FULL FAITH AND CREDIT
THE AUSTRALIAN EXPERIENCE

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I

IN HIS Cardozo lecture on full faith and credit in the American Constitution[1] Mr. Justice Jackson warned against allowing full faith and credit to become the orphan clause of the Constitution. Other American writers have also dwelt upon its neglect. Corwin's comment was that "there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause".[2] Cook in a celebrated essay[3] pointed to the failure of Congress to use its powers under the clause so as to provide both for the extra-state service of judicial process and for the registration and execution of sister-state judgments. Both Jackson and Cook have, at the same time, made favourable comment on the Australian law of full faith and credit. Mr. Justice Jackson has spoken of the Australian provisions as representing "a judgment upon our weaknesses and defects pronounced by people of purpose and tradition much like our own",[4] while Cook has pointed to the use of Australian Commonwealth powers to provide both for the registration and execution of sister-state judgments and for the extra-state service of process.[5]

This American praise of Australian activity in the field of full faith and credit is somewhat surprising in light of the almost complete absence of discussion of the subject in Australia. It is true that in its very earliest days the Commonwealth parliament exercised its powers under the Constitution to enact the Service and Execution of Process Act[6] which provided machinery for the registration and execution of sister-state judgments and for the extra-state service of state process. This was an important act, which has proved extremely useful. But it has to be recorded that

[1] *Full Faith and Credit—The Lawyer's Clause of the Constitution* (1945) 45 Columbia Law Review, 1. 34.
[2] (1933) 81 University of Pennsylvania Law Review, 371, 388.
[3] *The Powers of Congress under the Full Faith and Credit Clause*: in *The Logical and Legal Bases of the Conflict of Laws*, pp. 90 ff.
[4] *op. cit.* p. 19.
[5] These provisions, in Cook's words, enable litigants "to enforce their legal rights throughout the Commonwealth, in many classes of cases, with a simplicity and directness unknown to our law". *op. cit.* p. 98.
[6] No. 11 of 1901.

the full faith and credit clause has been mentioned in a handful of Australian cases in the half century of the Commonwealth's existence. In only one of these cases has the clause been given extended consideration,[7] while the references to it in other cases leave its scope and character obscure.[8] In a number of cases, a reference to full faith and credit might have been thought to be relevant, if not inevitable, but these have been decided in apparent disregard of the existence of the clause. The cases concerned with the recognition in another state of a state decree of judicial separation provide a good example. Such cases have been disposed of without any reference to the American cases in which the central issue for the court has been phrased in terms of the constitutional obligations of full faith and credit.[9]

In view of the few cases, it is not surprising that the Australian books neglect this question. Full faith and credit is either barely mentioned or wholly ignored. In the first major work on the constitution by Harrison Moore (1910) the full faith and credit provisions were briefly noted. From a short summary of some of the American decisions, Moore concluded that the most general proposition which the cases supported was that the provision did not carry the law much further than the doctrines of the common law.[10] This, presumably, was also Moore's estimate of the similar Australian provision. In 1910, Moore had no Australian cases to guide him. The absence of judicial consideration led Kerr (1925) to ignore full faith and credit altogether.[11] Wynes (1936) briefly noted the relevant provisions and provided a short discussion of the question whether the obligation to accord full faith and credit to judgments was predicated upon proof of jurisdiction in the original court under the common law rules of the conflict of laws.[12] Nicholas (1948) mentioned full faith and credit only to note a verbal difference between the American and Australian provisions.[13] This exhausts the books; there is no Australian book on the conflict of laws. The disregard extends to the legal periodicals. Apart from one or two uncritical notes of cases, the only discussions of full faith and credit in Australian law journals arise incidentally

[7] *Harris v. Harris* [1947] V.L.R. 44. [8] See pp. 35–41 *infra*.

