (1931).

<sup>126</sup> *Ex parte Burns*, 194 Wash. 293, 77 P. (2d) 1025 (1938).

<sup>127</sup> *Jones v. McCloud*, 19 Wash. (2d) 314, 142 P. (2d) 397 (1943), *supra* note 71.

*State ex rel. Marthens v. Superior Court*<sup>128</sup> was held to have furnished a precedent for the court's present holding.

#### D. Other States

At least two jurisdictions have expressly adopted the Washington rule: Tennessee in *State ex rel. French v. French*,<sup>129</sup> and Colorado in *McMillin v. McMillin*.<sup>130</sup> Alabama has independently developed the same approach. In the leading case of *State v. Black* the Supreme Court of Alabama announced that when a child is wrongfully brought into their jurisdiction, the courts, "recognizing the sovereign authority of a sister state in respect thereto, as a matter of comity, will refuse to deal with the question relating to the future welfare of the child. . . ."<sup>130a</sup>

While reserving to themselves full discretion in the interest of the child's welfare, by denying either the applicability of the full faith and credit clause to custody decrees or the foreign court's "jurisdiction," or by a liberal use of the change of circumstances rule, a large number of jurisdictions have clearly shown their inclination to recognize or enforce foreign custody decrees in cases of defiance against such decrees. Arkansas,<sup>131</sup> the District of Columbia,<sup>132</sup> Georgia,<sup>133</sup> Idaho,<sup>133a</sup> Ken-

<sup>128</sup> *Marthens v. Superior Court*, 25 Wash. (2d) 125, 169 P. (2d) 626 (1946).

<sup>129</sup> *State ex rel. French v. French*, 182 Tenn. 606, 188 S.W. (2d) 603 (1945), followed in *Cecil v. State*, 192 Tenn. 74, 237 S.W. (2d) 558 (1951).

<sup>130</sup> *McMillin v. McMillin*, 114 Colo. 247, 158 P. (2d) 444 (1945), relying, in addition to the Washington cases, also on *Guardianship of Cameron*, 66 Cal. App. (2d) 884, 153 P. (2d) 385 (1944). *Accord*, *Crocker v. Crocker*, 122 Colo. 49, 219 P. (2d) 311 (1950) (with significant language). See also *Crocker v. Crocker*, (10th Cir. 1952) 195 F. (2d) 236, *infra* note 149a. *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 27 P. (2d) 1038 (1933), was not to the contrary (as alleged in 107 A.L.R. 642) since it refused recognition to a foreign modification order after removal from the state. See *infra* notes 150, 159.

<sup>130a</sup> *State v. Black*, 239 Ala. 644 at 647, 196 S. 713 (1940), cited with approval on this point in *Moss v. Ingram*, 246 Ala. 214, 20 S. (2d) 202 (1944), and distinguished in *Ferguson v. State*, 251 Ala. 645, 38 S. (2d) 853 (1949) (*infra* note 155). This rule seems to have been consistently adhered to at least since *Burns v. Shapley*, 16 Ala. App. 297, 77 S. 447 (1917), cited with approval in *Lynn v. Wright*, 34 Ala. App. 492, 42 S. (2d) 484 (1949); *Little v. Little*, 249 Ala. 144, 30 S. (2d) 386 (1947).

<sup>131</sup> *Gregory v. Jackson*, 212 Ark. 363, 205 S.W. (2d) 471 (1947) [cited with approval in *Turner v. Dodge*, 212 Ark. 991, 208 S.W. (2d) 467 (1948)], refusing to recognize the modification of an Oregon decree made in the mother's favor after the father had removed the children to Arkansas. By stressing the lawful character of that removal the court may have indicated its approval of the clean hands doctrine. See also *Keneipp v. Phillips*, 210 Ark. 264, 196 S.W. (2d) 471 (1940). For other authorities to the same effect, see note, 2 ARK. L. REV. 78 (1948).

tucky,<sup>134</sup> Mississippi,<sup>135</sup> Missouri,<sup>136</sup> New Mexico,<sup>137</sup> New York,<sup>138</sup> North Carolina,<sup>139</sup> Ohio,<sup>140</sup> Oklahoma,<sup>141</sup> Oregon,<sup>142</sup> Pennsylvania,<sup>143</sup>

<sup>132</sup> Slack v. Perrine, 9 App. D.C. 128 at 155 (1896): "That a litigant, by violating the confidence of the court, and in direct contempt of its authority, can wholly defeat its jurisdiction by absconding with the thing or person that is the subject of contention is an inconceivable proposition." See also Boone v. Boone, (D.C. Cir. 1942) 132 F. (2d) 14, cert. den. 319 U.S. 762 (1943); and also supra note 61. Kirk v. Kirk, (D.C. Cir. 1945) 150 F. (2d) 589, can perhaps be distinguished on the ground that it involved a contest between a (victorious though defiant) mother and a grandmother. See also *infra* note 151.

