# CHOICE OF LAW IN FEDERAL JURISDICTION

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## PART II[1]

The nature of the choice of law jurisdiction of the Federal courts is best examined by investigating the exercise of this power in relation to the original jurisdiction of the High Court. The problem may be narrower in connection with other Federal courts of original jurisdiction because their powers may be less than those of the High Court, or may be more specialized. The original jurisdiction of the High Court combines that granted by the Constitution (section 75) and that which may be conferred by Parliament (section 76). In fact, jurisdiction has been conferred by Parliament in three out of the four classes of cases indicated in section 76. If then the problem of choice of law in Federal courts be considered as it is disclosed in the original jurisdiction of the High Court it is unlikely that any important aspect of the problem will be overlooked.

From one point of view these seven classes of cases may be divided into two mutually exclusive sections. On the one hand the case may be ruled in part or in whole by Commonwealth law. On the other hand the substantive rights in issue may be entirely ruled by State law. If the case is ruled in part by Commonwealth law this in itself may be in sufficient. But there may also be a State statute which is valid, relevant and effective to fill in the 'gap', though this State statute is not that of the forum State. It would normally appear that this State statute must be applied because of its constitutional force. But the Judiciary Act, section 80, would seem to suggest that, in the situation supposed, only the common law of England as modified by the statutes of the forum State is to be applied. This is one main difficulty to be considered. It would appear that if section 80 had the effect either of excluding the application of either a valid and relevant State statute of a non-forum State or of applying an otherwise irrelevant statute of a forum State, grave constitutional errors would arise. The 'plain' meaning and effect of section 80 are therefore, to say the least, matter for suspicion. If then the law to be applied to the case includes Commonwealth statute law and this law does not provide all the rules necessary to dispose of the case, recourse, according to the Act, must be had to the common law of England.[2] The facts of the case may be wholly connected with one State of the Commonwealth whether the State in which the court is sitting or some other.

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[1] This is the second and concluding instalment of this article. The first appeared in (1961) 3 *M.U.L.R.* 170.

[2] Judiciary Act 1903-1959, s. 80 (Cth).

Be this as it may, it is submitted that so far as not inconsistent with any Commonwealth statute, any and every State statute law will apply. This is not a consequence of section 80 of the Judiciary Act. Indeed it cuts across the terms of that section. It is a consequence which, it is submitted, could not be affected by any Commonwealth statute (except a valid inconsistent statute rendering the State law *pro tanto* invalid). It is a consequence which flows from the constitutional powers of the States. Up to this point it is obvious that the reference in section 80 to 'the State in which the (High) Court . . . is held' can have no application. The State law will apply because of its force and whether that of the forum State or some other State.

If on the other hand the facts of the case make contact with more than one of the States of the Commonwealth (and the whole matter cannot be completely solved by Commonwealth statutory law) it is sometimes suggested that the recourse will in the first place clearly be to some choice of law rule to determine the applicable law. It can hardly be that this is an application of the common law of England as mentioned in section 80. Equally it is submitted this should not be treated as an application of the 'common law rules' of the forum State under section 79 of the Judiciary Act. It is an application of the *lex fori* of the Federal court. The choice thus made will point to one or more of the States and in consequence to the possibility of the application of the statute laws of those States. Whether these statute laws or any of them will be applicable will depend, after the choice has been followed out to the appropriate State indicated, upon the interpretation of terms of the State statute law itself. It may be the State statute upon a true view of its meaning or intention does not apply to the facts of the case notwithstanding that the choice of law rule has pointed to the application of the law of that State. This is only to say that upon this precise set of facts there is no applicable State statute law. In these circumstances some common law rule will apply because, to return to our original hypothesis, there is a 'gap' left by the Commonwealth statute. And since the common law operates (in the absence of statute) in all of the States with similar effect the result of this process is clear. The initial recourse to the common law results in a choice pointing to an appropriate State which may or may not be the forum State. If it is not the forum State which is 'chosen' then the 'law of that [appropriate] State' may include valid State statutes. In such a case the law to be applied will be the common law as modified by the law of the chosen State and not the forum State. This must be the inevitable consequence of the resort to the common law. To apply the law as modified by the statute of the forum State when that law was not 'chosen' by the common law rule of choice would clearly be irrational. It is submitted that

it is equally irrational to allow any statute of the forum State to modify the choice of law rule which the court first applied.