[9] *Harding v. Harding* (1905) 198 U.S. 317; *Thompson v. Thompson* (1913) 226 U.S. 551; *Pettis v. Pettis* (1917) 91 Conn. 608. *Cf.* the decision of the High Court of Australia in *Ainslie v. Ainslie* (1927) 39 C.L.R. 381, and the Victorian case of *Perry v. Perry* [1947] V.L.R. 470. These cases are discussed below; see pp. *infra*.

[10] *Commonwealth of Australia* (2nd ed.) p. 450.

[11] *The Law of the Australian Constitution.*

[12] *Legislative and Executive Powers in Australia*, p. 292.

[13] *The Australian Constitution*, p. 271.

in the course of a wider discussion. There is a very brief note by an Australian state judge in the course of an article of more general scope.[14] Dean Griswold of Harvard University, in the course of a paper read to the Australian Jubilee Law Convention in 1951, dealt incidentally with one aspect of full faith and credit in Australia.[15] The present writer has discussed certain aspects of Australian full faith and credit in two short papers published outside Australia.[16]

This is the whole of the discussion of full faith and credit in Australia. It amounts to very little, and its poverty is, to say the least, extraordinary in view of the discussion which very similar provisions have excited in the United States both in the cases and in the books. It may be, as some commentators on the American clause have observed, that "the full faith and credit clause speaks with Delphic obscurity".[17] However, many of the problems involved in the existence of a full faith and credit clause in a federal constitutional framework have been raised and discussed in America by judges and writers, even though the solutions propounded may be, at times, obscure and uncertain. But to the Australian commentator, praise of Australian faith and credit must sound quite extraordinary unless it is intended to mean that the legislature has taken action in enacting the Service and Execution of Process Act which Congress, though apparently invested with power,[18] has not ventured to take.

II

The full faith and credit provisions in the United States and Australian constitutions are very similar. It is certain that the draftsmen of the Australian constitution drew heavily on American experience, and in the course of debate in the Australian Constitutional Conventions the interpretation of the American clause was called in aid.[19] In the only case in which extended consideration has been given to the Australian full faith and credit clause, the Judge said of the American and Australian clauses that "no distinction in point of terminology can, I think, be drawn between either pair of provisions".[20] However, the provisions in the two constitu-

[14]Wolff: *Res Judicata in Divorce* (1950) 1 Annual Law Review (University of Western Australia).

[15]*Divorce Jurisdiction and Recognition of Divorce Decrees—a Comparative Study.* (1951) 65 Harvard Law Review 193. (1951) 25 A.L.J. 248.

[16]Cowen: *The Recognition of Foreign Judgments Under a Full Faith and Credit Clause*: (1948) 2 International Law Quarterly 21; *The Conflict of Laws in Australia and the United States*; published in *Lectures on the Conflict of Laws and International Contracts* (Univ. of Michigan Press, 1951) pp. 176–179.

[17]Hilpert and Cooley: *The Federal Constitution and the Choice of Law* (1939) 25 Washington Law Quarterly 27, 38. See also Cook *loc. cit.* p. 91.

[18]Cook *op. cit.* pp. 90 ff; Jackson *op. cit.* p. 22. [19]See pp. 33–4 *infra.*

[20]*Harris v. Harris* [1947] V.L.R. 44, 46.

tions are somewhat differently organized. Under Art. IV, s. 1, of the United States constitution, the constitutional mandate to accord full faith and credit is imposed, and powers of implementation are given to Congress in the same section.[21] In the Australian constitution, the obligation to accord full faith and credit is set out in s. 118, which declares that full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every state. The implementing powers vested in the Commonwealth parliament appear in another chapter of the constitution.[22] S. 51 (xxiv) confers power to legislate with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states, while under s. 51 (xxv) the Commonwealth parliament may make provision for the recognition throughout the Commonwealth of the laws, the public acts and records and the judicial proceedings of the states.

