January 1954

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The Reciprocal Enforcement of Support Act in Montana

†Edwin W. Briggs

INTRODUCTION

In 1951, the Montana Legislature enacted the Uniform Reciprocal Enforcement of Support Act¹ designed to correct one of the most serious and aggravating evils that has developed in our American society—the regular desertion of families, by the breadwinner, with the attendant refusal to help financially to provide support for the wife and children. In this instance, the ease with which the culprit can slip over state boundaries has created seemingly insurmountable obstacles to providing effective procedures to compel the deserting husband or father to support. Hence, the phenomenal success which the domestic relations courts are reported to be having under this Act, and under

*1I want to use this opportunity to express my appreciation to the district court judges and to those county attorneys participating, for the many replies to my letter inquiring about their experience with this Act, and asking them to respond to an enclosed questionnaire. The matter discussed herein is based in large part upon and is colored by their comments; so I hope they will consider this paper a collective response to their observations. The study is intended primarily to be provocative, generally making little attempt to give final answers to the many questions raised by the Reciprocal Act.

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¹R.C.M. 1947, Section 94-901-1, to 94-901-18. In referring to particular Sections in the Act, in our discussion, generally we shall refer to them by the last number in the citation, the particular section number, generally corresponding to the number in the original draft Uniform Act. The Act is classified here under Title 94, as part of the Criminal Code,—a most questionable classification to be considered infra.

By September, 1953, forty-six states and five territories had adopted one of the two principal reciprocal Acts, or a slight variation thereof, the most remarkable adoption record for a Uniform Act by far, of any yet approved. Finally, the Canadian provinces also have adopted a similar Act called the "Uniform Maintenance Orders Act." The term "reciprocal" requires that both states involved have enacted this or "substantially similar" legislation providing for compliance with the other's request. Though the Acts in the United States generally have been considered nearly enough alike to qualify for reciprocal treatment, some of them vary substantially enough in certain respects to raise a question as to their "reciprocal" quality. A careful comparison with the Canadian Act has not yet been made, but it has been urged that cooperative efforts be made to establish reciprocal treatment. See, Reciprocal State Legislation to Enforce the Support of Dependents 22, (1953), published by The Council of State Governments, 1515 East 60th St., Chicago 37, Ill.
a very similar act, first adopted in the State of New York, in 1949, in bringing the deserter to "time," in the overwhelming majority of cases, appears to be almost a miracle.

Notwithstanding the very substantial success of this legislation, especially in the highly industrialized areas, a large majority of the lawyers and district court judges in Montana having had some experience with our Act, are highly critical. By analyzing the Act at some length, we hope to establish what part of this opposition may be founded on basic defects in the Act itself, and what part may be obviated simply by increasing understanding of and practice under the Act. To this end, it is necessary that we first have in mind, the traditional legal limitations which make it possible for any foreign state to be such a haven for the deserter. These limitations arise from "obvious" simple principles.

**HISTORY OF THE ACT**

As to the support of children, though it is recognized generally that a parent has a duty to support, based both on the relationship, and on the interest of the state and the community in the welfare of its children, some courts insist that it is a moral duty only. Though the large majority insist there is a legal duty as well, direct enforcement of that duty, even at the residence of the dependent, has been very limited and uncertain, for many reasons. Heretofore, the principal sanctions utilized have been those giving effect to the "public" interest in the problems, i.e., the criminal sanction, and that often contained in juvenile delinquent laws, providing that, within the limits of its jurisdiction

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**McK. Unconsol. Sections 2111-2120.** (McKinney's Cons. Laws of N. Y. Bk. 65).

**Freeman v. Robinson (1876) 38 N.J.L. 383, 20 Am. Rep. 399; Kelly v. Davis, 49 N.H. 176, 6 Am. Rep. 499,** leading case in the U.S. Both of these cases were suits by merchants for the supplying of necessities. They both recognize the moral obligation, but deny the legal. 39 Am. Jur., *Parent and Child,* Section 35.


**The legal impossibility for one spouse to sue the other was a complete bar for the wife. But the almost equally strong policy against suits between members of a family, disturbing domestic tranquility equally barred the children. Of course, these legal principles continued to cast a cloud over the ideas of there being a legal duty at all. Even when statutes were passed clearly stating the duty, they rarely contained express provisions for civil remedies to overcome the old rule against family suits.**

**R.C.M. 1947, 94-301—94-306.**
MONTANA LAW REVIEW

over juvenile delinquents, a court may exact subsistence from the parents, for the juvenile. But even these remedies obviously are available only for resident dependents. At the conflict of laws level, there has developed little practice of enforcing duties of support on behalf of other states or countries.

As to the duty to support a wife, the law has implemented that duty somewhat more fully—but not by the common law. Liability of the husband for necessities, gives the wife no direct right, but rather a derivative one only enforced by the supplier of each necessity. Here the duty is enforced directly, principally as an incident to a divorce, or a separate maintenance action where allowed. Although, where she is allowed to sue at all, many American courts have developed the principle that equity should take direct jurisdiction to grant the wife relief, on the ground that her legal remedies are so inadequate, even here such relief quite generally is limited to cases where the forum is the residence of the obligee. Here likewise, there has been little tendency in the past, for one state to assist another in the enforcement of its duties of support.

And so, by the simple expedient of crossing a state line, without even leaving the metropolitan district, in some localities, the derelict father could gain complete practical immunity from all

1 R.C.M. 1947, Sections 10-501-10-513 (dependent and neglected children); and Sections 10-616 (incidental to a juvenile delinquency proceeding.)

2 Restatement, Conflict of Laws, Section 458 Comment a (1934), states the traditional attitude succinctly thus: "The duty of support is imposed by a state as an enforcement of its own public policy. Whether the duty is criminal or civil in character, its enforcement is of no special interest to other states and since the duty is not imposed primarily for the benefit of an individual, it is not enforceable elsewhere under the principles of the Conflict of Laws."

3 The Restatement, loc. cit. supra, 8, recognizes the fact that a "quasi-contractual" duty for necessities, created by one state, will be enforced in another, but this is altogether inadequate. The extent to which even equitable relief will be granted even under the broad statutes seemingly imposing the duty to support generally, has varied greatly. See 27 Am. Jur., Husband and Wife, Section 402.

4 Edgerton v. Edgerton (1892), 12 Mont. 122, 29 P. 966, 16 LRA 94, 33 Am. St. Rep. 557; Wood v. Wood (1952) 258 Ala. 72, 61 So. 2nd 436. Child support may be thus enforced also, but only incidentally to the wife's primary right.

5 This statement must, of course, except a suit for accrued alimony, based on a foreign judgment, under the full faith and credit clause: Sistare v. Sistare (1910), 218 U.S. 1, 30 S. Ct. 682, 54 L Ed 905. Lynde v. Lynde (1901) 181 U.S. 183, 21 S Ct. 555, 45 L Ed 810. But even here, it is important to bear in mind that some foreign support decrees, supporting an action for past due support money, are not entitled to enforcement because of restrictions on them imposed by the foreign law itself. Maxim v. Maxim (1952) 118 N.Y. S. 541 well illustrates this in pointing out that a Family Court support order, for New York City, by its own judicial code, is not entitled to full faith and credit in a sister State.
duties of support imposed at the family residence. All he need do was to stay in a different state from that where his family lived.

A recent popular article on the subject states the difficulty of the problem thus: "Many great minds sought a cure. The American Bar Association, the Children's Bureau of the Federal Security Agency, the Federal Department of Justice, members of Congress, family-court judges and leaders in welfare work, all tried to find a legal wonder drug, and failed. The racket appeared to be unbeatable." That same article credits a Mrs. Grace Seaman, wife of a judge's secretary, with being responsible for the reciprocal support acts. It summarizes her tribulations thus when she appealed to the above authorities:

"'It's hopeless,' authorities told her. 'We've tried to get a bill through Congress, but it's unconstitutional. The Government can't order one state to act as a collecting agency for another.' . . . She wrote literally to every social agency . . . to charity organizations . . . to leading judges, lawyers and legislators. Not one would let her come and talk with him. . . . She wrote to Mrs. Franklin D. Roosevelt, and after three months the Department of Justice and the Children's Bureau gave the answer that came generally from one and all, 'We know all about it. Nothing can be done!' . . . At the end of four years the only encouragement she had received was a statement from a group of Brooklyn lawyers endorsing her crusade 'in principle,' but refusing any active aid. . . . The upturn came in 1945, when Miles F. McDonald was elected district attorney and became her boss. . . . Now, backed by a big name, Mrs. Seaman found appointments easy to get and influential folks not so hard to convince. . . . To detour the unconstitutionality of a Federal law, a reciprocal state law was produced . . . the act was passed by the New York State legislature (in 1949). . . . To spread the word to the other states, the Council of State Governments took the lead. To support and advise came the Governors' Conference, the National Conference of Commissioners on Uniform State Laws, the National Association of County and Prosecuting Attorneys and the American Bar Association. It was generally predicted, however—and correctly—that this new idea must go through a few years of trial and error and be amended several times before it was perfected."


Ibid.
In fact, that amending process has been under way, practically from the first. New York hurriedly passed some temporary stop-gap legislation in 1948, to get the 'reciprocity' principle under way. In 1949, this was supplanted by the more fully drawn Code, known as "The Uniform Support of Dependents Law," and actively promoted by the Council of State Governments. In 1950, the National Conference of Commissioners on Uniform State Laws approved the Uniform Act adopted by Montana in 1951. New York immediately amended her Uniform Dependents Law, to include some of the provisions of the Commissioners' Act, and in 1952, the Commissioners approved and submitted to the States for adoption an extensively amended Enforcement of Support Act.