<sup>133</sup> Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202 (1862). While apparently never more fully expressed in later cases, the clean hands approach probably underlies decisions such as Milner v. Gatlin, 139 Ga. 109, 76 S.E. 860 (1912); Stallings v. Bass, 204 Ga. 3, 48 S.E. (2d) 822 (1948); and even more clearly, Shivers v. Shivers, 206 Ga. 552, 57 S.E. (2d) 660 (1950), and Grant v. Grant, 202 Ga. 40, 41 S.E. (2d) 534 (1947) (denying full faith and credit in an abduction case on grounds of "jurisdiction"). See *infra* note 160.

<sup>133a</sup> See *Ex parte Derr*, 70 Idaho 527, 224 P. (2d) 306 (1950) (modification of Oregon decree where the child "was not brought to the State of Idaho by stealth or fraud or in violation of the terms of the Oregon decree") and cases discussed therein; also Clemens v. Kinsley, (Idaho 1951) 239 P. (2d) 266 (child removed prior to appeal). Cf. *infra* note 159.

<sup>134</sup> Shippen v. Bailey, 303 Ky. 10, 196 S.W. (2d) 425 (1946). While refusing to recognize a ten year old Ohio decree giving custody to the mother, the court ordered the father, a resident of the forum, to surrender the children unlawfully abducted to Louisiana from custody in Pennsylvania, and to seek relief at the children's domicile. The court felt that, though many reasons favored the father in view of the change of several circumstances since the issuance of the Ohio decree, "the manner in which this father obtained the custody of these children cannot under any circumstances be sanctioned by the courts"; and that "to adjudge their custody to him under these circumstances would put the stamp of judicial approval upon that wrongful act" (at 14). See also Stafford v. Stafford, 287 Ky. 804, 155 S.W. (2d) 220 (1941); Frick v. Kaufman, 310 Ky. 829, 222 S.W. (2d) 185 (1949) (decision against father to return the child after temporary visit); notes, 31 Ky. L.J. 287 (1943), 81 UNIV. PA. L. REV. 970 (1933). And cf. Marlar v. Howard, 312 Ky. 209, 226 S.W. (2d) 755 (1949), distinguishing Beutel v. Beutel, 305 Ky. 683, 205 S.W. (2d) 489 (1947), on similar grounds.

<sup>135</sup> See Cole v. Cole, 194 Miss. 292, 12 S. (2d) 425 (1943). For an intrastate application of this principle see Leggett v. Leggett, 202 Miss. 435, 32 S. (2d) 189 (1947). Haynie v. Hudgins, 122 Miss. 838, 85 S. 99 (1920), can probably be distinguished on the ground that the contest was between a parent and a more distant relative. See also Campbell v. Lovgren, 175 Miss. 4, 166 S. 365 (1936).

<sup>136</sup> Wood v. Wood, (Mo. App. 1950) 231 S.W. (2d) 882; *Ex parte Lofts*, (Mo. App. 1949) 222 S.W. (2d) 101; Daugherty v. Nelson, (Mo. App. 1950) 234 S.W. (2d) 353. See also Application of Shreckengast, (Mo. App. 1949) 219 S.W. (2d) 244. Cf. Dawson v. Dawson, (Mo. App. 1951) 241 S.W. (2d) 725.

<sup>137</sup> Wise v. Wise, 55 N.M. 461, 235 P. (2d) 529 (1951); Evens v. Keller, 35 N.M. 659, 6 P. (2d) 200 (1931); note, 81 UNIV. PA. L. REV. 970 (1933). Albright v. Albright, 45 N.M. 302, 115 P. (2d) 59 (1941), may be distinguishable on the ground that that case refused recognition to a foreign modification decree (*infra* note 151); and Mylius v. Cargill, 19 N.M. 278, 142 P. 918 (1914), on the ground that the court justified the children's unlawful removal.