Both Congress and the Commonwealth parliament have exercised the powers thus conferred on them. Congress has enacted three statutes. The first, passed in 1790, provided a method of authentication for state statutes, judicial proceedings and records. It further provided that such records and judicial proceedings should be accorded such faith and credit in every court within the United States as they have by law or usage in the courts of the state from which they derived. A further act of 1804 provided a method of authenticating non-judicial records and prescribed their effect in terms similar to those in the earlier act. It may be noted that these two acts do not wholly depend upon the power conferred on Congress under Art. IV, s. 1. That clause provides only for full faith and credit to be accorded to proceedings of the various *states*. The language of the acts of 1790 and 1804 is wider, and it was held in *Embry v. Palmer*[23] that these acts, supported by other and wider powers conferred on Congress, required recognition to be given to the judgments of courts of the District of Columbia.

No provision was made by Congress in these acts for the measure of faith and credit to be accorded to legislative acts. This gave rise

[21]Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

[22]Chap. 1, Part V, s. 118, appears in Chap. V.

[23](1882) 107 U.S. 3. See Costigan: *The History of the Adoption of s. 1 of Art. IV of the U.S. Constitution* (1904) 4 Columbia Law Review 470. In *Harris v. Harris* [1947] V.L.R. 44, Fullagar J. could find no distinction between full faith and credit clause on the one side and the Acts of Congress on the other. The judge appears to have overlooked *Embry v. Palmer*.

to a discussion of the question whether in this respect the full faith and credit clause was self-executing. The weight of opinion appears to have supported the view that it was.[24] This view finds support in decisions of the Supreme Court which can only be explained on the footing that the absence of Congressional provision for the recognition of legislative acts did not mean that the obligation to accord full faith and credit did not attach to them.[25] So the law remained until 1948, when Congress provided that the acts of any state, territory or possession of the United States should have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of the state, territory or possession from which they are taken.[26] For the reasons stated in *Embry v. Palmer*, this statute depends upon a power wider than that conferred by the full faith and credit clause. This act would seem to have rendered otiose the discussion of the question whether the full faith and credit clause is self-executing with respect to acts. Moreover, it has been suggested on high authority that the specific requirement in this recent statute that full faith and credit be accorded to statutes may involve a change of considerable importance.[27]

The Australian Commonwealth parliament has also exercised its powers under ss. 51 (xxiv) and 51 (xxv) of the Constitution. There are two acts: the Service and Execution of Process Act and the State and Territorial Laws and Records Recognition Act, both originally enacted in the first session of the Commonwealth parliament in 1901.[28] Of these two acts, the former made provision for the service of process, outside the limits of a state or territorial boundary. It

[24]See footnote 18, *supra*.

[25]See, e.g., *Bradford Electric Light Co. v. Clapper* (1952) 286 U.S., 145; *Alaska Packers Assn. v. Industrial Accident Commission* (1934) 294 U.S. 532; *Pacific Employers Ins. Co. v. Industrial Accident Commission* (1939) 306 U.S. 493; *Hughes v. Fetter* (1951) 341 U.S. 609, 613.

[26]Title 28, U.S. Code, s. 1738 (approved June 25, 1948).

[27]Goodrich: *Yielding Place to New: Rest versus Motion in the Conflict of Laws* (1950) 50 Columbia Law Review 881, 891, says: "The question posed by the language of the new judicial code is this: will the Supreme Court take the opportunity which is apparently offered by this provision to begin an era of national conflicts of laws rules?" See also Cheatham, Griswold, Goodrich and Reese: *Cases and Materials on Conflict of Laws* (3rd edn.) pp. 76–7 (footnote). However, in *Hughes v. Fetter* (1951) 341 U.S. 609, 613, the Supreme Court in holding that Wisconsin must give effect to the Illinois wrongful death statute found it "unnecessary to rely on any changes accomplished by the Judicial Code Revision". Moreover, four dissenting justices held that Wisconsin was not obliged to apply the Illinois law. See Reese: *Full Faith and Credit to Statutes, The Defense of Public Policy* (1952) 19 University of Chicago Law Review 339, esp. 343–6.