The Commissioners on Uniform State Laws had dealt with the problem of non-support many years ago, in the "Desertion and Non-Support Act," approved in 1910, and formally adopted by twenty-four states. However, it did not even attempt to go beyond provisions for imposing criminal sanctions, and that limited by the traditional rule that the "crime" of desertion takes place at the residence of the wife and children with prosecution possible only there. The Conference of the Commissioners again became interested in the operation of that Act, in 1942, appointing a study committee, and receiving a brief report therefrom in that year. Though deciding that "duties of support" probably could not be dealt with effectively in a uniform act, the committee continued to tinker with the subject, strictly within the basic limits of the original Act, until in their 1949 report, they dealt realistically for the first time with the migratory husband and father, and the problem of actually getting support from him, by approving the "reciprocal" approach, which authorizes a procedure for subjecting him to the duty without disturbing his earning capacity. This basic change in approach apparently stemmed directly from New York's support of Dependents Law, through the Council of State Governments.

The Enforcement of Support Act attempts to do two quite distinct things: 1. Eliminate all of the extreme obstacles existing in the common law to the effective enforcement of civil duties of support, created either under the local law or an applicable for-

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*Note: New York Uniform Support of Dependents Law, 1 Syracuse L. Rev. 300, (301).


**Handbook and Proceedings, Nat'l. Conf. Com., Un. St. Laws, pp. 58, 62, item 22, and 233 (1942). It may be of interest to some that this revived study was sparked by an article in Cosmopolitan magazine, by Committee statement.
eign law; 2. Provide an inexpensive, direct procedure for initiating a suit to enforce these civil remedies in the state where the dependents reside, even though the defendant may be residing in a distant state, and not amendable to local process at all. We shall consider these two objectives separately.

IS THE ACT CIVIL OR CRIMINAL?

But first let us consider whether this Act provides essentially a criminal or a civil remedy. The entire Act should be treated as providing a civil remedy. But since so many of the profession have considered it to be essentially criminal in character, we must understand the reasons therefor, to justify the contrary conclusion. Both bench and bar generally have assumed that the Act primarily is criminal in its operation, presumably for several reasons, among which may be: (1) the inclusion of the extradition section; (2) the fact that enforcement is vested in the county attorney; (3) the fact that in an interstate case, traditionally the duty of support has been enforced primarily by means of the criminal sanction;17 (4) the Code editors have so classified it.

It is of primary importance to determine a correct answer to this question, because it has many practical consequences. In the first place, its constitutionality may be much more seriously doubted if it is a criminal Act. But aside from that, the answer to various other legal questions turns on this primary answer. For example, at least one enforcing officer justifies the use of the citation as originating process on the ground that the statute is "quasi-criminal." The same attorney refuses to enforce requests for a judgment for past due alimony on the ground that this would be a civil judgment, and civil and criminal relief cannot be combined in a single proceeding.

It is understandable that the profession should be conditioned to interpreting this Act as essential criminal. Practically the only method for enforcing duties of support in Montana in the past has been by criminal sanctions. Superficially considered,

17 Though perhaps it is true, as one representative practitioner insists, that, for local enforcement of support duties, many lawyers will think of and rely on the equitable action for maintenance in Montana, it is at least possible that the county attorneys and the courts, the ones primarily entrusted with enforcing the Reciprocal Act, think primarily in terms of criminal enforcement even for local litigants.

18 There is a suspicion that enforcement officers think of the juvenile delinquent statutes as "essentially criminal," which is not correct. They are essentially equitable in their procedure, even though criminal penalties may be stipulated to aid in their enforcement—but so does the citation for contempt for disobeying a court decree, serve the same purpose in any case.
our applicable Criminal Code Sections seem to provide a very similar treatment to that found in the Reciprocal Act. It authorizes the judge to suspend the sentence, provided the defendant agrees to pay support money, continuing suspended so long as he pays. The resemblance between this procedure and that dealt with in Sections 5 and 6 of the Reciprocal Act, subjecting the defendant to extradition proceedings, but granting him an exemption therefrom if he agrees to comply with the decree imposing the duty to support, is only superficial, however. Under R.C.M. 1947, 94-302, no attempt is made to enforce a formally established and judicially decreed duty of support. Though, we maintain elsewhere, our Codes clearly affirm such duty, the principle if not sole means of enforcing that duty has been thought to be to use a criminal conviction in the local court as a leverage for exacting the promise. So the promise to pay, exacted from the defendant under 94-302, (a pure criminal statute) is entirely dependent upon, incidental and subordinate to the criminal conviction. Not so under the Reciprocal Act. As Vernier says:

"The rule (duty of support) should not depend for its efficacy upon the ability of the child to persuade merchants to provide him with necessities, but direct action on behalf of the child should be permitted in order to secure funds with which the necessaries may be purchased, or to force their purchase ... Therefore, a civil statute meeting the needs above outlined might advantageously be adopted. Perhaps such action is contemplated by the broad statutes herein discussed which do not provide the means of enforcing the duty stated. If so, they are faulty in not so specifying."

That is exactly what the Reciprocal Act does.

Indeed, ordinarily, a civil liability to support is established under the Act without any related extradition proceeding at all. In very few cases will the requesting state really want the defendant returned. The practical purpose of extradition Section 5 is to put more "bite" in any civil decree rendered under the Act. The whole object of the Act is to let the obligor stay where he has a job so he can continue working, without the stigma of "criminality" attached to him.

Although with one exception noted shortly, the Enforcement Act does not create any new duties not existing heretofore, it does provide for a plain simple civil action to enforce what-

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36 This dispensation also is possible under the Juvenile Codes.
37 Vernier, American Family Laws 60 (1936).
ever duties exist independently by the applicable law. This alone, is a monumental advance for many states. Moreover, it provides this remedy, not only for the abandoned wife or child, but for every other person entitled to support by the applicable law. It even creates an entirely new right of subrogation (for an interstate suit) in a state expending welfare funds on an 'obligee,' entitled to support under the Act. Such state can sue the 'obligor,' the one with the duty of support, for the full amount so expended. It is claimed that this is one of the most important features of the entire Act. Certainly it will very measurably discourage attempts to shift the burden of support to the state.

One of the most serious obstacles to the enforcing of support is that many states approve the rule that such duties are strictly "local" in character. This is doubly restrictive in effect. As a forum, such state applies its own law only for the benefit of its own domiciliaries; it also refuses to enforce the support laws of another state. The Reciprocal Act removes both of these restrictions to suit by providing first in Section 4, that the enacting state will enforce duties of support, even though the obligee never has resided or been present there, making its own duties of support available to foreign obligees. Section 7, authorizes the enacting state's court to enforce duties of support created by a foreign law in certain circumstances. These are monumental

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2 R.C.M. 1947, Section 94-901-9, states that, "All duties of support are enforceable by petition or complaint . . ." R.C.M. 1947, Section 93-3001 states that "Civil actions in the courts of record of this state are commenced by filing a complaint." R.C.M. 1947, Section 93-2211 says that, "A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress . . . of a wrong." Under the Reciprocal Act the moving party filing the complaint is the obligee, in whose favor a duty of support is created, and he simply is trying to enforce that duty for his private benefit.

2 Though much of our discussion concerns the rights of wives and children, in judging the basic character of this proceeding, it is very important to realize the very broad range of persons who may sue as obligees—wives, infant children, welfare agencies, parents, adult children, grandparents, sisters, brothers, and any other in whose favor the applicable law has created a right to claim support.

2 R.C.M. 1947, Section 94-901-8. Though other recent social welfare legislation has provided similar redress in particular instances, for an intra-state proceeding, the remedy here created, for the benefit of a foreign state, is much more nearly absolute than that generally recognized heretofore against its own "citizens" in a local suit.


Unfortunately, this section is so worded as to appear to deal also with the choice of law problem, apparently conflicting with Section 7, the controlling section on choice of law. This problem is discussed infra, at notes 76-81.
changes in traditional law, in clearing away hurdles to more effective enforcement.

As stated supra, the common law governing domestic relations generally, imposes a duty to support a wife and at least legitimate children, quite independently of the criminal law. Certainly, the duty does not originate with the criminal law, however much that may have been the primary sanction used for its enforcement, in the past. Moreover, the Montana Civil Code on Parent and Child, Husband and Wife, and Divorce, repeatedly reaffirm that duty, though its provisions for effective civil enforcement have been very inadequate. Hence the Reciprocal Enforcement Act should be classified in the Montana Code as involving almost exclusively civil rights and remedies. It was a very serious error to classify it under Title 94, covering criminal law and procedure. So the statement made in the Commissioners' Prefatory Note that, "The 1950 act, . . . attempts to improve and extend the enforcement of duties of support through both the criminal and the civil law," is very misleading, at the least.

Sections 7, through 20, of the original Act, deal exclusively with the second primary objective of the Act, i.e., providing an inexpensive procedure, originating in the obligee's home court, for suing an out of state obligor. A local obligor must be proceeded against under other local rules. This is the "two-state" suit contemplated by the Act, where the plaintiff's part of the trial is carried on in his own court and the defendant's in his own, the responding court. This is the least obvious portion of the Act. It works like this. All duties of support are enforced by a civil action initiated by a verified petition, or complaint, stating the name, address and circumstances of the defendant,
RECIPROCAL SUPPORT ACT

If this complaint states a cause of action, or makes out a case of ‘probable cause,’ as to the defendant’s liability (raises a presumptive liability in the defendant), the initiating court certifies that fact to the responding court (where it appears the defendant may be subjected to personal jurisdiction), along with certified copies of the complaint. The responding court files the complaint for the plaintiff (thus ‘docketing the cause’), notifies the enforcing officer (the county attorney in Montana), sets a time and place for hearing, and secures personal jurisdiction over the defendant.

The Act then says simply, ‘If the court of the responding state finds a duty of support, it may order the defendant . . . to furnish support or reimbursement therefor and subject the property of the defendant to such order.’

This simple proceeding intends to remove two very serious practical difficulties facing the obligee in the past. The first one is that raised by distance in initiating a suit in the obligor’s state. The second one is that of cost, by providing that certain state agencies shall carry forward the litigation, at a minimum of cost to the dependents, associated with this fact is the closely related one that various persons are made available to the obligees for the purpose of counseling, advising, aiding, and even pushing the obligees into starting proceedings. This has been a primary obstacle in the past in even getting an action started.