<sup>138</sup> See Forbell v. Forbell, 276 App. Div. 785, 93 N.Y.S. (2d) 1 (1949), *supra* note 70; *People ex rel. Kniffin v. Kniffin*, 184 Misc. 545, 56 N.Y.S. (2d) 108 (1945).

<sup>139</sup> *Allman v. Register*, 233 N.C. 531, 64 S.E. (2d) 861 (1951) (decision against

and Texas<sup>144</sup> would seem to fit into this fast-growing pattern. And there are some indications that Connecticut,<sup>145</sup> Iowa,<sup>146</sup> Kansas,<sup>147</sup> Massachusetts<sup>147a</sup> and Utah<sup>148</sup> might come to join this list which, counting

father retaining visiting children contrary to Virginia decree). Neither support nor rejection of this approach can be had from *Gofford v. Phelps*, 235 N.C. 218, 69 S.E. (2d) 313 (1952) (no foreign jurisdiction); *Sadler v. Sadler*, 234 N.C. 49, 65 S.E. (2d) 345 (1951) (full faith and credit to decree obtained upon petitioner's submission); *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E. (2d) 884 (1949); *In re Biggers*, 228 N.C. 531, 47 S.E. (2d) 32 (1948); or *Ex parte Means*, 176 N.C. 307, 97 S.E. 39 (1918); *supra* note 58. See in general note, 30 N.C. L. REV. 282 (1952).

<sup>140</sup> See *In re Francis*, 75 N.E. (2d) 700 (Ohio Prob.), appeal dismissed 77 N.E. (2d) 289 (1947), where the court denied recognition *inter alia* on the ground that the party seeking such recognition had himself been guilty of defiance to the foreign decree. See also *Anderson v. May*, 157 Ohio St. 436, 105 N.E. (2d) 648 (1952), (app. filed, 21 L.W. 3071) giving full faith and credit to custody decree of Wisconsin court from whose jurisdiction children were unlawfully withheld.

<sup>141</sup> *Hatcher v. Hatcher*, (Okla. 1952) 244 P. (2d) 480; *Remick v. Remick*, 204 Okla. 345, 229 P. (2d) 600 (1951); *Ex parte Miller*, 201 Okla. 499, 207 P. (2d) 290 (1949); *Chapman v. Walker*, 144 Okla. 83 at 84, 289 P. 740 (1930) ("Before the courts of this state will disregard a judgment of a court of a sister state awarding the custody of a minor child, it must be shown that the minor child was brought into this state by a person having the lawful custody thereof"). Cf. *Gaunt v. Gaunt*, 160 Okla. 195, 16 P. (2d) 580 (1932).

<sup>142</sup> See *Lingel v. Maudlin*, 188 Ore. 147, 212 P. (2d) 751 (1949), language to the contrary notwithstanding; and even more clearly *Application of Lorenz*, (Ore. 1952) 241 P. (2d) 142 at 146 ("surreptitious removal of the children from the jurisdiction of the Indiana court"). Cf. *Ex parte Quinn*, (Ore. 1951) 233 P. (2d) 767 at 772 (*dictum*). But see the modification case *Griffin v. Griffin*, 95 Ore. 78, 187 P. 598 (1920).

<sup>143</sup> *Pyles v. Pyles*, 157 Pa. Super. 450, 43 A. (2d) 651 (1945). Cf. *Commonwealth ex rel. Graham v. Graham*, 167 Pa. Super. 470, 75 A. (2d) 614 (1950) *supra* note 63. *Helton v. Crawley*, 241 Iowa 296, 41 N.W. (2d) 60 (1950) mentions four Pennsylvania cases as giving "no controlling consideration to the violation of a court order in the removal of a minor child." *Commonwealth ex rel. Pukas v. Pukas*, 164 Pa. Super. 488, 66 A. (2d) 315 (1949); *Commonwealth ex rel. McTighe v. Lindsey*, 155 Pa. Super. 560, 40 A. (2d) 881 (1945); *In re Rosenthal*, 103 Pa. Super. 27, 157 A. 342 (1931); *Commonwealth ex rel. Sage v. Sage*, 160 Pa. 399, 28 A. 863 (1894). None of these cases involved disobedience to the custody decree of a sister state. Cf. *Cochran's Estate*, 28 Pa. Co. 33 (1902).