[28]The State and Territorial Laws and Records Recognition Act was number 5 of 1901, and the Service and Execution of Process Act number 11 of the same year.

has been held that a judgment resting upon such service is itself entitled to full faith and credit.[29] The Service and Execution of Process Act made further provision for the execution outside state boundaries of various state processes. Most notable was the provision in part 4 of the act for the registration and enforcement of judgments of courts of record. The machinery is quite simple. A certificate that such a judgment has been secured in state or territory A may be obtained from the appropriate official, and on production of this certificate to the proper officer of a court of like jurisdiction in state or territory B, the judgment may be registered there. On registration, the judgment ranks as, and has the effect of, a domestic judgment of B. The act applies not only to money judgments but also to orders in the nature of decrees of specific performance and injunctions. In defined circumstances, a court of B may order a stay of proceedings on a certificate. A broadly similar provision was enacted in the United States in 1948, but only with respect to the judgments of district courts of the United States.[30] There is no general provision in the United States for the registration of state judgments. Madison unsuccessfully advocated the grant of power to Congress to make such provision,[31] and in 1927 a committee of the American Bar Association proposed the enactment of an enforcement system throughout state and federal courts. But the only action so far taken is in the statute of 1948.

The State and Territorial Laws and Records Recognition Act provides for judicial notice of the law of the various states and territories to be taken in all Australian courts. Like the Congressional Acts of 1790 and 1804 it makes provision for the authentication of legislative acts, judicial proceedings, etc. Section 18 of this act prescribes the effect to be given to authenticated acts and proceedings. "All public acts, records and judicial proceedings of any state, if proved or authenticated as required by this act, shall have such faith and credit given to them in every court and public office within the Commonwealth as they have by law or usage in the courts and

[29] *Re E & B Chemicals and Wool Treatment Pty. Ltd.* [1939] S.A.S.R. 441.

[30] Title 28, U.S. Code, s. 1963: "A judgment in any action for the recovery of money or property entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district court by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." See Goodrich (1950) 50 Columbia Law Review 881: see also (1950) 50 Columbia Law Review 971. See also Title 28 U.S. Code, s. 2508, which provides for registration in any District Court of the U.S. of a judgment of the Court of Claims rendered in favour of the United States.

[31] 2 Farrand, *The Records of the Federal Convention*, 448.

public offices of the states from whence they are taken." It was on this section that Mr. Justice Fullagar principally relied in *Harris v. Harris*[32] in reaching his sweeping conclusions about the scope of full faith and credit in Australia.

III

Justice Jackson has written that he can "find no evidence that the members of the Constitutional Convention or the earlier Congresses had more than a hazy knowledge of the problems they sought to settle or of those they created by the full faith and credit clause".[33] It seems certain that the modern views of full faith and credit would have astounded and confounded the American founding fathers. Madison's proposal to confer specific power on Congress to provide for the registration and execution of sister-state judgments was rejected on the ground that it was an excessive encroachment on state sovereignty.[34] None the less, the weight of modern authority supports the existence of power in Congress under the full faith and credit clause to enact such legislation.[35] The records of the Australian constitutional conventions make Jackson's observation equally applicable to the Australian provisions. There was very little discussion of full faith and credit. The clause passed the 1891 and 1897 Conventions without amendment and with brief consideration. Some attention was directed to the question whether the full faith and credit provisions would authorize the recognition of the probate of a will in states other than the state of grant. Griffith's answer in 1891 is illuminating, insofar as it reveals a very limited notion of full faith and credit. Griffith, who subsequently became the first Chief Justice of the High Court, was a principal architect of the 1891 Constitution bill. His opinion was that a grant of probate was a judicial proceeding and therefore came within the purview of the clause. The probate would be recognized as proof of the will and as authorizing the committal of the property in the state of grant to a specific person. But "so far as a revenue law might be in force in South Australia, providing that certain probate and succession duties should be payable there, no court would recognize that as creating an obligation to pay duties in Victoria and New South Wales. I do not think this will enable the parliament of the Commonwealth to require committal of the administration of an estate in one state to the same person to which it has been committed elsewhere, and I do not think it is intended to go so far".[36] This was

[32][1947] V.L.R. 44.
[33]*op. cit.* p. 6.
[34]See note 31, *supra.*
[35]See note 18, *supra.*
[36]Sydney Convention, Debates (1891) p. 687.

the opinion of a draftsman, and also, presumably, his estimate of the American law. It confines full faith and credit very narrowly, and limits it to an obligation to accord judicial notice to the proceedings of sister states.