Unquestionably, however, the summary statement of the proceeding outlined above, which substantially is all that the Act says about how the suit is to be prosecuted, leaves a great deal

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Footnotes:


81 Brockelbank, The Problem of Family Support: A New Uniform Act Offers a Solution, 37 A. B. A. JRN. 93, 96, col. 3 (1951). Professor Brockelbank was chairman of the Commissioners’ drafting committee when the 1950 draft was approved.

82 Under the 1950 Act, the papers transmitted also must include an authenticated copy of its Reciprocal Law, to establish that it is entitled to reciprocal treatment under the responding state’s act. But under the 1950 Act as amended, authentication is not necessary.

83 Actually, the Act also authorizes the responding court to exercise a quasi-in rem jurisdiction where it cannot serve him personally but can seize his property, rendering a decree enforceable to the value of the property. This is the most reasonable construction of Sections 94-901-11, 94-901-12, 94-901-13.


85 Section 11 of the 1952 Amended Act, an entirely new section, not only requires the enforcement officer to represent the plaintiff in the initiating state, but also attempts to name all agencies and offices that might have an interest in the plaintiff, directing them to counsel her and to cause the initiation of an action, if deemed desirable.
unsaid. Apparently, the Act’s framers optimistically expected all courts and enforcing officials to be very imaginative in adapting the Act to existing rules of procedure. But at the outset, it is very important that we anchor ourselves with two fundamental propositions, implicit in the Act. The first one is that the only court with jurisdiction to render any kind of binding decree or judgment in this action is the responding court—provided it secures jurisdiction over the defendant, or his property.

The initiating court is calling on the responding court precisely for the reason that it has not and cannot acquire jurisdiction over the defendant, and so can render no kind of judgment binding him personally. The initiating court cannot do more than certify that the plaintiff’s complaint states a cause of action on its face, or establishes a *prima facie* case for finding a duty of support against the defendant. It cannot make any kind of order or decree finding the duty. The sole reason for such certification is to protect the responding court against frivolous charges and wholly unjustified requests to cooperating states to take their time and sustain the costs of a trial. These initial steps are simply to get the obligee’s complaint filed in the responding state at a minimum of cost to her. Once it is filed, we are led inexorably to the conclusion that it is exactly as though she had hired an attorney in the responding state to initiate an ordinary civil action there on her behalf. Those studying the Act thoroughly, tacitly or expressly grant this much.

Once the complaint is filed in the responding state, how do we proceed?

In view of this fact, the clause in the title to the Montana Act, referring to ‘judgments,’ is unfortunate: “... providing duties in district court to respond to judgments in support actions brought in states with reciprocal laws.” It is doubtful that this word intends to refer to anything else than the “record” transmitted from the initiating court to the responding court. This must not be thought of as in any sense a “judgment.”

Of course, the plaintiff may already have a judgment based on personal jurisdiction conclusively establishing defendant’s duty, on which she bases her present reciprocal action—but that is another matter.

A very satisfactory wording of the “finding” in the certification is used in a California certification form: “... and that in the opinion of the undersigned Judge of the above-entitled Court, the defendant should be compelled to answer such complaint and to be dealt with according to law.”

On request, The Council of State Governments, 1313 East 60th St., Chicago 37, Ill., will supply a pamphlet entitled, *Reciprocal State Legislation to Enforce the Support of Dependents* (1953), containing, in addition to other pertinent data on procedural requirements for each state having the Act, proposed model procedural forms for the initiating state, including forms for testimony by petitioner, sample form of the petition, and one for certification.

*Brockelbank, Multiple-State Enforcement of Family Support, 2 St. Louis University Law Journal 12 (1952).*
The second fundamental proposition mentioned above, answers that question. The Act makes no attempt to set up special procedures, other than including an optional section, rejected by Montana, that would extend any informal rules of evidence that might be practiced in certain other proceedings, as in juvenile delinquency. The Commissioners' note puts it thus: "Provisions covering other details of procedure have been kept out of the Act so that the usual rules for obtaining jurisdiction, for carrying on the procedure and for appeal may be held to govern." Subject to a slight qualification discussed infra, this would seem clearly to require that we treat this suit as being subject to all of those rules generally governing an ordinary, simple, civil action.

This being so, the complaint itself is subject to our Code requirements as to formal content, and is demurrable for substantially the same reasons as is any other complaint stating a cause of action essentially equitable in character. It is to be hoped that our courts will not impose outrageously strict requirements as to pleading. To do so would make the cooperation between courts contemplated by the Reciprocal Act much more difficult. Subject to this proviso, however, if a complaint certified from another court is clearly insufficient under our Code, which is one criticism lodged against the efficacy of the Act, and so is obviously demurrable, the responding court will greatly expedite the proceeding if it will return the complaint to the initiating court with a notation as to the obvious defect. Though a literal application of Section 12 of the Act might suggest that the responding court has a ministerial duty to "docket the cause," in every case, upon receipt of the certified papers, it is submitted that this Section must be construed in the light of the overriding policy to treat the certification by the initiating court simply as a device to originate the civil action in the responding court.

"9A UNIFORM LAWS ANNO., CUM. AN. POCKET PT., (1953) Uniform Recip. Enforcement of Support Act, Section 19, proposes to provide special rules of evidence; Ibid., 1952 Act, as Amended, in Section 19, proposes to apply varying proceedings according to the "type of duty of support claimed." Neither of these sections is law in Montana.


"The action is conceived as being essentially equitable in character. Citation or order to show cause, may be appropriate as supplementary process, as discussed infra.

"Actually, there appears to be considerable improvement in the sufficiency of the complaints being filed. Many of the more recent ones show a real effort to have them properly framed. Furthermore, the recommended practice under the proposed uniform forms mentioned supra, note 38, calls for a transcript of testimony, sworn to and taken by the Initiating judge, and transmitted with the complaint."
Holding a tight rein on the proceeding, the latter court determines the sufficiency of the pleadings at every stage. Stated another way, the responding court is acting under its own Reciprocal Act, not that of the initiating state. Hence, it is for it, and it alone, to determine how and when the initiating court has qualified to ask for the former's assistance. By the Commissioners' own construction, this must be measured by the responding court's general rules governing pleadings. If this should prove unsatisfactory, further statutory modifications will be necessary.

**Is "Show Cause" Order Sufficient Service?**

The same rules must govern all questions of process. In so far as is possible under the wording of the Act, it would seem that that process generally used in an ordinary civil action must follow. Originating process thus would be the summons. Indeed, it may very well be that any decree or judgment rendered without the issuing and service of a summons, or without the attaching of property, would be found void on appeal, under R.C.M. 1947, Sections 93-3001, 93-3002 and 93-3003. These sections provide for the issuing of a summons for every ordinary civil action, as a matter of course, and no exception whatever is indicated. Yet, the common practice under the Act, so far, seems to be to issue an order to show cause as originating process.

If such practice can be justified in the light of the character of the action, admittedly it has some advantages, at least in expediting the action on behalf of the plaintiff. But it should not be used as originating process, for the following reasons: 1. There is at least some reason to suspect that its use comes from uncertainty and confusion as to the essential nature of the proceeding called for by the Reciprocal Act. If this be true, use of the order will tend further to create, perpetuate and emphasize that confusion. However, at least one enforcing officer, having considerable experience with the Act, approves use of a “citation” requiring a showing of cause, only because he has determinedly treated it as a “quasi-criminal” proceeding, and agrees that, as an ordinary civil action, the order cannot be justified—thus perpetuating a misinterpretation of the Act. 2. There is danger that such decree would be reversed by the Supreme Court because not supported by a legal service for a civil action. We have said

"Such confusion may result either from a feeling that the Reciprocal Act intends to provide simply for a continuation in the responding state of a suit already under way in the initiating state, or in a misinterpretation of the essential character of the proceeding authorized by the Act."
that the plaintiff's action is an ordinary civil action, as defined under R.C.M. 1947, Section 93-2203, seeking to establish an obligation imposed by operation of law, as defined under R.C.M. 1947, Section 93-2207, and to impose and enforce that obligation against the defendant, in the exclusive manner provided for ordinary proceedings under R.C.M. 1947, Sections 93-3001 ff. If these conclusions are correct, current practice poses this question: "Is the order to show cause as originating process, either appropriate or permissible for this ordinary civil action under the Code?"

The characteristic use of the rule or order is as a substitute for the notice ordinarily required in response to motions made in the course of and incidental to a proceeding in which the court already has acquired jurisdiction over both parties and the subject matter. A very recent California case puts it simply thus: "It is well settled that an order to show cause is a notice of motion."

"An order to show cause is a notice of motion and a citation to the party to appear at a stated time and place to show cause why a motion should not be granted. The primary function of such an order is to bring a motion before the court more speedily than it could be done by ordinary motion; and when so used it is a substitute for the notice of motion required by law."

An interesting feature of such orders is that they are framed as if they are in response to a motion that the responding court issue summary judgment against the defendant. They require him "to show cause why he should not be made to support the plaintiff," or "to pay as the plaintiff demands," etc. Such rule cannot be in response to any properly framed certification by the initiating court, which can only ask the responding court to proceed with trial. Certainly, the plaintiff's complaint should not be treated as a 'motion' any more than in any other civil action. Divorce and injunctive actions, in which the order is regularly used, collateral to the primary proceeding, furnish no precedent for its use as originating process.

Of course, use of the order to show cause as originating process may be expressly authorized by statute. This is true in special proceedings where there is particular justification for making the proceeding summary in character. But, it is frequently asserted that, "The right to summary process implies pendency of

"Silva v. Mercier, 187 P 2d 60, 62 (1947), aff. 33 C 2d 704, 204 P 2d 609."