<sup>144</sup> In this state several recent lower court decisions follow this trend. See *Roberts v. Tippet*, (Tex. Civ. App. 1951) 239 S.W. (2d) 859; *Burckhart v. Bachrach*, (Tex. Civ. App. 1950) 225 S.W. (2d) 1022; *Mahaffey v. Mahaffey*, (Tex. Civ. App. 1949) 219 S.W. (2d) 519. The Supreme Court of the state, in *Wicks v. Cox*, 146 Tex. 489 at 496, 208 S.W. (2d) 876 (1948), while not concerned with a foreign decree, indicated that it might refuse to follow the practice of those states which do not ". . . decline jurisdiction even where the child is brought into the state in plain violation of a valid court order of another state." [Incidentally the only authority cited for such a practice is 107 A.L.R. 642 which fails to establish this proposition.] This assumption is supported by the court's reliance on *Goldsmith v. Salkey*, 131 Tex. 139, 112 S.W. (2d) 165 (1938), where the court, at 148, in asserting "jurisdiction," stressed the fact that "here the child was rightfully in Texas in the custody of its mother" whose "custody was legal." Exception will apparently be made in favor of spouses disobeying foreign decrees in cases of overruling equitable considerations such as *laches* [*Avenier v. Avenier*, (Tex. Civ. App. 1948) 216 S.W. (2d) 638 (besides involving decree of court of foreign country)]. In *Duncan v. Duncan*, (Tex.



Alabama, California, Colorado, Tennessee and Washington,<sup>149</sup> would, in the virtual absence of authority to the contrary, well be held to represent prevailing authority. This approach is strongly supported by the decision of the Tenth Circuit in *Crocker v. Crocker*<sup>149a</sup> where plaintiff was held entitled to damages for having been temporarily deprived of

Civ. App. 1946) 197 S.W. (2d) 229, the court, while failing to reverse a trial court ruling refusing recognition, referred to that ruling as "somewhat paradoxical." Neither of the cases cited in *Helton v. Crawley*, 241 Iowa 296, 41 N.W. (2d) 60 (1950), as contrary to the clean hands doctrine is in point. *Bowman v. Bridges*, (Tex. Civ. App. 1949) 220 S.W. (2d) 512 at 515, itself refuses to "put a premium on the wrongful act"; and *Black v. Adams*, (Tex. Civ. App. 1948) 214 S.W. (2d) 703, even fails to concern a foreign custody decree. Nor is *Ex parte Birmingham*, (Texas 1952) 244 S.W. (2d) 977, to the contrary, where the court declared irrelevant the surreptitious removal in accordance with a foreign decree. And see *Worden v. Worden*, 148 Tex. 356, 224 S.W. (2d) 187 (1949), affirming an order to restore the child to foreign custody from which it had been removed by force.

<sup>145</sup> See *White v. White*, 138 Conn. 1, 81 A. (2d) 450 (1951) (denial of full faith and credit to a custody decree for the mother after removal of the child without the father's consent), fully discussed by Rheinstein, "Jurisdiction in Matters of Child Custody," 26 CONN. B. J. 48 (1952) [see also notes, 25 CONN. B. J. 413 (1951), 26 CONN. B. J. 41 (1952)]; and dissent in *Boardman v. Boardman*, 135 Conn. 124, 62 A. (2d) 521 (1948). See also supra note 60, infra note 166.

<sup>146</sup> Two judges in *Helton v. Crawley*, 241 Iowa 296 at 331, 41 N.W. (2d) 60 (1950), commending the Washington rule, dissented on the ground that "the majority opinion, while apparently in accord with the weight of authority, . . . is an open invitation to divorced parents, who have had their day in a court of competent jurisdiction, to bring by stealth or force into this state, children to whose custody they have been denied and thus avoid the effect of a legal decree." See also the strong dissent of four judges in *McKee v. McKee*, 239 Iowa 1093, 32 N.W. (2d) 379 (1948), and the opinion by one of the dissenting judges in *McKee v. Murrow*, 241 Iowa 434, 40 N.W. (2d) 924 (1950). For other Iowa decisions see infra notes 166 et seq., and *Pelton v. Halverson*, 240 Iowa 184, 35 N.W. (2d) 759 (1949) (Iowa jurisdiction to change California decree—children in Iowa with petitioner's consent). The 26 cases on which the majority in the *Helton* case relies as giving "controlling consideration to the violation of a court order in the removal of a minor child from a court's jurisdiction," includes cases such as *Ex parte Memmi*, 80 Cal. App. (2d) 295, 181 P. (2d) 885 (1947), or the Pennsylvania (supra note 143) and Texas cases (supra note 144).