By 1897, Griffith had become Chief Justice of Queensland. He accordingly took no active part in the proceedings of that Convention. The questions in the 1897 Convention were very similar to those raised in 1891: would the courts of another state recognize the appointment of a Receiver or Trustee in Lunacy, or a Curator of Intestate Estates; would the administrator of an intestate estate be entitled to register his appointment in another state and administer assets there? Barton, who became the first prime minister of the Commonwealth and subsequently a judge of the High Court, propounded a very narrow view of full faith and credit. "I take it that the effect of this clause would be to cause the courts of the Commonwealth to take judicial notice of the laws, acts and records of the states without the necessity of requiring them to be proved by cumbrous evidence."[37] This is virtually a restatement of Griffith's position in 1891. Isaacs, subsequently a Justice and Chief Justice of the High Court, intervened with a suggestion that the power conferred on the Commonwealth parliament under s. 51 (xxv) to make laws for the recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the states, might authorize legislation requiring the judgments of state courts to be accorded the same operative effect in another state as they possessed at home.[38] Barton agreed, and added briefly that while s. 118 (the full faith and credit clause) was only concerned with judicial notice, the legislative power conferred on the parliament by s. 51 (xxv) might take the matter further into the realm of substance.[39]

Under the powers conferred by s. 51 (xxv), the Commonwealth parliament in 1901 enacted the State and Territorial Laws and Records Recognition Act. Much of the act was concerned with matters of evidence and set out methods of authentication of various proceedings. However, s. 18, as we have seen,[40] was a sweep-

[37]Adelaide Convention, Debates (1897) p. 1005.

[38]*ibid.*, p. 1006. Isaacs was the first Australian-born citizen to become Governor-General of the Commonwealth.

[39]*ibid.*, p. 1006. "One clause means that as a matter of evidence judicial notice is to be taken; the other means that there is legislative power not only to define the manner in which that shall be done, but it may also mean further than that, that there is a legislative power to cause recognition of these matters in substance as well as in evidence."

[40]See p. *supra*: "All public acts, records, and judicial proceedings of any state, if proved or authenticated as required by this act, shall have such faith

ing direction, prescribing the effect to be given to acts and proceedings so authenticated. The brief debate in the Commonwealth parliament reveals that the act was regarded *entirely* as dealing with matters of evidence. Senator O'Connor (subsequently a Justice of the High Court) stated briefly that the act relieved courts of sister states from the technicalities of proof.[41] The Attorney-General, Deakin, referred expressly to s. 18 which he regarded as a mere matter of evidence. "It provides for the recognition throughout the Commonwealth of the laws, the public acts, records and judicial proceedings of the States. As such it is practically an Evidence Bill."[42]

It is quite clear that the Australian founding fathers intended the full faith and credit clause to occupy a relatively minor place in the constitutional structure. The principal object appears to have been to ensure that judicial notice should be taken of state and territorial acts, records and proceedings in other states and territories. Isaacs alone pointed to the possible implications of the power conferred on the Commonwealth parliament by s. 51 (xxv). But the only exercise of that power—The State and Territorial Laws and Records Recognition Act—was regarded by its authors as a piece of evidentiary machinery, dispensing with technicalities of proof and enabling judicial notice to be taken of the laws of sister states and territories. It is a striking commentary on the way in which the interpretation of acts becomes divorced from their history that in less than fifty years the very section of the act referred to by Deakin was held by a Victorian judge in *Harris v. Harris* to impose substantive obligations to accord full faith and credit to a judicial decision of a sister state which were wider in scope than those imposed by the American law of full faith and credit.