"Black v. Coughlin (1894) 105 Cal. 268, 38 P. 730; 7 BANCOFT'S CODE PRACTICE AND REMEDIES 7664 (1928)."
suit between parties and is confined to incidental matters arising during the contestation, except where summary proceeding is expressly allowed by law.' And, "The right to initiate original proceeding by rule to show cause is derived from express statutory authority." It also is put thus: "The right to initiate an original proceeding by rule to show cause must . . . be derived from express statutory authority, and, in the absence of statutory or exceptional circumstances, a rule or order to show cause will not be available as original process, but only as process auxiliary to jurisdiction already obtained.'

Certainly, the action here considered is not a "special proceeding" in any sense, and there is not any statutory authority authorizing the use of the order as originating process in this legislation or elsewhere. The court cannot rely on R.C.M. 1947 Section 93-1106, giving it authority to adopt any suitable procedure "conformable to the spirit of the Code," "if the course of the proceeding be not specifically pointed out," when it is given a particular jurisdiction, because this, being a civil action, the minimum essential procedure is "specifically pointed out."

It is submitted that the fact that the Reciprocal Act stipulates that the court shall "set a time and place for the hearing," should not be taken as so authorizing the order. True, that provision does not seem to fit readily with the requirement of a summons providing that the defendant shall have twenty days in which to answer. This language can conceivably be construed as giving the judge a broad discretion as to how he should proceed. But, abridging the defendant's rights generally present in a civil action as to time allowed for his answer—a substantial right—should not be lightly considered. If he has a real defense, he should be given time to prepare—remember the issues raised on the show cause order as generally framed, are not incidental or collateral to the primary merits of the case; they are the case itself. There is nothing more in this record justifying ordering the defendant to show cause as to why the court should not require that he comply with the plaintiff's demands set forth in the complaint than in any other complaint in an ordinary civil action, when it is first filed.

Even if a show cause order is issued, it should only supplement service of a summons, and in such event, might be framed to require the defendant to show cause why the court should not

*Foret v. Stark (1943) 16 So. 2d 79, 82.
*"Ibid.
*60 C.J.S. Motions and Orders, Section 20 at nn. 5, 6, and 7.
*R.C.M. 1947, 94-801-12.
honor the request of the initiating state that he be subjected to suit. The hearing on such order may be timed with the service of the summons. If it be insisted that there is reason for expediting this proceeding to give the plaintiff badly needed relief, and that the Act's provision directing the judge to "set a time and place for the hearing" so authorizes, it does not necessarily follow that the show cause order must be used as originating process. Admittedly the state recognizes a very direct and substantial interest in itself in such suit, evidenced by the fact that it assumes the bulk of the costs for the litigation, and expects to be relieved of great welfare costs; in addition, its direct interest in the defendant's welfare generally, as parens patriae, is expressed in a great variety of ways. Hence, if there is reason to bring in the defendant on short notice, to get the proceedings under way, he might very well be subpoenaed as in a proceeding in which the state is concerned, under R.C.M. 1947, Section 25-218, providing for the calling of witnesses on behalf of the state. Nothing in the Section limits it to cases where the state is a formal party.

Perhaps it would be more appropriate yet, however, to rely on the court's equitable powers under R.C.M. 1947, Section 10-616, regulating the jurisdiction of the juvenile court and empowering it to issue any process necessary to compel the attendance of a child's parents or any other necessary person. The essential purpose of this suit is exactly the same as under 10-616, to compel the parent to provide, at least where the dependent is a child, and probably is similar enough to warrant the same kind of process in any support case. The issuing either of a subpoena or a citation, as is provided for in 10-616 has the very real advantage that the defendant will be subject to the compulsion of the court to respond. It is most necessary that we actually get the defendant into court. An informal hearing before trial could save considerable time, being just a form of pre-trial hearing, and which would be a most desirable practice in these cases. Sometimes such hearing will establish the undesirability of proceeding with the action. In any case, the provision directing the court to "set a time and place for a hearing," would be complied with, consistently with

 Though traditionally, it has been insisted that one state cannot be interested in the securing of support for citizens of other states, the Reciprocal Act is framed on an enlarged view of each state's interest—each state is interested in the other's obligees, so that it may more effectively secure support for its own obligees.

 At least there are not nearly the serious objections to extending this section by implication, that there are to extending the uses of the order to show cause by implication.
the essential nature of the proceeding as an ordinary civil action.

Experience so far has shown that, as to the very large bulk of litigation under the Act, the defendant will admit liability readily, so that there may be very good reason for bringing him before the Court at the earliest practicable moment by supplementary process, so as to give the petitioner relief at the earliest possible moment. However, for those defendants who resist the allegations of the complaint, not only should they be given the full time to respond contemplated by the summons issued in connection with a civil action generally, but they must likewise be granted all the other safeguards normally available to such defendant. Hence, assuming that he insists on litigating, but that the complaint will withstand a demurrer, the defendant will next answer, which, if subject to a reply, should be certified by the responding court and remitted to the initiating court, reversing the procedure set forth in Section 11 for the original certification. The reply, in turn will be dealt with in the same manner. Certainly the pleading requirements of the responding state are the ones that must control here.a

It likewise is generally recognized, at least now, that the responding court should not render a judgment merely on the pleadings.a Not only is the defendant entitled to insist that the plaintiff must "prove," as well as allege, but that those rules of evidence and of proof generally utilized to give the greatest possible assurance for arriving at the "truth" are preserved to him. So, the complaint is not evidence, because a self-serving declaration.a So, also, the right to give evidence by testimony and to cross-examine the opponent's witnesses are to be preserved. Certainly, in no kind of case, are the issues more likely to be more hotly contested, and more colored with emotion and with the temptation to falsify than in a support case where the defendant denies paternity, or where there is a substantial issue of "fault" involved. Nowhere will cross examination be more vital to ascertaining the truth. Fortunately, such cases will be comparatively rare. When they arise, however, full resort to the use of interrogatories, discovery, and depositions will be in order.

The new York Act expressly provides for the procedure outlined above, detailing the mailing back and forth of the record,

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aSuch rule is axiomatic in the conflicts field. Though the principle that "the law of the forum governs procedural matters" is being critically re-examined today, there seems no reason to question it regarding the present issue.


Ibid.
both to complete the pleadings and to take proof,"\(^6\) empowering the initiating court to make a specific *recommendation* to the responding court, after the former has taken evidence from the petitioner in response to the defendant's denials. It concludes with, "'Upon the resumption of such hearing, the respondent shall have the right to examine or cross-examine the petitioner and the petitioner's witnesses by means of depositions or written interrogatories, and the petitioner shall have the . . . (same right).'\(^7\) Though the Commissioners' Uniform Act does not so state, this same procedure inevitably follows their clear intent that, "'... the usual rules (of the enacting state) for obtaining jurisdiction, for carrying on the procedure and for appeal may be held to govern.'\(^8\) Our Code contains no statute providing for any other kind of procedure.

The above discussion assumes that each party is in his own respective separate court. Though the Act contemplates this, it does not require it. There is nothing to prevent either party from appearing in the other court at any given stage either generally, or for a very limited purpose. Indeed, when the defendant is denying paternity, it may well be that he should hire counsel to represent him in the plaintiff's court. Of course, in many areas, the two courts will be very close together. This is strikingly demonstrated in a recent New York-Connecticut proceeding. The New York court transmitted a certified petition to the Connecticut court, requesting that the respondent be made to support his wife, petitioner, and child. The respondent denied paternity at the Connecticut hearing, and the latter court remanded the proceedings to the New York Court to determine the issue of paternity. The present decision is one by the New York Court,\(^9\) on this issue, with both parties appearing with counsel. It is significant to note that the initiating court treated the respondent's appearance as being only for the purpose of testifying and cross-examining. It did not attempt to exercise a personal jurisdiction over him as defendant, granting him the privilege of "appearing specially" for this purpose. Further, reciting that the issue of paternity was remanded to the initiating state for final determination, apparently, the New York court considers itself as acting in an advisory capacity, only, concluding that it still is necessary to remit "an exemplified transcript of the proof and evidence and of the proceedings and recommendation taken in

\(^{6}\) *Op. Cit. supra* 2, Section 2116, particularly paragraphs (e) through (i).

\(^{7}\) *Op. Cit. supra*, 2, Section 2116 (1).

\(^{8}\) *Op. Cit. supra*, 41.

\(^{9}\) *In re Miller*, 114 N.Y.S. 2d 304 (1962).
this court, ... (to) ... the Court in Connecticut, where the final order will be made and enforcement may be had.

This seems to be an eminently correct decision.

On the other hand, a recent Arkansas case warns of the need for caution in appearing before the initiating court. There, the Arkansas Court took personal jurisdiction of defendant to render a single adjudication, where he appeared in his wife’s original action, filing a written motion and a petition for continuance there, though he lived in Pennsylvania, and though, without such appearance, the proceeding would have had to continue in Pennsylvania.

The New York case discussed just above, suggests something of the possible flexibility in procedure desirable under the Act. Actually, the extremely inclusive provisions of the Act, in giving any and all kinds of dependants, based on any and every duty of support, whether the duty originates from statute or from court decree topped off with a right of subrogation in state welfare agencies, may justify varying treatment in detail, as the issues and the manner of proof vary according to the type of case involved.

We have assumed a case so far, where the initiating court has not now and never has had personal jurisdiction over the defendant. But the Act seems surely to include a case where the plaintiff already has a divorce from her home court, with a provision for alimony, supported by personal jurisdiction over the defendant, at the time, with the defendant having failed to pay and is now in a foreign state. W wants to recover for past due alimony and also enforce her duty of support under the decree in the future. She can institute an original suit in her home court, tendering that court’s own decree to prove her claim, and that court can then ask the responding court to proceed with the suit by obtaining jurisdiction over the defendant. Based on the record, the initiating court, contrary to the more typical case, can here make an absolute finding of a continuing duty to support, in its certification to the responding court.

The New York Act expressly gives the initiating court a power to “recommend” to the responding court, upon further hearing there, but it is clear under that Act that the responding court is the proper one to enter the judgment it deems proper. Op. cit. supra, 2, Sections 2116 (g) (h) (i).