<sup>147</sup> *White v. White*, 160 Kan. 32, 159 P. (2d) 461 (1945) (where the court, though protesting its freedom of discretion, in effect enforced a California decree against the defiant resident father); *Moyer v. Moyer*, 171 Kan. 495, 233 P. (2d) 711 (1951) (semble).

<sup>147a</sup> See *Conley v. Conley*, 324 Mass. 530 at 534, 87 N.E. (2d) 153 (1949), maintaining its own jurisdiction against a fugitive father to discourage "the flouting of court decrees and the despicable practice of child snatching"; and *Welker v. Welker*, 325 Mass. 738, 92 N.E. (2d) 373 (1950), modifying a foreign decree favoring a fugitive mother. See also *Henderson v. Henderson*, (Mass. 1952) 107 N.E. (2d) 773.

<sup>148</sup> See *Briggs v. Briggs*, 111 Utah 418, 181 P. (2d) 223 (1947); *Cooke v. Cooke*, 67 Utah 371, 248 P. 83 (1926), cited with approval in *Sampsel v. Holt*, 115 Utah 73, 202 P. (2d) 550 (1949).

<sup>149</sup> See supra notes 130a (Alabama), 91 et seq. (California), 130 (Colorado), 129 (Tennessee) and 120 et seq. (Washington).

<sup>149a</sup> *Crocker v. Crocker*, (10th Cir. 1952) 195 F. (2d) 236.

her child's custody, awarded to her by a court of a sister state, by the child's removal into the trial court's jurisdiction.

### E. *Apparent Exceptions*

To be sure there are a number of cases in which courts have refused to recognize or did recognize custody decrees of sister states without apparent regard to the "clean hands" of the benefiting parent. Close analysis, disregarding inconclusive reasoning in the traditional terms of jurisdiction and change of circumstances, permits, however, classification of a large majority of such cases under other, more realistic, equitable considerations.<sup>150</sup>

1. *Modification despite petitioner's unclean hands.* In *Cook v. Cook*<sup>151</sup> the court awarded custody to a mother contrary to a New York decree although she had, in violation of that decree, refused to return the child after a vacation. We can probably assume that the court, while basing its decision on a "change of circumstances," was determined by the fact that the paternal grandfather had not claimed his rights for a considerable period and had himself violated the prior decree by favoring the father. Similarly, the court in *Helton v. Crawley*<sup>152</sup> or in the *Gilman*<sup>153</sup> case had no misgivings about giving the abducting parent preference over a foster home or a grandparent.<sup>154</sup> Again, in two other cases, similar modifications, though purportedly based on a change of

<sup>150</sup> The writer of the annotation in 107 A.L.R. 642 (1937, no supplement), "after an extensive search," was able to adduce only two cases as supporting the proposition that the child's unlawful removal will not preclude re-examination by the second state of the first decree: *Wagner v. Torrence*, 94 Colo. 47, 27 P. (2d) 1038 (1933), which, however, merely refuses to recognize a foreign decree of modification "as a part of the punishment" of the disobedient parent, a generally accepted rule not bearing upon the here relevant question; (as to more recent Colorado decisions see supra note 130); and *Sheehy v. Sheehy*, 88 N.H. 223, 186 A. 1 (1936) (based on the interpretation of a New Hampshire residence statute). Similarly the note in 32 COL. L. REV. 383 (1932), maintaining a position contrary to the clean hands rule here advocated, refers to cases not here pertinent: In *Barnett v. Blakeley*, 202 Iowa 1, 209 N.W. 412 (1926), a father prevailed over a grandparent; in *Calkins v. Calkins*, 217 Ala. 378, 115 S. 866 (1928), full faith and credit was denied in reliance on the law of the first forum, Kansas (supra note 52 et seq.) (for the law of Alabama see supra note 131). In *Ex parte Leu*, 240 Mich. 240, 215 N.W. 384 (1927), the unlawful retention was not discussed.