This somewhat abstract and complicated description merely attempts to reproduce a process adopted in fact by courts and judges in Australia without difficulty and perhaps without any conscious analysis of the various steps involved. It is convenient to examine the matter by means of a concrete example.

Let us suppose a contract is made in Tasmania for the sale of a large quantity of aluminium by the Z Company to the Commonwealth. The aluminium is to be delivered in instalments in Tasmania whence the Commonwealth ships it to Fremantle. Disputes arise as to quality, quantities and times of delivery. The Commonwealth sues for damages for breach of contract in the High Court out of the West Australian Registry and the case is heard by a justice of the Court sitting in Perth. No doubt the action is one in which some provisions of the (statutory) laws of the Commonwealth may be applicable, but those laws will be insufficient to determine completely the rights of the parties. This then would at first glance appear to be the situation contemplated by section 80 wherein the Commonwealth statutory law cannot, without more, be 'carried into effect'. Questions may arise in the litigation as to whether the contract was in truth made, or was breached. There may be questions as to the measure of damages, as to implied conditions of quality, *et cetera*. In the absence of appropriate statutory provisions these questions could be resolved by the rules of common law. In fact there may be modifications of the common law in Sale of Goods statutes in Tasmania and Western Australia and the provisions of these statutes may differ. Can there be any doubt that the statutory provisions of the Tasmanian law would be applied in the case supposed, since the whole facts of the case are Tasmanian, and the provisions of the Western Australian law disregarded (except so far as they related to procedure). Indeed, in the circumstances outlined, to fail to apply the Tasmanian law would surely involve a disregard of the full faith and credit required by the Constitution. In truth the statutory modification by the forum State of the common law rules could have no operation.

It may be useful to take a rather more complicated set of circumstances. Let it be supposed that the contract in question is made in Canberra by a formal document there negotiated and executed. The contract provides that the aluminium shall be smelted in Tasmania and there subject to inspection by Commonwealth officials and thereafter delivered by the vendor company into store in Perth, payment to be made subject to prescribed conditions to the head office of the vendor company in Melbourne. In litigation in Perth in the High Court by the Commonwealth against the vendor company, questions

may arise as to the making or performance of the contract or as to breaches arising in either Tasmania, Western Australia or Victoria. In each case the matter in issue is covered by a rule of the common law modified by a statutory provision. It is conceivable that there are statutory modifications of the common law rules on the particular matters in issue in each of the States and these modifications are dissimilar. Can it be supposed that in each of the matters which arise the modification contained in the law of Western Australia alone is to be applied because the Court happens to be hearing the action in that State? Manifestly this cannot be the true view and section 80 cannot be given any such operation.

The true course to be followed is to consider the nature of the modifications of the common law involved in each of the State statutory provisions. Upon careful analysis each of these statutory provisions can be given a precise operative extent although this may not be expressed. Thus, for example, one of the sections of each of the Sale of Goods Acts of each of the States (and the Australian Capital Territory) may be found to apply to the 'making of the contract' in question. It will then be proper to select the State statute of the State which is the '*locus contractus*'. Again another of the statutory provisions may operate to measure the extent or nature of the contractual duty (but not the mode of performance). This surely will be an appropriate statutory modification of the proper law of the contract as indicated by the common law, and as otherwise provided by rules of the common law. The statutory provision of the State which is identified as the seat of the 'proper law' would then provide the statutory modification of the common law rules and no other. In the same way statutory provisions relating to performance would be treated as modifications *pro tanto* of the common law rules relating to performance. The statutory modifications of the common law (that is to say, the *lex loci* solutions) applicable to that part of performance due to be carried out under the contract in each one of the three States, in which performance is stipulated, would be found in the statute law of each particular State.