Dean v. Dodge (1952) 220 Ark. 853, 250 S.W. 2d 731.

The 1952 Amendatory Act expressly so provides in Section 19, as an optional section.

A cautionary word is needed even here. Even notice requirements recently have been made stricter to satisfy due process. In Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 70 S.Ct. 652, and more particularly in Griffin v. Griffin (1946) 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635, the Court makes it clear that the doctrine of McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917) (Re-
be a little more basis for contending that the latter court can hale the defendant before it by an order to show cause why he should not be made to pay, treating the proceeding simply as supplementary process in aid of the initiating court's attempt to get summary execution on its original decree. It is believed, however, that this argument completely loses sight of the basic nature of the proceeding under the Reciprocal Act. This law does not provide a summary method for certifying, filing or recording a foreign judgment for the purpose of entitling it to all local process for summary execution in any event. W has brought an original action under the Reciprocal Act, as in any other case, and she must still prove her claim in the responding state as in any other cause—though the matter of proof is now tremendous-ly simplified for her. And the responding court still must try her claim in the same way as it would were she to sue on her behalf locally, on the foreign cause of action. As to the accrued alimony, she is suing essentially in debt, and as to both the past due alimony and the future duty to pay, the defendant may have very real and substantial defenses. He may have paid; or he may challenge the validity of the original decree, insisting that it is void. He still must be given his day in court subject to the same procedural rules as in any other ordinary civil action.

COMMON CRITICISMS AND THE 1952 REVISED ACT

The Uniform Commissioners enacted an extensively amended Uniform Reciprocal Duty of Support Act in 1952," almost amounting to a revision of the 1950 Act, adopted by Montana. That many of the criticisms of the 1950 Act, made by judges and attorneys in the state, have merit and express the very common reaction of the profession over the country generally is attested to by the fact that the 1952 amendments deal with many of these same objections, seeking to remedy them. The Amended Act also attests to the fact that its framers believe these objections are requiring that kind of available substituted service which is most likely to give defendant actual notice, even where substituted service is allowed) is to be extended to at least some kinds of mere notice, where the court already has acquired personal jurisdiction. In Griffin v. Grif-fin, the Court ruled that a New York judgment which had been rendered ex parte for past due alimony, without any notice to the defendant, was not entitled to full faith and credit in the District of Columbia. The responding court should take this into account in considering any foreign judgment sued upon. Though such summary judgment should not be enforceable, however, the original judgment for alimony will support an ordinary action under the Reciprocal Act, because the defendant must be properly served in that action, and the original decree is valid.

not fundamental and can be entirely eliminated by additional experience.

One of the most common administrative difficulties, mentioned frequently by state enforcement officers is that the papers the initiating state sends the responding state contains altogether too little information for identifying and locating the defendant. Sections 10 and 18 of the amended Act seek to correct this condition, enjoining both the plaintiff and the responding court to much greater diligence and ingenuity to that end. The former enumerates (for illustration only) the various kinds of real evidence that may be appended to the complaint, such as a photograph, fingerprint, Social Security number, description of any distinguishing marks of his person, other possible names and aliases than his own, by which he might be known, etc. Section 18, requires the responding court to report immediately inability to locate because of insufficiency of description, and to be aggressive in using all means at its disposal, while holding the case pending additional information from the initiating court. Of course, these provisions will not eliminate the difficulty, which is inherent in the character of the litigation involved, but persistent practice and continued experience following these directions will substantially reduce the difficulty.

Related to the responding court's problem of locating the defendant, is the initiating court's difficulty in identifying and locating the responding court. Section 13 of the amended Act imposes the duty on the initiating court by implication, to learn the address of the information agency in each state which will serve as intermediary between the initiating and the responding courts. Practically every state with the Act has such agency. A listing of them can be secured from the Council of State Governments. It also is available in the Cumulative Annual Pocket Part of the Uniform Laws, Volume 9a for 1953. Section 16 of the Act also stipulates the Information Agency for the enacting state, requiring that Agency to compile a list of local competent courts and send to the corresponding agency in other states, and to receive the same from other states and transmit to the local courts.

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60 MONTANA LAW REVIEW

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60 MONTANA LAW REVIEW

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The Council of State Governments, 1313 East 60th Street, Chicago 37, Illinois.

costs are to be disposed of. Several attorneys mention this fact. The attorney General’s Office has ruled that the regular filing fees should be charged. Since the need for depositions and interrogatories appears to be common under the Act, a common objection is that these costs make total expenses under the Act excessive, largely defeating a primary purpose thereof. Evidently they have not been used under our Act largely for that reason. The new Act deals with the subject in Section 14, providing that any court acting under the Act may, in its discretion, decide whether all costs and fees should be assumed by the state. It is recognized that the amount involved and the economic condition of the parties may sometimes justify leaving the costs with them.

Section 15 makes a rather half hearted attempt to cope with the common plaint that most defendants are transients, economically irresponsible, and that if they don’t leave before trial, they nearly always disappear after making one or two payments, by providing that the initiating court may request and the responding court may proceed to arrest the defendant, to insure his presence.

Some county attorneys have taken the position that they have no duty as such, to represent the plaintiff in initiating an action under the Act,—and probably correctly, as now written,—even though such interpretation may limit somewhat the effectiveness of the Act. Though there is no doubt that this Act takes a major step in “socializing” this particular field of the law, in which the state assumes a primary responsibility in proceeding with the litigation, the proper thing to do is to leave it to the legislature to make clear just how far it wants to involve the state therein. The amended Act gives a clear answer to that question, in Section 11, expressly requiring an appropriate enforcement officer to act on behalf of any plaintiff, and also brings any and all welfare agencies into the picture more clearly by designating them as proper agents to cause such action to be taken—and to advise

At least some county attorneys’ offices in the state are extending the benefit of R.C.M. 1947, Section 93-8625 granting the right to sue in forma pauperis, not only to the plaintiff initiating a suit here, but to foreign plaintiffs, as well. The language of the Section readily permits that construction.

24 ATTORNEY GENERAL’S Opinions, Number 105, rendered July 14, 1952. Several judges and letters from county attorneys say that depositions and interrogatories have been little used, largely for this reason. Although R.C.M. 1947, Section 94-901-12 requires the responding court to “inform the county attorney to proceed with the cause,” Section 94-901-11 gives no such direction to the district court as initiating court. No Section expressly imposes a duty on any public official to act as counsel for the plaintiff in the initiating court.
and give counsel to a prospective plaintiff. But until this Section is adopted in Montana, any county attorney is within his "rights" under the earlier Act to refrain from initiating such action, though at least some county attorneys offices are performing this service currently in Montana.

The above criticisms involve administrative difficulties almost exclusively. One involving a more substantial question of law is that the complaint filed with the responding court almost invariably does not state facts sufficient to state a cause of action under local procedure. Though the 1952 Act provides for additional information in the complaint, in Section 10, it relates only to the question of identifying and locating the defendant, as pointed out supra. Actually, however, an examination of complaints from other states does not bear out the statement that they *always* fail to state facts sufficient to state a cause of action under the local law. Indeed, there is strong evidence that courts generally exercising jurisdiction under the Act are coming to agree that such complaint must satisfy the requirements of the responding court's law, as to sufficiency, and that the latter generally will require as full a recital as for any ordinary civil action. In addition, to obviate the common requirement in an action based on this kind of liability that any judgment must be supported by some evidence—and that the bare complaint cannot be introduced as such evidence, being a self-serving declaration, initiating courts frequently now subject the plaintiff to an examination under oath by the court itself, sending the resulting transcript along with the complaint. In other words, whatever defects may have existed in this area initially, seem to respond readily to developing procedures based on a little experience with the Act.

We have just considered some of those complaints against the Act, which seem to process of partial correction, either by legislative amendment, or by modifying practice. There remain some questions largely unmentioned by the Montana profession, apparently because their experience has not proceeded far enough to lay those questions bare.

"Sample complaints and certifications from California and Washington being currently used seem quite adequate. As the uniform forms resulting from recommendations of interstate conferences on reciprocal non-support legislation come into more general use, this difficulty will very largely abate. These forms are available in a pamphlet distributed by the Council of State Governments, *supra* n. 38.


"Sample form number One in the uniform forms proposed by the Council of State Governments, *supra*, n. 38, at 12.
Probably the least satisfactory part of the Reciprocal Act, in terms of draftmanship are those sections determining the "choice-of-law" issue under the Act, i.e., by what law the plaintiff is entitled to claim the benefit of a duty of support against the defendant, making him an obligor. Section 7 states the choice of law rule in the alternative—the plaintiff having the benefit of either of two principal laws. However, Section 4 also deals with the subject sufficiently to require considering the two together. The latter reads:

"Extent of duties of support. The duty of support imposed by the laws of this state or by the laws of the state where the obligee was present when the failure to support commenced as provided in section 7 (94-901-7) and the remedies provided for enforcement thereof, including any penalty imposed thereby, bind the obligor regardless of the presence of residence of the obligee."

Section 7 reads:

"Civil enforcement—what duties are enforceable. Duties of support enforceable under this law are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee."

In enacting Section 4, the apparent object was to repudiate the traditional doctrine that locally created duties of support exist only for the benefit of local resident plaintiffs. The Code Commissioners put it thus:

"The only extension of the duties of support is the principle stated in Section 4 that the duty shall bind the obligor regardless of the presence or residence of the obligee. The purpose here is to overcome the rule in some states that the duty of support runs only in favor of obligees within the state, . . ."