<sup>151</sup> *Cook v. Cook*, (D.C. Cir. 1943) 135 F. (2d) 945. Cf. supra note 132.

<sup>152</sup> *Helton v. Crowley*, 241 Iowa 296, 41 N.W. (2d) 60 (1950), discussed note, 5 *MIAMI L.Q.* 312 (1951). Cf. supra note 146, infra note 166 et seq.

<sup>153</sup> *Gilman v. Morgan*, 158 Fla. 605, 29 S. (2d) 372 (1947), cert. den. 331 U.S. 796 (1947). See supra note 61a.

<sup>154</sup> See also supra note 132.

circumstances, were clearly induced by the fact that the mother's malfeasance was held justified by the father's threats<sup>155</sup> or prior waiver.<sup>156</sup> And in *Eddy v. Stauffer*<sup>157</sup> the child's choice was given decisive weight, while in *Brown v. Brown*<sup>158</sup> the first court's failure to give full faith and credit to the forum's decree apparently resulted in retortion.

2. *Nonenforcement despite respondent's unclean hands.* In the course of the present analysis it has appeared repeatedly that a majority of those cases relied on by those courts and writers rejecting the clean hands approach involved the denial of full faith and credit to foreign decrees depriving, on the mere ground of his disobedience,<sup>159</sup> a spouse now within the forum's jurisdiction of a custody previously granted. Indeed, it is submitted that this practice is a general one and should be recognized as an exception to, though not as a refutation of, the clean hands doctrine here suggested. It is further submitted that this exception can be fully rationalized on the ground that courts, though anxious to prevent dissatisfied parents from kidnapping their children for the mere purpose of re-trying a lost cause, are reluctant to execute a discipline imposed by a foreign court without primary regard to the child's welfare.<sup>160</sup>

The case is rare where refusal to recognize a foreign decree violated by that spouse opposing it cannot thus be rationalized.<sup>161</sup> At least in

<sup>155</sup> *Ferguson v. State*, 251 Ala. 645, 38 S. (2d) 853 (1949). Cf. supra note 130a.

<sup>156</sup> *Brown v. Parsons*, 136 N.J. Eq. 493, 42 A. (2d) 852 (1945). Cf. supra note 62.

<sup>157</sup> *Eddy v. Stauffer*, 160 Fla. 944, 37 S. (2d) 417 (1948). Cf. supra notes 61a, 153. On Florida law see note, 1 *UNIV. FLA. L. REV.* 360 (1948); and Alpert, "Custody Incident to Divorce in Florida," 2 *MIAMI L.Q.* 33 (1947).

<sup>158</sup> *Brown v. Brown*, 104 Cal. App. (2d) 88, 230 P. (2d) 651 (1951). Cf. supra note 91 et seq.; also note 22.

<sup>159</sup> See e.g., *People ex rel. Wagner v. Torrence*, 94 Colo. 47, 27 P. (2d) 1038 (1933). See, e.g., supra notes 21, 130, 137; and *Cole v. Cole*, 68 Idaho 561, 201 P. (2d) 98 (1948); *Dawson v. Dawson*, (Mo. App. 1951) 241 S.W. (2d) 725. Cf. *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W. (2d) 566 (1949) (no foreign decree, children's removal therefore no bar to jurisdiction).

<sup>160</sup> For an express statement of this rationale see *Gaunt v. Gaunt*, 160 Okla. 195, 16 P. (2d) 579 (1932); cf. supra note 141. The following cases, seemingly contrary to the clean hands doctrine, can also, I believe, be rationalized on this ground. *Griffin v. Griffin*, 95 Ore. 78, 187 P. 598 (1920) (see also supra note 142); *Sheehy v. Sheehy*, 88 N.H. 223, 186 A. 1 (1936) *Avenier v. Avenier*, (Tex. Civ. App. 1948) 216 S.W. (2d) 638 (though unhappily distinguishing between illegal removal and illegal retention); *Milner v. Gatlin*, 139 Ga. 109, 76 S.E. 860 (1912) (supra note 133). In general see notes, 80 *UNIV. PA. L. REV.* 712 at 716 (1932); 15 *BROOKLYN L.J.* 290 at 294 (1950).