It may be admitted that the actual task of characterizing the various provisions of the various State statutes for the purpose of determining their 'local' operation may not always have been a simple and obvious one. But it seems impossible to conceive of any system for the exercise of jurisdiction other than in some such way as this in a Federal community where State statutes can claim within true constitutional limits a general legal force which cannot be denied by any Federal law. Moreover, such constitutionally valid State statutes are by the Constitution itself entitled to full faith and credit.

If it be suggested that section 80 is a specific law, directing the

application of one State law only (that of the forum State) and the consequential non-application of any valid statutes of other States in terms applicable to the matter in hand, it would seem clear that such a Federal law would be, for a variety of reasons, invalid.

In the result and if irrational consequences are to be avoided, it seems inevitable, whenever a practical issue does arise, that some attempt must be made to give a very narrow and specialized meaning to the expression 'insufficient to carry them into effect' in section 80. The phrase must be considered alongside the next following reference to the provision of 'adequate remedies or punishments'. These two provisions may each throw light on the meaning of the other. There may lurk in the section some idea of a portion of the *corpus juris* not relating to substantive rights on the other, but concerned with carrying the law into effect but not quite so specifically as is the case with 'remedies'; and concerned with recognition, or application of substantive rights, *et cetera*. It is to this that the expression ('carry them into effect') is directed. It is very doubtful whether apart from remedies there are legal rules of this kind. There is a disinclination to admit any such rules in a system of jurisprudence in which remedies are still so closely related to rights and in which the separation of rules prescribing the 'substantive norm' on the one hand and 'effective realization' on the other is historically and logically unacceptable. It is true that a construction of the section based upon such a distinction would have a strong rational basis—for upon such a basis the selection of the modification of the common law by the statutes of the forum State only would be justifiable. Indeed, section 80 would be an echo of the legislative policy of section 79. Whether the invalidity or irrationality of any construction of section 80 giving the full normal grammatical force to the words would result in a limited construction involving such considerable qualification of the literal meaning is no doubt a matter which must await debate in court and final determination.

The conclusion submitted is that with regard to original jurisdiction of the High Court in any matter in which some statute law of the Commonwealth applies but does not cover the whole field, that in the first instance the rules of the common law are resorted to. Each of such rules, however, may have been modified by a valid State statute. This statutory modification will have either express or implied a 'local' character or operation though not necessarily a geographically delimited operation. Thus a State statute dealing with the interpretation of wills, if not containing express provisions delimiting its operation, would normally apply to wills made by persons dying domiciled in that State. The operation may be said to be 'local' but not geographically delimited. When the operation of the statutory

modification has been determined as a matter of construction it will be clear whether this modification should be applied to the particular set of facts existing in the particular case being determined by the High Court.

Before leaving the examination of this aspect of section 80, it is desirable to recur to one feature. The effect of the opening expression of the section is to provide that 'so far as the laws of the Commonwealth are not applicable' the common law as modified by the statute law of the forum State shall govern the court. It is not clear whether this expression is intended to apply to all the classes of cases which may come before a Federal court and in particular the High Court exercising its original jurisdiction.

If the case is one in which a Federal statute affects the substantive issue arising but does not provide a complete solution for that issue, no doubt it is clear that the laws of the Commonwealth are not *completely* applicable. They are applicable 'so far as' they extend but *ex hypothesi* there is an area to be filled in and to which they are not applicable.

If the case is one in which a Federal statute could constitutionally be enacted upon the matter of the substantive issue but in fact has not been so enacted, it may be open to debate whether it can be said that there is a point beyond which Commonwealth laws are not applicable. Suppose the substantive issue concerns the forms to be observed in contracts of sale of goods in interstate commerce by land, could it be said that there was a point beyond which the laws of the Commonwealth were not applicable because there was no such law on the matter at all?

Finally, the case may be one in which no Federal statute could constitutionally be enacted upon the substantive issue. The phrase 'so far as the laws of the Commonwealth are not applicable' seems to contemplate that there are such laws partially applicable or at least could be laws partially applicable. It may be therefore that section 80 would not apply to this third situation at all. One reason for this conclusion is that it would be beyond the power of the Commonwealth Parliament to prescribe by reference or incorporation or otherwise the law to be applicable to the substantive issue because of the limits of its constitutional powers.