Sec. 7 is generally understood as providing an alternative choice of law rule. Though it selects either any law where the defendant has been present, or where the "obligee was pres-

"R.C.M. 1947, Sections 94-901-4 and 94-9017.
"Op. cit. supra, n. 23."
Section 4 seems to assume that the choice of laws available by the appropriate "choice of law" rules are either "those imposed by the laws of this (the enacting) state, or those imposed by the "place where the plaintiff was present when the duties of support commenced." It is submitted that this inconsistency in terminology is the result of faulty draftsmanship, and should be corrected as soon as possible. The same Sections in the 1952 Act are amended to reduce the proper "choice of law" in any case under the Act to "the laws of any state where the obligor was present during the period for which support is sought" under Section 7 completely eliminating the alternative which the plaintiff has under the Montana Act. Section 4 further refers to "the laws of this state" only "when applicable under Section 7," i.e., when the defendant has been "present" in this (the enacting) state for part or all of the period during which support is sought. So, under the Amended Act, the two Sections are completely harmonized. However, in Montana, these Sections as originally drafted continue to be the law for the time being; so we have to try to interpret them in their original form.

One might try to explain Section 4 on any one of at least three different grounds: 1. As being a declaration by the enacting state that all duties of support created under its own law may be available to non-residents as well as its own residents, in proper cases; 2. As being a declaration that, whenever its courts (i.e., the enacting states’) select a law under the controlling choice of law rule provided by Section 7, that law is to be ap-

The last alternative choice in this Section is criticized as being based on "circular reasoning." The writer assumes that the phrase "when the failure to support commenced" necessarily has an exclusively "legal" meaning. See Otterstedt, Reciprocal Support Legislation, CURRENT TRENDS IN STATE LEGISLATION 1952 (Legislative Research Center, University of Michigan Law School) 165 at 232 ff. The criticism must be rejected, however. If the Section is related to and interpreted in the light of the allegations of each particular complaint, any apparent circularity of reasoning should be resolved. If the plaintiff relies on an absolute duty to support, i.e., a subsisting duty in the defendant, as husband, or father, it is only necessary to determine where the plaintiff was "present", at the moment that the defendant ceased to support in fact, to ascertain the applicable law. We then look to that law to see whether the failure in fact violates a legal duty—whether a legal duty is imposed by that law. On the other hand, if the plaintiff relies on a contingent duty, being say a grandparent, claiming to be indigent, two facts must be first alleged in the complaint: 1. The moment at which the plaintiff became indigent, with the further fact that the defendant provided no support at that time; 2. the further allegation that the law where the plaintiff was at the moment of his indigence did impose a legal duty to support, on the defendant. (Cf. this phrase with ambiguity in phrase "place of contracting," or "place of the tort," used to make the 'choice of law' when the question is whether there is either a contract or a tort.)
plied free of the traditional restriction that such duties were created only for that law’s domiciliaries; 3. As constituting a declaration of policy encompassing both “1” and “2”. However, the differences in the applicable law expressed by the varying language of 4 and 7 respectively, cannot be completely harmonized under any one of these three. No. “1” interpretation would have been accomplished simply by stating the rule with reference to the “duties of support created by the laws of this state,” without referring to any alternative law. Under “2”, Section 4 should refer to the same possible choices of law as provided for by Section 7; and under “3”, Section 4 should refer to the duties created, a. by its own law; b. by the law of any state where the defendant had been present; c. by the law of the place where the plaintiff was present when the duty first commenced.” Hence, there remains a difficult problem of construction.

Probably the overall purpose of the Act will be best served by giving Section 4 the number “2” interpretation, supra, with the further limitation that the reference to the “law of this state” in Section 4 is controlled and thus limited by Section 7, so as to contain this further implied limitation, “when applicable under Section 7.” This is precisely the manner in which it is limited in the new Section 4 of the 1952 Act.”8

As drafted, these sections determining the choice of law under the Act, raise still another (a very different kind of) problem. Under them, both the jurisdiction of the court to entertain the suit, and the choice of the applicable law, are controlled simply by “presence” in contrast to the traditional relationship of “domiciliation” or “residence” generally controlling in the domestic relations field. There is much more than meets the eyes, in this substitution. It quite generally is understood, however, that “presence” means just that and nothing more.”7 The desir-

“On its face, Section 4 seems to attempt to change not only the enacting state’s law, in this respect, but that of another state as well—something beyond its legislative competence. However, the number “2” interpretation avoids that conclusion.

“But this interpretation still contains a major departure from traditional doctrine that, when F refers to a foreign created right, it will apply that right subject to the same limitations as are imposed by the law creating it. The 1952 Act avoids this objection by omitting reference to the alternative law selected according to the “wife’s presence.” However, there is nothing to prevent the forum from legislating such choice of law rule.

“Otterstedt, op. cit. supra, n. 76, at 232 ff.; Stimson, Simplifying the Conflict of Laws: A Bill Proposed for Enactment by the Congress, 36 A. B. A. J. 1003, 1005 (1950). One difficulty with constantly shifting “presence,” is the burden of proving “presence” in the past, affirmatively placed on the plaintiff. The 1952 amendment in Section 7 tries to correct that, though, by raising a presumption of continuous presence in the forum, shifting the burden to the defendant.
ability of basing the jurisdiction of the courts on "presence" raises much less debatable issues than does that of selecting the applicable "choice of law" on that ground. In addition to raising a very difficult practical problem, where the defendant has been in many states in the interim, with none of those states having any present governmental interest whatever in the litigation, it is predicated on an extremely debatable thesis that all conflicts issues should be resolved by selecting the law on an extreme "territorial basis," illustrated in the present Act, by the use of "presence for the time being," as the basis for selecting the controlling law.\[^{1}\] Though an extended discussion of the fundamental policy question in the conflicts field is beyond the scope of the present study, selecting the law on the basis of bare "presence" deserves the most thorough critical examination before being accepted as settled legislative policy.\[^{2}\]

Another problem deserving more attention than it has received so far, involves the question of whether a plaintiff with a divorce and alimony, or a separate maintenance decree, is entitled to bring an action under the Act, seeking to recover for all accrued sums due. The very wording of Section 7 seems strongly to suggest an affirmative answer. If the reference to the laws of states where the defendant has been in the past is not to establish the measure of his liability for the future, it must be to compute a total accrued sum for which the defendant is liable, even in the

\[^{1}\] Stimson, \textit{op. cit. supra}, n. 79. 'Domicil' or 'residence' are the most obvious alternative bases in the common law for selecting the controlling law. \textit{Restatement, Conflict of Laws} (1934) Section 457. Granted even that there are some difficulties in "domiciliation", as the basis for making the choice of law, and that it should not be used where there is an acceptable alternate basis, 'residence' deserves serious consideration, as the 'connecting factor' for selecting the applicable law. Probably it indicates that law having the greatest legislative interest in a 'support' case.

\[^{2}\] Selecting the controlling law on the basis of 'presence for the time being' may well greatly oversimplify the problem. Surely it gives little consideration to the selection of that law with the greatest amount of governmental interest. \textit{Cf.: Briggs, Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws, 6 Vanderbilt Law Rev. 667 (Symposium on Conflicts) (1953)}; Briggs, \textit{The Jurisdictional—Choice-of-Law Relation in Conflicts Rules}, 61 Harv. L. Rev. 1165 (1948). In fact, much dissatisfaction with Section 7 as amended, even, continues to be expressed generally. \textit{See, Reciprocal State Legislation to Enforce the Support of Dependents, op. cit. supra}, n. 38, at page 22, where a resolution by the Conference on Social Welfare and Non-Support, 1953, urging the Commissioners to continue studying the choice of law problem, is set forth. In addition to the question of whether 'presence' is a proper basis for making such choice, there is the further one of whether it is practicable in a single choice of law rule, to deal with both contingent—depending on the indigence of the plaintiff, and absolute duties —arising simply out of a relationship.
absence of a formal decree. Lump sum awards are expressly authorized for the benefit of all state welfare agencies. Further, the definition of "duty of support" in the Act, would seem to the definition of "duty of support" in the Act, would seem to compel that same conclusion, in so defining explicitly as including duties raised by any kind of judicial decree, as well as by general law. This definition plus the full faith and credit clause should make any other conclusion impossible. Yet, in at least two district courts in Montana, the position is taken that such relief is not available. Furthermore, a standard form in use in Idaho, for a complaint under the Act, based on a prior decree, where the court had jurisdiction over the defendant, and reciting the past non-payment, with resulting accruals, makes no demand, as of right under the full faith and credit clause, for the accrued alimony, praying instead for "such sums as shall be deemed just and equitable for the support . . . of the plaintiff and . . . children . . . ." This refusal to render a decree for past due alimony certainly cannot be justified by the reason given by one Montana county attorney, which was that the Act is 'quasi-criminal,' and to grant an award for accrued alimony on a foreign judgment would be combining civil and criminal remedies in one action, which is not permissible.

The preferable construction of the Act is that it intends to provide a much more convenient method for the plaintiff to enforce an alimony or maintenance award against a non-resident defendant, by permitting suit to be initiated in the former's home court, with the state assuming a major portion of the costs, in proper cases. Indeed, this may well become one of the principal virtues of the Act. Of course, the responding court may have a duty to measure past due support by the original decree, without having any such duty to so measure as to future sums due, at the time of its decree. As to the latter sums, however, there immediately arises the question of which decree takes precedence, as payments become due, if the responding court refuses to impose a duty measured by the award of the prior decree, awarding instead, a lesser amount. Under the 1950 Act this could be a very troublesome problem. However, Section 27 of the 1952 Act, resolves that question by providing that each decree continues to be operative, with payments on the lesser one to be credited on the larger one. This Section should be interpreted as having particular reference to duties of support, prospective at the time of the responding court's decree.