<sup>161</sup> *STUMBERG, CONFLICT OF LAWS*, 2d ed., 330 (1951), mentions as such a case *Digiorgio v. Digiorgio*, 153 Fla. 24, 13 S. (2d) 596 (1943). All the court held in that case, however, was that the Florida court, notwithstanding the petitioner's malfeasance, had jurisdiction to modify a prior California award. For the aftermath of this case see *Di Giorgio v. Di Giorgio*, 87 Cal. App. (2d) 576, 197 P. (2d) 213 (1948).

one case the appellate court, while refusing to reverse such a decision, expressed its criticism based on the considerations here discussed.<sup>162</sup> And in other cases unexpressed doubt as to the jurisdiction of a migratory divorce court may have prompted the court.<sup>163</sup>

3. *Recognition regardless of clean hands.* In several recent cases the court refused to re-examine a foreign decree notwithstanding the fact that the spouse asking for such re-examination had in no way mis-conducted himself. But in such cases the court will stress with particular vigor its free discretion which might also have supported the opposite conclusion.<sup>164</sup> Similar protestations will be found in those few cases in which courts, because of their growing desire to remove the child from his parents' controversy, have refused to treat a parent's defiance of a foreign decree by itself as a ground for a change of custody.<sup>165</sup> Even in Iowa, one of the few states in which full faith and credit to foreign custody decrees will apparently be upheld even in the face of respondent's malfeasance, discretionary factors largely determine the decision. In *McKee v. McKee*<sup>166</sup> an Iowa court had given custody to the mother, reserving to the father a mere right of visitation. During the child's visit to his home in Texas the father sought and obtained in that state a modification of the Iowa decree awarding complete custody to him. The mother, however, then in Iowa, having recovered the child "by force" prior to the issuance of the Texas decree, sought and obtained full custody of the child. Upon the father's appeal the Supreme Court of Iowa, apparently maintaining the tradition of *Wakefield v. Ives*,<sup>167</sup> reversed with mere reference to the full faith and credit due the Texas decree in the absence of a proved change of circumstances. But the authority of this decision as supporting constitutional recognition seems weak both in view of a strong dissent by four out of nine judges who led the court in a sequel of this case giving custody to the

<sup>162</sup> *Scott v. Scott*, 227 Ind. 396, 86 N.E. (2d) 533 (1949).

<sup>163</sup> See, e.g., *Smith v. Smith*, 4 Ter. 268, 45 A. (2d) 879 (Del. 1946).

<sup>164</sup> Cf. *ex parte Miller*, 201 Okla. 499, 207 P. (2d) 290 (1949) (cf. *supra* note 141).

<sup>165</sup> See, e.g., *Heard v. Heard*, 323 Mass. 357, 82 N.E. (2d) 219 (1948) (on Massachusetts law see *supra* note 147a); *People ex rel. Turk v. Turk*, 86 N.Y.S. (2d) 139 (1949) (on New York law see *supra* note 69).

<sup>166</sup> *McKee v. McKee*, 239 Iowa 1093, 32 N.W. (2d) 379 (1948). See also *Helton v. Crawley*, 241 Iowa 296, 41 N.W. (2d) 60 (1950). Cf. *Addy v. Addy*, 240 Iowa 255, 36 N.W. (2d) 352 (1949); *Barnett v. Blakeley*, 202 Iowa 1, 209 N.W. 412 (1926). But cf. *Boor v. Boor*, 241 Iowa 973, 43 N.W. (2d) 155 (1950) (denial of foreign jurisdiction and changed circumstances); and the much cited case of *Kline v. Kline*, 57 Iowa 386, 10 N.W. 825 (1881). For a criticism of the first case see note, *Custody of Children and the Conflict of Laws*, 1 DRAKE L. REV. 18 at 24 (1951).

<sup>167</sup> *Wakefield v. Ives*, 35 Iowa 238 (1872).

mother,<sup>167a</sup> and because the court may originally have given weight to the fact that the mother, too, had sought the jurisdiction of the Iowa court with unclean hands. A general conscientious observance of the clean hands approach as the primary basis for the recognition of foreign decrees would have prevented outrageous cases such as that presented in *Crowell v. Crowell*,<sup>168</sup> where the Oregon court was compelled to choose between the enforcement of five foreign decrees between the issuance of which the child had been kidnapped twice by the father and three times by the mother.