This last consideration seems evident enough. But does not the same result follow in relation to the second of the classes of cases mentioned above? The case might, for example, involve a question as to the existence of some legal capacity of an alien. Upon this matter no existing Commonwealth statute has been enacted. Would section 80 apply? Would it result in the application of the statute law of the forum State? If it had this result, what would be the subject-matter

of the exercise of power by the Commonwealth Parliament? Surely not the power to make laws with respect to aliens! Can it claim a power to make laws with respect to the exercise of Federal jurisdiction extending to the determination of the *lex causa*. Perhaps it may have such a power if, and only if, the subject-matter of the *causa* is within the Commonwealth legislative competence. But even if this problem be resolved favourably to the Commonwealth power, surely the terms of section 80 are not appropriate as an exercise of any such power.

But it is necessary to carry this analysis one stage further. It is necessary to consider the case which raises issues which cannot be covered by valid Commonwealth law. Let it be assumed that the litigation arising in the High Court sitting in Sydney is concerned with claims between residents of different States in an action of tort by a resident of New South Wales against a public official of the State of Western Australia arising out of alleged default by the public official of that State. A New South Wales statute provides that no claim shall be sustained for an amount in excess of £50,000 against any public servant of any of the Governments of the Commonwealth in respect of any act or omission in the course of their office except with the consent of the Attorney-General of the Government concerned. Obviously a statute in this form if valid would qualify the right of the plaintiff and not merely affect the procedure in respect to the enforcement of his claim. As enacted in New South Wales and applicable to proceedings it is submitted in the courts of that State it would be valid. Would section 80 apply? The result would be to make effective this particular New South Wales law, altering the substantive rights of individuals against State Government officials, so far as these rights fall to be determined in Federal courts. It is difficult to imagine a subject-matter more remote from the scope of Federal power. Indeed the State of the defendant official might have a provision on the same subject but in different terms. This State law would, however, find no application under section 80 since the direction therein is (in the absence of Commonwealth legislation) to apply the common law subject only to the modification by statute law of the forum State. It is true that in the situation here considered the possible overriding of the State law of the defendant official whether statutory or not by the law of the forum State in which the Court happens to sit would raise for consideration questions of full faith and credit, the constitutional force of which might well modify the operation of section 80. It is sometimes sought to escape from this aspect of the operation of section 80 by referring back to the effect of section 79. It is said that the expression 'the laws of each State' include the common law choice of law rules of each State.

Apart from the argument that this expression should not be held to include non-statutory State law, there is the further difficulty that the New South Wales statute itself may well involve an alteration of the normal conflict rule of choice as well as the substitution of a new substantive rule of decision. This problem of choice brings forward the whole problem of the true basis of the choice of the law to be applied in Federal courts when exercising jurisdiction in relation to substantive rights created or conditioned entirely by State law. Consideration of this final matter may be delayed until some judicial views upon the operation of the Judiciary Act in relation to the original jurisdiction of the High Court are examined.

It is unfortunate for the argument as to the true scope of section 79 set out in this survey that it appears inconsistent with the *obiter dictum* of Dixon C.J. in *Deputy Commissioner of Taxation v. Brown.*[3] It is true that the question was not fully examined in *Brown's* case and indeed has never been given the historical and comparative study which it deserves. Nevertheless there is no gainsaying the weight which must be attributed to even the merest *dictum* of the Chief Justice of Australia—especially when expressed as definitively as in the sentence cited. Notwithstanding the difficulty thus presented, the writer thinks full consideration does suggest another view of this whole problem. Indeed the Chief Justice himself notes that in the High Court at least one different view had been expressed. To a consideration of these *dicta* it is now necessary to turn.

In *Musgrave v. The Commonwealth*[4] a claim for damages for libel against the Commonwealth was heard in original jurisdiction by Latham C.J. sitting in Sydney. The defamatory statement had been published in Brisbane by a Commonwealth official in Brisbane. Though evidence as to some acts and matters occurring in New South Wales was admitted as relevant on the question of the character of the plaintiff and therefore on the question of damages and also on the question of malice, nevertheless the facts of the case may be treated as having contact in any significant sense with one State only. The acts and matters occurring in New South Wales could not it is submitted have in themselves made operative any choice of law rule selecting New South Wales law. How then was an action for a Queensland tort to be dealt with in the original jurisdiction of the High Court sitting in Sydney?