IV

Apart from *Harris v. Harris*, the Australian full faith and credit provisions have been referred to in two reported decisions of the High Court of Australia, and in two cases in the Supreme Court of South Australia. In *Jones v. Jones*,[43] there was an application to the High Court for leave to execute a writ of attachment in Victoria. The writ of attachment had originally been issued in New South

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and credit given to them in every court and public office within the Commonwealth as they have by law or usage in the courts and public offices of the state from whence they are taken."

[41] Parl. Debs., Session 1901–2 (First Session) Vol. 2, p. 1497.

[42] *ibid.*, p. 2089.

[43] (1928) 40 C.L.R. 315.

Wales in respect of the non-payment of alimony by a husband. The present application was made under a provision in the Service and Execution of Process Act which conferred authority on state courts and the High Court to grant applications for leave to execute such writs out of the state in which they had originally issued. In this case, the Victorian Supreme Court had refused leave and the wife petitioned the High Court. That court, over the dissent of one judge, refused leave upon the ground that as the state court had refused the application, the applicant had had his day. In effect, the court treated the act as providing alternative methods of application. No reference to full faith and credit was made in the majority opinion, and the implication was quite clear that no such issue arose for the court.

The dissenting judge, Higgins J., denied that the unsuccessful application to the state court precluded a further application to the High Court. He was also of opinion that a question of full faith and credit was involved.

> "S. 118 of the Constitution is based on an article of the U.S. Constitution, under which it has been held that the words do not relate to evidence merely, but make the findings of the earlier court conclusive as to rights. S. 51 (xxv) of our Constitution allows provision to be made as to evidence and (xxiv) allows provision to be made for execution throughout the Commonwealth of the state processes and judgments. I think that under s. 19 of this act,[44] taken with s. 118 of the Constitution, we ought to give effect to the laws of the states whether we approve of them or not, and that the granting of leave should be the rule, the refusal the exception. The order made *ex parte* for the writ of attachment can, admittedly, be set aside in the New South Wales Court if made wrongly. If indeed we should find that the order for the writ was made without due authority of the State Legislature, the leave should be withheld; and there may be other reasons for withholding leave. Unless due cause be shown to the contrary, we should endeavour to render the judicial process of any state effectual in other states as against persons who, as here, are evading the state's process by leaving the state. The real effect of refusing to exercise our jurisdiction is to assist the respondent in evading the payment of the alimony ordered, and merely because the Victorian law requires notice of any application for an attachment in Victorian suits."[45]

[44]The relevant section of the Service and Execution of Process Act.
[45](1928) 40 C.L.R. 315, 320–1.

This appears to have been the first Australian judicial pronouncement of full faith and credit. It was made more than a quarter century after the enactment of the Constitution. It represents a remarkable advance on the notions of full faith and credit entertained by the Australian founding fathers. It seems clear enough that they were thinking in terms of evidence, of replacing relatively cumbrous methods of proof by an obligation to take judicial notice of the law of sister states and territories. Higgins J., on the other hand, clearly envisaged a *substantive* effect for full faith and credit, obliging a court *to give effect to* the law of a sister state or territory in appropriate circumstances. It is interesting to recall that Higgins himself was a member of the 1897 constitutional convention. In view of this interpretation of s. 118, it is a little odd that Higgins J. should have regarded s. 51 (xxv) as purely evidentiary machinery. It will be recalled[46] that in the 1897 convention Isaacs agreed with Barton that s. 118 related to matters of evidence only, but suggested that s. 51(xxv) might carry the matter beyond evidence into the field of substantive law. Moreover, in *Harris v. Harris,* as we shall see, the court found in legislation enacted under s. 51 (xxv) the warrant for an interpretation of full faith and credit extending deep into the field of substance.