### F. *Ultimate Solutions*

A modification in this sense of our present formulas would express, on the one hand, the flexibility of the standards actually applied, and, on the other hand, the determination of most courts to prevent willful evasion of sister state decrees. A fully satisfactory solution, however, cannot be found, I believe, as long as a child's custody is decided upon within the framework of adversary proceedings developed and suited for the preservation of rights and duties of litigants, rather than for the ex officio investigation of the child's welfare. What in other countries has come to be known as "*extralitigious*" proceedings, instituted and prosecuted by the state as *parens patriae* without regard to the cooperation or the resistance of feuding parties,<sup>169</sup> should perhaps be studied with a view to eventual adoption by uniform legislative action. Under such a procedure all courts in the United States would, on their own initiative, cooperate in child custody cases, exchanging freely both information and assistance. Under such a scheme there would be no doubt but that, while "full faith and credit" or comity is due in cases of attempted evasion, otherwise any court must fully cooperate in any scrutiny to which its decree may be subjected in any sister state.

The Uniform Support of Dependents Act, now in force in ten states, has shown the way in which such cooperation between courts can easily be achieved within the American system of administration of

<sup>167a</sup> *McKee v. Murrow*, 241 Iowa 434, 40 N.W. (2d) 924 (1950).

<sup>168</sup> *Crowell v. Crowell*, 184 Ore. 467, 198 P. (2d) 992 (1948). Cf. *supra* note 142.

<sup>169</sup> See, e.g., §111 of the Austrian *Jurisdiktionsnorm* which provides in matters of custody or guardianship that any court may "transfer its jurisdiction in whole or in part" to any other court wherever this appears to be in the interest of the ward. This authorization includes transfers of jurisdiction to courts of foreign countries. See also the Hague Guardianship Convention of June 12, 1902.

justice. Under that act support proceedings may be brought on behalf of a child in his own court without regard to whether or not personal service can be obtained upon the father. In the latter case the judge will transmit the petition to a court which can effect such service, and subsequent proceedings will be carried on in cooperation between the petitioner's and the defendant's court.<sup>170</sup>

### *Conclusions*

1. The *Restatement* formula requiring "enforcement" of foreign custody decrees subject only to a finding of absence of foreign jurisdiction or change of circumstances, has proved to be both too rigid and too flexible: too rigid in requiring recognition and enforcement without regard to the child's welfare, and too flexible in permitting non-recognition and nonenforcement, even in favor of a parent "fugitive from justice," upon a mere "change of circumstances" which can be found at will.

2. This result has induced the courts of several states to adopt the "Kansas rule" completely discarding the *Restatement* approach and purporting to exercise unlimited discretion.

3. Factual analysis proves, however, that American courts, though frequently invoking the *Restatement* or the Kansas rule have in effect failed to follow either. Rather, while clearly feeling free at any time in the child's interest to change custody or to refuse to enforce a foreign decree, most courts will refrain from such action in certain typical situations, in which the change or nonenforcement of a foreign decree would benefit a parent with "unclean hands." This practice (here referred to as the "Washington rule") does not extend, however, to the recognition or enforcement of the decree of a foreign court modifying

<sup>170</sup> Uniform Reciprocal Enforcement of Support Act, §11 et seq., 9A U.L.A., Supp. 1951, 18, 26. See also new §13 et seq. amendments approved at the meeting of the National Conference of Commissioners of September 8-13, 1952. Legalistic objections to this procedure based on the doctrine of separation of powers have been successfully met, as have been doubts as to whether the courts of two sovereigns may participate in the disposition of a single case. Comment, "The New Uniform Support of Dependents Act," 45 ILL. L. REV. 252 (1950). See also International Institute for the Unification of Private Law, Preliminary Draft of a Convention on the Recognition and the Enforcement Abroad of Maintenance Obligations (Rome 1950) with an Appendix setting forth the laws of the several countries. For a proposal of a uniform act based on a jurisdictional approach, see note Strategy for Child Custody Suits Involving Conflict of Laws, 2 DUKE B.J. 11 (1951).

its previous award merely or primarily for the purpose of punishing disobedience.

4. Conscious application of these rules now effective though contrary to traditional language, would greatly clarify and render more predictable decisions in interstate custody cases. An ultimate solution of the present difficulties in this field, however, must await legislative action which would provide for the close cooperation *ex officio* between American courts in what has elsewhere developed as "extralitigious proceedings" in the sole interest of the child's welfare.