Latham C.J. treated the matter as regulated by section 79 of the Judiciary Act. He held that in consequence the conflict rules of the common law as applied in New South Wales provided the choice of law rule for disposal of the case. This involved the view that the primary measure of the actionability in the cause was New South

[3] (1958) 100 C.L.R. 32, 39; [1958] Argus L.R. 285, 286. [4] (1936) 57 C.L.R. 514.

Wales law. It is submitted this was not a satisfactory solution to the problem though in actual fact the choice of law was not of practical consequence to the parties in the ultimate result.

The view of the learned Chief Justice rested of course upon the view that 'the laws of each State' referred to in section 79 included all the rules for decisions applied by judges in that State including of course the common law rules relating to conflict of laws. It has been submitted elsewhere in this article that there are good reasons for not adopting this view. It is also clear that the Chief Justice arrived at the same result as would be reached by an American Federal judge who would first treat the Congressional statutory provision corresponding to section 79 as limited to State statutory law but would apply the common law rules of the forum State including its conflict rules because directed to do so by the Supreme Court.[5] It is submitted that this solution also is not appropriate or applicable in Australia.

It may be considered, however, that it was section 80 of the Judiciary Act which was applicable to the matter in hand. On one view the claim of the plaintiff may have been founded in part upon provisions in the Constitution but was also governed by section 56 and section 64 of the Judiciary Act. These sections, however, provide a perfect model of provisions of a Commonwealth statute which, without more, are 'insufficient to [be carried] into effect'. They gave a right to sue and by reference indicated the 'rights of [the] parties' but clearly left much to be filled in. This then was a case in which section 80 purported to import the common law modified by the statute law of New South Wales. If this section operating in this way be in truth valid, would it have led by a different route to the conclusion reached by the Chief Justice? It is submitted that it would not have done so. The 'common law' directed to be applied by the Court (prior to the consideration of any New South Wales statutory modification) would be constituted, it is submitted, by rules, including conflict of law rules, appropriate to the High Court exercising original jurisdiction in the Commonwealth of Australia, observing all valid statutes enacted by a constitutional authority in the country and indeed giving not more and not less than full faith and credit to each. The conflict rules would be those appropriate to a Federal jurisdiction. The choice of law rule to be adopted deserved recognition because of its logical applicability and not because it was part of the common law applicable *between* the States.

When *Musgrave's* case reached the Full Court on appeal it is at least clear that the other members of the Court were far from ready to give authority to the view of the Chief Justice. Rich J. was con-

[5] See *Erie Railroad Company v. Tompkins* (1937) 304 U.S. 64.

tent to leave doubts as to choice of law unresolved.[6] Dixon J. (as he then was) also reserved his doubts upon this question.[7] One pronouncement is important in the light of submissions made herein, namely: 'Sections 79 and 80 of the Judiciary Act apply only where otherwise Federal law itself is insufficient. . . .'[8] He also indicated that the true measure of tortious liability might well be found in Federal law. Upon this view it is submitted that such liability may well be itself conditioned or affected by valid State law entitled to 'faith and credit' and that choice of law rules operating as between State statutes may themselves be 'federal' in character, deriving force from the whole of the 'legal situation' in which the Court finds itself including the constitutional power of State legislatures. In the view of Evatt and McTiernan JJ., 'the law to be applied [in this case] is the same law as must be applied where the action is brought in the Supreme Court of the State where the claim arose by reason of the publication of the libel . . .'.[9] Whilst this conclusion may be acceptable in this case it may be thought to overlook the possibilities of other State laws having good constitutional claims to operative effect. Their Honours continued:

> Whatever may be the precise limits to be assigned to section 79 of the *Judiciary Act,* it does not introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard in Sydney.[10]

It is submitted this is a useful starting point from which the law should be developed and *Musgrave v. The Commonwealth* cannot be considered to have established any more definite rule than this.