In this opinion, Mr. Justice Higgins laid emphasis on two important considerations affecting full faith and credit. First, the clause was designed to prevent the evasion of obligations by removal into another state. Second, the objects sought to be attained by the enactment of the clause would be frustrated if a court were allowed to deny effect and operation to the law of a sister state on the ground that it would offend some relatively trivial domestic policy. While historical authority for these sweeping propositions is lacking, it should be observed that a substantially similar view of the fundamental purposes of full faith and credit has been taken in important American decisions.[47]

[46] See p. 34 *supra.*

[47] A notable example is *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268, where it was held by the Supreme Court that full faith and credit must be given to a judgment for taxes. Justice Stone, for the court, after remarking that the command of full faith and credit was not all-embracing, said: "The very purpose of the . . . clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy on a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if its exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional mandate provision and the interest of the state whose judgment is challenged."

The real interest in this first judicial comment on the clause was its stress on the substantive elements in full faith and credit. The view expressed was that the clause imposed a mandatory obligation on courts in appropriate circumstances—not exhaustively considered in this opinion—to apply the law of a sister state or territory. This *substantive*[48] interpretation of full faith and credit gained the support of the three judges of the High Court who considered the full faith and credit problem in *Merwin Pastoral Co., Pty. Ltd. v. Moolpa Pastoral Co., Pty. Ltd.*[49] There the question was whether a contract for the sale of land and chattels in New South Wales was governed by New South Wales law so as to attract the operation of moratorium legislation of that state, which had been enacted to relieve the pressure on debtors. In the Supreme Court of Victoria, the trial judge had declined to apply this legislation on the ground that it contravened the public policy of the state in that it worked manifest injustice on one of the parties. This decision was unanimously reversed by the High Court. It was held that the contract was governed by New South Wales law, and that the statute operated to relieve the debtor.

Justices Rich, Dixon and Evatt referred to the full faith and credit clause. Rich and Dixon JJ. stated tersely that the holding of the Victorian judge that the Victorian court could deny operation to this New South Wales statute appeared to contravene the full faith and credit provisions in the constitution.[50] Evatt J. dealt with the question rather more elaborately. After observing that English courts sometimes invoked the doctrine of public policy to deny operation to a law which would normally be applicable, he said:

> "It is, in my view, not permissible for a Victorian court to adopt such an attitude here. All that the Legislature of New South Wales did, was, in a period of unexampled economic crisis, to revise, alter, suspend or discharge certain contractual obligations over which it could exert its constitutional power. The Legislature of Victoria, too, enacted a law which differed in degree only

[48]The term is used for convenience to make the contrast with the view of full faith and credit as resting in evidence merely.

[49](1933) 48 C.L.R. 565. The two other members of the court, Starke and McTiernan JJ., reached the same result without adverting to this question. See *The Conflict of Laws and International Contracts* (Univ. of Michigan Press, 1951) pp. 177–8.

[50]p. 577. "This suggestion (that the legislation is contrary to public policy) is not supported by any authority and goes much further than any decision of the courts has gone hitherto in refusing recognition of the law of another country. Further, it appears to be contrary to s. 118 of the Constitution (cf. s. 18 of the State and Territorial Laws and Records Recognition Act 1901)."

> from that of New South Wales. And, further, the Commonwealth Constitution expressly requires that 'full faith and credit shall be given, throughout the Commonwealth, to the laws . . . of every state' (s. 118). In the United States the constitutional provision from which our s. 118 is taken has been regarded as prohibiting a refusal by the courts of one state to give effect to a substantive defence under the applicable law of another state (*Bradford Electric Light Co. v. Clapper* (1932) 286 U.S. 145, p. 160)."[51]