*R.C.M. 1947, 94-901-2 & 6.*
We shall conclude this consideration of general problems of substance raised under the Act by considering briefly the scope of the defendant’s right under Section 6 to avoid extradition by submitting “to the jurisdiction of the court of such other state and (complying) with the court’s order of support.” The requesting state may choose to seek extradition without initiating a civil action. There is some tendency to interpret Sections 5 and 6 of the Reciprocal Act as controlling any and all applications for extradition for non-support, thus giving the defendant the right to demand that the local court take jurisdiction for the purpose of subjecting him to an order of support, with which he can comply. Such construction is questionable, however. This Reciprocal Act is operative, with all of its various provisions, only between states, both of whom have enacted it. Section 6, itself, is worded carefully in terms of the requesting (and initiating) state: “Any obligor contemplated by Section 5, who submits to the jurisdiction of the court of such other state and complies with the court’s order of support, shall be relieved of extradition for desertion... entered in the courts of this state...” This Section assumes that the other court is ready to exercise such jurisdiction. The requesting state cannot compel the requested court to exercise any such jurisdiction, except by qualifying under this Act—and that only by initiating a civil action to accompany its request for extradition. The Section is, in terms, a dispensation granted by the requesting state, not by the requested one. Certainly it could not be applicable in terms of creating any “rights” in the defendant in a case where the requested state has not enacted the Reciprocal Act. The entire wording of Section 6, in granting the dispensation, assumes a case where the requested (and responding) court is ready to exercise jurisdiction in the civil action as a matter of course, envisaging the initiating of such action by the requesting state—and presumably limited to that situation. Finally, this construction is most consistent with our position that Sections 5 and 6, the only ones remotely relating to criminal procedure, are included in this Act as supplementary and incidental to the civil action to put more “bite” in the latter. Hence, if the requesting state chooses to request extradition without initiating a corresponding civil action, under its general extradition laws, neither the defendant nor his state can complain.

*One county attorney mentioned this particular problem taking the view mentioned. At least two practitioners discussing it, were inclined to the same view. Semble: Ex parte Susman, 1953, 254 P. 2d 161, 116 Cal. App. 2d 698.
(Of course, such refusal may conceivably have some bearing on the requested Governor's consideration of the case.)

FOUR ILLUSTRATIVE CASES

A brief discussion of some of the cases arising under the Reciprocal Act, and called to our attention, should help to illustrate some of the conclusions on the Act, given above.

A Montana District Court received certified copies of a petition filed in Oregon under the Act, asking for support for a minor child and of the Oregon court's "order" reciting that, "having examined the foregoing Petition and other files herein, it finds that the facts set forth therein are true and the D owes a legal duty of support to his dependent," and requesting that the Montana court acquire jurisdiction over the defendant and proceed with the trial. On the basis of this certification, the responding court issued an order to the defendant "to appear and show cause why he should not render support to his daughter," with five days notice. Defense counsel secured a dismissal of the action by advancing the following arguments: 1. It is a criminal proceeding, and some of the defendant's basic rights in a criminal trial are necessarily violated in the procedure provided for by the Reciprocal Act; 2. If it is a civil action, the initiating court cannot make absolute findings of fact and render a judgment of liability thereon in this personal action, as it purports to do, without first acquiring personal jurisdiction over the defendant, which it never had done in this case; 3. The mother was not a proper party to bring the suit without first being appointed guardian ad litem for the infant.

Though at least until recently, the Multnomah County courts have continued to use the above form of certification, it clearly is wrong. It is not surprising that that certification should confuse the responding court, at first. It is true that the initiating court cannot make any such finding as did the Oregon court here, because it has never acquired any jurisdiction supporting such "decrees." Indeed, it may be profitable to compare the above certification with that from a California form, a most satisfactory one: "The undersigned . . . hereby certifies . . . that said complaint sets forth sufficient facts from which it may be determined that defendant owes a duty of support to the person named therein . . . and that in the opinion of the undersigned Judge . . ., the defendant should be compelled to answer such
Although very probably the court was greatly influenced by this certification in dismissing—and understandably so—such action need not follow from the faulty certification. Being within the exclusive power of the responding court to determine whether the initiating court has qualified to request action of the responding court, the latter may very properly give the effect to the certification that a properly worded certification would be entitled to under the Act, i.e., require the defendant to answer the complaint, as is very aptly stated in the California form, above. Undoubtedly the Oregon court itself expects no more. It would be a grievous error indeed to proceed on the assumption that the Montana proceedings is a secondary or incidental stage of a suit over which the Oregon court has already acquired jurisdiction. It would, therefore, be equally erroneous to try to justify the issuance of an order to show cause on the ground that the certification merely amounts to a motion incidental to a suit already begun.

We have said enough above to make it clear that, in our opinion, the sufficiency of the order to show cause why the defendant should not be required to support, as originating process, is very doubtful. However, it might be issued auxiliary to a summons, ordering him to show cause why he should not be made to answer the complaint—this at least would be responsive to California’s certification form given above.

The question of whether the mother was entitled to sue to recover for the support of the infant, in her own right, in this action, has a dual aspect. Whether the mother, entitled to the custody of the child by formal decree, is entitled to claim support in her own right, from the father under the Act, must depend on whether either choice of law permitted under Section 7 grants her such right. If it does, she can sue in her own name. But, even if it does not, giving the right to sue for support only to the child directly, there still remains the further question of whether the mother can sue in the responding state as natural guardian, or has to be formally appointed guardian ad litem. To answer this last question, the law of the responding state, as forum, must control. Experience seems to have established such

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"The proposed uniform form, modelled on New York practice, puts it more succinctly yet: "4. THAT in the opinion of the undersigned Justice the petition sets forth facts from which it may be determined that the respondent owes a duty of support and that such petition should be dealt with according to law."

"Clearly this is a question of "procedure," traditionally regulated by the law of the forum. Restatement, Conflict of Laws, Section 588—Parties (1934)."
appointment as a general requirement under the 1950 Act, because in Section 12, the 1952 Act expressly authorizes the person entitled to the legal custody of the child to sue on its behalf without formal appointment. Editorial comments states that this was to remove the technical appointment requirement. Our own Code likewise would seem to require it."

However, it is very arguable that the person with legal custody, particularly where the mother, should be able to sue for the support of the child in her own right, under our statutes and decisions. Without suing for divorce, the wife may sue in her own right to recover maintenance both for herself and minor children, first judicially established, and now re-affirmed by statute. Further, if W, wife, has secured a divorce which provides for alimony and support money, she is entitled to institute further proceedings, in her own name, under that degree, seeking modification either of alimony or support money for the children. Hence, if she has a divorce decree which fails to award alimony and support money only for want of personal jurisdiction over the father, there is every reason to allow her to sue in her own right to adjudicate the question of duty of support.

This view is fully supported by our Code, under which the right to custody at the outset is coequal between the parents, and the duty of support is likewise imposed on both parents where needed. This seems clearly to create reciprocal rights and duties between the parents themselves with respect to support, which, under the proper circumstances, should give either parent a direct right of action against the other—until there is a formal delimitation of those rights and duties by contract or decree. The primary historical bar to such conclusion, the inability of one spouse to sue the other has long since been repudiated by our code.

R.C.M. 1947, Section 93-2805.
R.C.M. 1947, Section 21-137.
R.C.M. 1947, Sections 61-105 and 61-106.
Refer v. Refer, op. cit. supra, n. 88; Brice v. Brice, op. cit. supra, n. 88.
Even here, such decrees are subject to constant modification in the interests of the children. And a contract between parents is enforceable only so long as not inimical to the best interests of the child: Brice v. Brice (1915) 50 Mont. 388, 147 P. 164.
Wife may own separate property: R.C.M. 1947, Section 36-111; husband and wife may contract with each other with any third person, R.C.M. 1947, Section 30-105, "married woman may prosecute action for injuries to her reputation, person, property, and character, or for the
In another case, suggesting something of the variety of ways the Act may be invoked, the wife went to California with her two children, ostensibly to visit her parents. Instead of returning to Montana, as her husband expected, she remained in California and sued for separate maintenance for herself and children. Certifying in much the same way as did the Oregon court in the above case, the California court concluded with, "... the verified complaint sets forth facts from which it is determined that the defendant owes a duty of support of the minor children ... and that the District Court of ... Montana, may obtain jurisdiction over the defendant or defendant’s property." Although the Montana court misinterpreted this certification as gratuitously trying to confer jurisdiction on the Montana court, it correctly gave the effect to the certification intended under the Act, docketing the case for trial and subjecting the defendant to process. On the trial, it became apparent that the wife was at fault and so not entitled to separate maintenance. A decree was entered accordingly. This case is of interest in that it supports the suggestion made above that, even though the initiating court’s certification may be improperly worded, it should, nevertheless, be given the legal effect intended for it under the Act, i.e., effectuating a filing of the complaint in the responding court. The case also is suggestive of this phenomenon that it is by no means always the man who does the abandoning. Very frequently the wife leaves with the children, then tries to establish her right to separate maintenance in a foreign jurisdiction.

Another California case is a slight variation on the above one. Again, the wife left her Montana home and husband and went to California. There she brought an action for divorce, simultaneously filing an action for "alimony" apparently, under the Reciprocal Act. If the California Court hoped in this way to cure its own want of personal jurisdiction over the defendant, it should not be necessary to point out that the jurisdiction in the Montana Court would add exactly nothing to the California Court’s jurisdiction; so it still could not render any kind of binding alimony or support decree. Further, the Montana Court almost certainly would make a finding of fault in the wife, con-
trary to California’s probable finding in the divorce action, requiring a verdict in the defendant’s favor.

This last case is mentioned principally to illustrate what gross misuse of the Reciprocal Act may be attempted—all the more startling in this particular case because practiced by state agencies. To paraphrase this judge: One case, from Los Angeles, was not from any court. The Welfare Board had met there, without any notice to the husband who had been living in Montana for years, and ex parte had determined that the husband should pay hundreds of dollars in hospital, doctor, and drug bills, stating an exact amount, and also declaring that it would be necessary for him to pay over $100.00 per month for future support. They had the papers certified by their chairman and secretary, and sent them to the Court here. I did not consider that they met the provisions of the law, but finally did issue a citation, thinking that some kind of an agreement might be reached if he were served. Hearing brought out these facts. Defendant was living with wife in the Panama Canal Zone when she deserted him. He had not lived with her since, and had never lived in California. A few months before this hearing he had secured a divorce from plaintiff in Cascade County, Montana; she had been represented in the divorce action by reputable attorneys; and agreement had been made, even though she was the offending party, for the payment of monthly sums for a stated period of time, the decree stating the sums, and he had a receipt showing prompt payment of all installments due.