In *re Oregan,*[11] Webb J. was called on to consider the sections of the Judiciary Act in a matter between residents of different States in the original jurisdiction of the High Court. The issues as to choice of law were squarely raised and the solution, it is submitted, clearly illustrates the highly unsatisfactory nature of what might appear to be one orthodox view of the meaning of the Judiciary Act sections. The case for hearing was an application for a writ of *habeas corpus* by means whereof a mother who had separated from her husband sought to obtain custody of her son, seven years of age. The mother was resident in Victoria whilst the father and son were domiciled and actually resident in Tasmania. The matter came on in the first instance in Sydney but was heard substantially in Melbourne. The main question for determination so far as the choice or application of the appropriate law was concerned was whether the provisions of

[6] (1936) 57 C.L.R. 514, 543. [7] *Ibid.* 547-548.
[8] *Ibid.* 547. [9] *Ibid.* 550-551. [10] *Ibid.* 551.
[11] *The Queen v. Oregan; Ex Parte Oregan* (1957) 97 C.L.R. 323.

the Victorian Marriage Act relating to questions of custody of infants applied or whether corresponding but not identical provisions in the Guardianship and Custody of Infants Act of Tasmania governed the Court and the matter. In the first step, Webb J. decided that section 79 of the Judiciary Act did not provide any solution. This was an interesting conclusion and in accordance with the views expressed in this paper. The learned judge held that the expression 'laws of each State' in that section referred to statute law but not to common law choice of law rules.[12] This conclusion was not elaborated or based upon historical or comparative law reasoning. The ultimate result was in itself so unsatisfactory that this initial assumption attracted the implied criticism contained in the *dicta* of Dixon C.J. in *Deputy Commissioner of Taxation v. Brown*.[13] This writer prefers to think that Webb J. was right for a wrong reason but that the recourse to choice of law rules was required by other reasons than the provisions of section 79. Having then decided that the provisions of the Victorian Marriage Act relating to custody of children upon its true intendment was not applicable to the case of an infant domiciled in Tasmania, he naturally concluded that the Victorian statute was not one applicable to the case by virtue of section 79. This process of construing and in consequence 'delimiting' the operation of the Victorian Act was, it is submitted, inescapable.

Having disposed as it were of section 79, Webb J. passed on to a consideration of section 80. He decided to apply this section. The only ground for its application was that there was no law of the Commonwealth which was applicable. The subject-matter—'custody of infants'—was of course one allotted to the Federal Parliament. No Commonwealth law being applicable, the learned judge found himself directed to apply the common law as modified by the Victorian Act as being the modification of the 'forum State'.[14] The situation was thus revealed in all its nakedness. The Victorian Act was by the intention of its makers not applicable. Nevertheless the Commonwealth Parliament had made it applicable, had decreed that it was to operate as a law for the peace order and good government of the Commonwealth with respect to the custody of infants. Marshall C.J., it will be remembered, denied the validity of delegating Federal legislative discretion to State assemblies. How he would have viewed the process of adopting State legislation but giving it a scope and operation contrary to that chosen by the State legislature itself is not difficult to imagine. And, be it noted, the State statute thus held to be governing might just as well have been upon a subject-matter not included amongst those confided to the Commonwealth Parliament by section 51 of the Constitution. In that case the result would

[12] *Ibid.* 330-331. [13] (1958) 100 C.L.R. 32, 39. [14] (1957) 97 C.L.R. 323, 331.

have been by Commonwealth law to eliminate the valid Tasmanian statute which was itself *intra vires* and entitled to 'full faith and credit' and to apply a Victorian statute which in such an application would have been beyond its own intendment and in respect of a subject-matter itself beyond allotted Commonwealth powers. Indeed even in the circumstances of the case before Webb J. the interpretation of section 80 led to a result which surely denied full faith and credit to the law of Tasmania and so disregarded the constitutional mandate.

Some of these considerations indeed may not have failed to wake echoes in the learned judge's mind, for he commented upon the possible undesirable operation of section 80 'in a case where there is a difference between the law of the State where the Court is sitting and the law of the domicile of the parties in another State . . . [this difficulty] can be avoided by adjourning the sitting of the court to the latter State'.[15]

The spectacle of the Commonwealth Parliament prescribing the law to be chosen and the Court moving itself from place to place in order to avoid the operation of the rule of choice would be unusual, to say nothing more.