It goes without saying that the Court dismissed the action. But such cases as these latter ones fully justify an insistence that the

*If the divorce should be decided first, ruling in the wife’s favor on the issue of fault, does that become res judicata in the independent civil action for support under the Reciprocal Act? Involving an issue (duty to continue supporting) beyond the jurisdiction of the divorcing court to decide, because of lack of personal jurisdiction over the defendant, its finding on fault for divorce purposes cannot bind the defendant, in an independent proceeding for support in a different court. Always true, this conclusion has been made much clearer by recent United States Supreme Court decisions developing the “divisible divorce” concept: Estin v. Estin (1948) 334 U.S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561; Esenwein v. Esenwein, (1945) 325 U.S. 279, 65 Sup. Ct. 1118, 89 L. Ed. 1608. See also Sutton v. Leib, (1952) 342 U.S. 402, 72 Sup. Ct. 398, 96 L. Ed. 448. Note the possibility of the divorcing court using a civil action under the Reciprocal Act to secure evidence from the defendant on the fault issue, (or any other issue common to both actions) if it so desires.
fullest opportunity for a trial on the merits, with all rights incidental thereto, be preserved to the defendant.

**Evaluation**

The cases just discussed are not cited as typical of those generally arising under the Act in Montana. Such Act seems already to have aided greatly in the more effective enforcement of duties of support by migratory defendants in many areas. It is difficult, however, to determine the total volume of support money actually recovered, or the number of "successful terminations" under the Act in proportion to the total number litigated in Montana. It also is too early to pass final judgment on the effectiveness of the divided trial procedure. A spot check indicates considerable variation in the experience of different enforcing offices. A county attorney in one of the larger offices reports that, of some 12 cases initiated in that county, and sent to other states, to date he has not received one cent as support money from a single case. On the other hand, of about the same number in that county, enforced as the responding county, he has secured a duty of support decree and the defendants have been paying regularly to date, in all except one case, though the average weekly payments are quite small.

A judge from another district reports that, in the one case he has initiated, the responding court has not effected personal service. Of the seven he has handled as responding court, only one has paid without further difficulty to date, though none has contested, admitting liability readily, but most defendants are of such character that collection poses a very serious problem. Citations for contempt are becoming numerous, and some defendants have left the state. On the other hand, a judge from still another district reports some five or six cases pending at this time, with every one of them contested bitterly. Still another official reports that, although he has not carried any proceeding under the Act into court, the bare existence of the Act has caused several derelict fathers, refusing to pay, heretofore, to come forward and pay without further protest.

Though these varying reports from different judicial districts are too fragmentary, and our general experience with the Reciprocal Act is altogether too incomplete to support any gen-

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*Chancing to discuss this problem with an Oregon practicing attorney, he reported that, of four cases he had personally initiated in the past two years, for the plaintiff in Oregon, three to California, and one to Utah, none of his clients has received one cent support money.*
eral conclusions as to its past, present or future value in Montana, we can make certain tentative conclusions that should aid in correcting some of the short-comings found in the 1950 Act, and also in making a further evaluation of the Act as we gain more experience. The Act goes very far in eliminating the old legal bars preventing the effective enforcement of duties of support across state lines removing that stigma on the law. It provides a simple, direct civil remedy for every obligee, initiated in the easiest manner possible, with the further objective of doing all of this at practically no expense to the obligee. Though this last objective has not been entirely realized yet, much progress has been made by the 1952 Act in shifting that expense to the state wherever the obligee is indigent. Further, it establishes a widely accepted rule permitting a state welfare agency to recover from the defendant funds used to support his dependents. Such rule seems highly desirable. These accomplishments alone justify the Reciprocal Act. At least it can no longer be said that the fault lies in the “law” or in “legal doctrine,” enabling deserting fathers to avoid their responsibilities simply by crossing state lines. Legal doctrine now is fully adequate to meet the test, though the problem of on what basis the choice of law should be made under Section 7 merits further careful study. Further, there is little doubt that a very large portion of such obligors will not contest a suit against them, and will accept the fact that the law has “caught up with them.”

However, as is always true, those who are constantly seeking and expecting to find magical panaceas are doomed to disappointment with this law also. The Act does not succeed in resolving all the difficulties inherent in this very complex sociolegal problem. The maximum theoretical return that ideally should be realized under the Act always will be seriously cut down by these factors:

1. If the obligor has not re-married and assumed new family ties and obligations, he is likely to be a migrant—a “drifter.” Rarely commanding a very large wage, he is ready to move on at the drop of the hat, and he is likely to do just that. Yet, imposing criminal sanctions on him will not provide support. That this problem already has shown up acutely is clear in Section 15 of the 1952 Act, which provides for his detention by arrest, before trial if deemed necessary. But that does not keep him on the job as a wage earner after the decree. So far, the discretionary power of the court to require the defendant to post bond for compli-

*Assuming the Act’s constitutionality, mentioned *infra.*
ance with the court decree has not produced very encouraging results, at least in Montana. The possibility of subjecting the obligor to more severe contingent criminal penalties, may merit further study.

2. Almost without exception those persons who have become so fixed that they can be relied upon to pay within their ability, rather than to change their residence, are in this position precisely because they have established a new family with all its responsibilities, and for that very reason, in terms of ability, cannot do much. Naturally, and properly, the responding court takes these facts into full account when it assesses the duty to pay, often resulting in very meagre payments. After all, his duties of support to his new local dependents are quite as urgent as those coming from a distant state.

3. In considering the inherent difficulties arising from the nature of the problem, and making the ideal administration of the Act more difficult, the fact that it makes possible a great many spurious claims may be included. Wives abandoning their husbands frequently will try to compel him to support them where they want to live, though the husband has a perfect defense in such case. Again, probably all too often these same wives will seek support from a present or former husband for a child which is not even his. These tendencies will be aggravated by the desire of local welfare agencies to shift the financial burden to private shoulders. Recipients often will be pressured to file claims when they have none, or to provide false evidence in support of the agency's claim. It may surprise many to learn of the considerable number of cases in which the husband has a perfectly valid defense. Desertion is by no means a one way street. This makes it necessary that the defendant be assured a formal and complete trial, with all those rules and practices aiding in the discovery of truth preserved to him under the Act.

CONCLUSION

This discussion of the Reciprocal Act has been limited in large part by current practices in Montana, and by the questions and criticisms coming from the profession. We have not attempted to consider numerous questions, both large and small. To some, the most notable omission may be our failure to discuss its constitutionality. But that issue lies outside the objective of this paper, which seeks simply to understand the Act itself, and
the procedure it calls for, as completely as we can. Further, we dealt not at all with the concluding sections involving the procedures for collecting and transmitting support money after decree. Purely ministerial they do not pose the primary problems under the Act.

As a result of this study, however, further positive legislative action in two directions seems clearly called for. The amended Act of 1952 makes such marked improvements that it should be adopted without further delay. Secondly, as a corollary to an enactment of this kind providing broad sweeping civil remedies for everybody, where the defendant is without the state, our legislature should remove all question as to whether these remedies are equally available for the persons mentioned in the Act, in a strictly local action. To answer in the negative would produce a monstrous situation in the law. While courts probably would be justified in finding a legislative policy expressed in the Act necessarily including such remedies for strictly local actions, the issue can be best resolved by a statute so providing. As Vernier says:

"... A civil statute meeting the needs above outlined (direct action for support) might advantageously be adopted. Perhaps such action is contemplated by the broad statutes herein discussed which do not provide the means of enforcing the duty stated. If so, they are faulty in not so specifying."

It is believed that, properly construed, this Reciprocal Act will withstand attacks on its constitutionality. Brockelbank, the drafting committee's chairman, considers possible constitutional bases for attacking the Act, and upholds it on all counts in Brockelbank, *Is the Uniform Reciprocal Enforcement of Support Act Constitutional?*, 17 Mo. L. Rev. 1 (1952), and 31 Ore. L. Rev. 97 (1952). A much more intensive constitutional study also upholds its constitutionality: Otterstedt, op. cit. supra, n. 76, at 257 ff. The National Association of Attorneys General has offered to make available supporting briefs amicus curiae, from other states, at the request of any state, on behalf of reciprocal support laws under attack on constitutional grounds. See action of 1953 Conference on Social Welfare, op. cit. supra, n. 81.

Vernier, American Family Laws 60 (1936). Out of such discrepancies between the remedies given under the Reciprocal Act and the varying remedies generally given, arises still another issue of interpretation—and of constitutionality. Otterstedt, op. cit. supra, n. 76, at 272 ff insists this is the most challenging constitutional issue raised by the Act. Many different kinds of remedies have become available for enforcing support duties—though a direct civil action is least frequently authorized. An equitable action for maintenance of wife and children, the imposing of criminal sanctions, liability to third persons for necessaries, and statutes declaring certain duties of support by a policy declaration without providing a remedy for its enforcement, are the most common evidences of the existence of such duty. How must such duty be ex-
pressed in the applicable law for the plaintiff to be entitled to civil enforcement here? I always have felt that, if the applicable law recognizes a legal duty to support, in any given case, as part of its domestic relations law, it should support an action under the act, however deficient it may be in its enforcement machinery—even though it appears to enforce only by criminal sanction, at least if the object of such sanction is to secure performance of the civil duty. The forum does not thus enforce the foreign criminal statute, by imposing the same penalty on the defendant, but rather only enforces the basic civil duty supplied by the applicable law. Though not increasing the class of persons entitled to support, the Reciprocal Act expressly provides a remedy, "... in addition to and not in substitution for any other remedies." Section 3. If, however, there are sound policy reasons for the applicable law to limit both the existence of the duty, and its enforcement to the criminal law field, (which may be doubted) the forum should defer to that policy, where found. Orthodox conflicts rules denying enforcement to a foreign 'penal' statute would require that result.