It cannot be said that either *Musgrave v. The Commonwealth*[16] on appeal, or *In re Oregan*[17] contains any clear decision as to the true choice of law method to be adopted by a Federal court, and more particularly by the High Court sitting in Federal Jurisdiction. It is submitted, notwithstanding the *dictum* in *Deputy Commissioner of Taxation v. Brown*,[18] that the matter is open to consideration upon a basis of general principle and in the light thrown by the sources from which the Commonwealth statutory provisions were derived. It is suggested that solution is to be found along the following lines.

Let us assume a case in the original jurisdiction of the High Court between residents of different States but upon a substantive issue completely outside the competence of the Commonwealth Parliament. An example of this nature will bring the essential issues into the open, without, it is believed, altering the fundamental principles which have to be kept in mind as applicable to all cases.

In the first place it is submitted that section 79 will not do more than import State statute law. The reasons for this have been given elsewhere. In particular it is submitted that the non-statutory choice of law rules of the forum State cannot be treated as ordered to be applied by section 79. There are various reasons for this conclusion but the primary one seems to arise from the essential nature of the conflict rules themselves.

[15] *Ibid.*
[16] (1936) 57 C.L.R. 514.
[17] (1957) 97 C.L.R. 323.
[18] (1958) 100 C.L.R. 32, 39.

As between the laws of the States of the Commonwealth, surely the selection of the appropriate *lex causae* must be a function of the Federal court adjudicating between the residents of the different States. That is part of the very purpose of the constitutional grant of the jurisdiction. Suppose, for example, that the facts of the case had contact with the two different States of residence but the significance of the contact was very strongly in favour of State A, not being the forum State, in which the High Court was sitting. Suppose, however, that the statute law of the forum State contained a choice of law rule making the law of that State applicable in such a case. No doubt in the courts of that State such a law would bind the courts of that State, subject to full faith and credit considerations. But in the Federal court the operation of this State statute should surely be limited so as to make it an order directed to the tribunals of the State only. The Federal court should decide upon a full consideration of the facts as to the contacts of the case with two or more States what law should be applied. Any other course would be a denial of the nature of the jurisdiction itself.

If section 79 purports to direct the Federal court to act in any other manner it is taking a power not available to the Federal Parliament. If it were within the power of the Parliament to compel the adoption of the choice of law rules of the forum State, however logically inapplicable these might be, then it would be equally within power for that Parliament to adopt the choice of law rules of some other State (as, for example, the State or residence of the defendant) however illogical that might be. In the last resort it would be *intra vires* the Commonwealth Parliament to lay down its own code of conflict rules. But surely such a conclusion is a *reductio ad absurdum*. It is submitted then that no solution to this problem is to be found in section 79.

What of section 80? It may be that the case is not one to which the section applies because no laws of the Commonwealth *could* be applicable because of the subject-matter. On the other hand this may not be the case. The first step in either event is for the court to consider any possibly applicable State statute. This will be a matter of determining the true operative extent of such statutes, construing them according to their intent and bearing in mind the implied limitations upon the extent of operation of any statute which may be deduced from the true 'local' operation of the law of any particular sovereign, bearing in mind that the 'local' operation may extend well beyond the area of the sovereign's 'territory'. The Federal court must so construe any possibly applicable valid State statute because the Constitution gives to such statutes a binding force in all courts, Federal and State, in the Commonwealth. No Commonwealth statute can modify or condition this duty.

It may be that more than one State statute will, as the result of such process of construction, appear to be applicable. In short, they will appear to overlap in the spheres of their operation. This 'conflict' must be resolved by the application of the Constitutional duty to give full faith and credit to all State statutes and hence to resolve a competition between them.

This process will result in the disclosure either of one single State statute as applicable or of the absence of any State statute as applicable. In either case it may be necessary also to apply some rule or rules of the common law, assuming all the facts of the case to have occurred in Australia.

No question of any choice of law can arise. The common law rules (excluding statutory modification which has been considered) are identical throughout Australia. If there are apparent differences, some error has arisen, ultimately to be resolved by the High Court as a general court of appeal from the States. But there cannot be permanently and validly differing interpretations of the rules of the common law, as there may be, and in fact are, in the courts of the States in the U.S.A. The High Court in its original jurisdiction, like every other Federal court, must do its best to 'find' the true common law rule, and for this purpose may prefer the view adopted by the Supreme Court of one State rather than another. The Full High Court will ultimately determine the true view. But as between different 'expressions' of the common law rule no question of 'choice of law' can arise in Australia, though it can and does arise in U.S.A.

Let us attempt to apply this process of reasoning to the situation before Webb J. in *re Oregan*.[19] The case was one relating to the rights of parents to the custody of an infant. First it was necessary to consider the operation of two statutes. The Victorian statute, it is submitted, upon its true construction applied to infants domiciled in Victoria. The process of reasoning leading to this conclusion is well understood. Equally the Tasmanian statute applied to the custody of infants domiciled in Tasmania. Surely every Australian court dealing with the custody of an infant domiciled in Tasmania was bound to give faith and credit to this Tasmanian statute wherever it was sitting and whether it was a State or a Federal court, and no statute could otherwise provide. That, it is submitted, was the end of the case—simple and in accordance with principle.

And could section 80 ever have a valid operation over and above these straightforward principles? It is difficult to see how this could be possible. Let us assume a statute of the forum State dealing with the subject-matter of the cause before the High Court. Either upon its true construction and intent, it being constitutionally valid, it

[19] (1957) 97 C.L.R. 323.

'reaches to' the facts of the case being decided or it does not. If the former is the case, it will be necessary for the Federal court to apply it because the statute can claim constitutional authority. If, upon such construction, it does not reach to the facts in question then, it is submitted, no Commonwealth statute can validly require a Federal court to apply the State statute.

An example should make this clear. Suppose a New South Wales statute requires that every valid will shall be attested by three witnesses. If there be no explicit provision in the statute, its operation would extend to all wills of persons dying domiciled in New South Wales and to all wills relating to immovable property situated in New South Wales and to no other wills. If then a case arose in the High Court sitting in Sydney between residents of different States involving the validity of a will affecting immovables, the New South Wales statute would apply if the immovables were situated in New South Wales but not otherwise. How could section 80 be given such force as to make a new law regulating the formal validity of wills of foreign immovables, that is a will relating to non-New South Wales immovables. On the other hand, so far as the question related to a will of immovables in New South Wales, the State statute would necessarily apply and not because it was a modification of the common law by a statute of the forum State but because it was a valid and binding statute. The submission seems clear enough when, as in this example, the subject-matter in issue is not within the legislature competence of the Commonwealth Parliament. But it is submitted, for various reasons, the conclusion holds in all other cases.

Let us consider shortly the case in the High Court between residents of different States relating to a will of immovables situated, be it supposed, in New York. It is agreed on all hands that the Court would determine the formal validity of this will by applying New York law. One view is that this is a result of the statutory direction in section 79 to apply 'the laws of each State', including the State conflict rules of choice. Is there not, however, something forced and artificial about such a view? Suppose section 79 had never been enacted. The original jurisdiction of the High Court would have existed. The case would have proceeded and the Court would have applied the same choice of law rule. The logic of the situation would surely have required the result. It is true that the Court might have heard debate between applying (say) the law of the domicile of the testator, the *lex situs* of the immovables, and perhaps the law of the place where the will was made. But the law of New York would on the whole have been preferred as a rational mode of exercising the jurisdiction constitutionally conferred. Choice of law rules surely reflect jurisdiction as a mirror the face opposed to it. To find the authority

for, and direction of the choice in the words of section 79 is on the one hand to underrate the quality of this judicial exercise and on the other to exaggerate the power of the Commonwealth Parliament over the constitutional jurisdiction of the Court.

The critics may suggest in conclusion that the whole of the foregoing demonstrates what is not enacted by sections 79 and 80. It does little or nothing to show what positively is enacted by those sections. Maybe, despite some judicial commentary incidental to graver issues, the real answer is just that—'little or nothing'.