These opinions endorse the view that full faith and credit operates in the sphere of substantive law, and in appropriate cases will deny power to a forum to refuse to give effect to the statute law of another state on the ground that this would contravene the public policy of the forum. The discussion of the point in the *Merwin Pastoral Co.* case is too brief to justify a general proposition that the doctrine of public policy can never be invoked within the area in which the Australian full faith and credit clause operates. It should be noted that the American authorities do not go so far. The American cases in fact hold that a forum may, in some cases, without violating the mandate of full faith and credit, deny effect to the statute law of a sister state on grounds of public policy.[52] The discussion of the problem by Evatt J. suggests that a material consideration may be whether the invocation of the rule of public policy would operate to exclude a defence otherwise available. In aid of this doctrine, the judge referred to the opinion of Brandeis J. in *Bradford Electric Light Co. v. Clapper.*[53] However, Brandeis's view on this point was not adopted by all members of the Supreme Court in that case, and has been adversely criticized in a subsequent decision of the court[54] on the ground that the operation of the constitutional mandate to accord full faith and credit cannot depend upon the circumstance that public policy has been invoked specifically to deny the availability of a *defence.* So far as Evatt J. relied on American authority, his ground was therefore dubious and, it would seem, unsatisfactory in principle. But the importance of the decision in the *Merwin*

[51] pp. 587–8.

[52] See, e.g., *Alaska Packers Assn. v. Industrial Accident Commission* (1934) 294 U.S. 532; *Pacific Employers Ins. Co. v. Industrial Accident Commission* (1939) 306 U.S. 493; *Hughes v. Fetter* (1951) 341 U.S. 609.

[53] (1932), 286 U.S. 145, 160. "A state may, on occasion, decline to enforce a cause of action. In doing so, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defence under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done."

[54] *Alaska Packers Assn. v. Industrial Accident Commission* (1934) 294 U.S. 532.

Pastoral Co. case lay in the holding by three judges that the full faith and credit clause imposed substantive obligations upon a forum to give effect in appropriate circumstances to the law of a sister state. The discussion of full faith and credit, especially in the joint opinion of Rich and Dixon JJ., was tantalizingly brief, and the most that may be said beyond the clear holding that full faith and credit imposes substantive obligations is that full faith and credit severely inhibits the power of a forum to deny operation to the law of a sister state on grounds of public policy.

This is the full measure of the discussion of full faith and credit by the High Court of Australia. There are also two decisions of Napier J. of the Supreme Court of South Australia. A fanciful argument based upon s. 118 was raised in *Re Commonwealth Agricultural Service Engineers Ltd.*,[55] a case involving claims on the assets of a South Australian company in liquidation. Napier J. had no difficulty in rejecting the argument in this case. His judgment reflected some uncertainty as to the scope of full faith and credit, which on the facts of the case did not call for an attempt at resolution.

> "The effect of s. 118 has yet to be determined. It may well be that this court is required to take judicial notice of the statute law of Queensland and that the principles upon which that law is to be recognized *and applied* are to be regarded as binding, not merely as a matter of comity, but as the law of this state prescribed for that purpose by the Constitution."[56]

The latter part of this dictum indicates for what it is worth that full faith and credit may operate in the field of substance.

Several years later the same judge in *Re E & B. Chemicals and Wool Treatment Pty. Ltd.*[57] specifically stated that full faith and credit imposed an obligation upon a forum to apply the law of a sister state in appropriate circumstances. The facts were that a judgment had been obtained in Victoria against a contributory of a Victorian company. A form of application for shares unaccompanied by a prospectus had been signed by the contributory in South Australia, and accepted by the company in Victoria. By South Australian law it was an offence to issue in that state forms of application for shares in companies incorporated outside the state unless accompanied by a prospectus. It was held that the contract to take shares was governed by Victorian law, and that the contributory was liable for calls, even though an offence had been committed under South Australian law. The action on the Victorian judgment accordingly

[55][1928] S.A.S.R. 342. [56]p. 346. Italics supplied. [57][1939] S.A.S.R. 441.

succeeded. The judge held that it was not open to the court to apply the public policy rule in such a case as this. Further it was inappropriate to refer to a judgment of a sister state as a foreign judgment. With respect to s. 118 of the Constitution

> "I think that this is a direction to the court of trial to ascertain and apply the proper law of the matter or transaction that is in question. In other words, the intention is that the law to be applied shall be the same, wherever in Australia the cause is tried. It follows that any defence that was properly available under the law of South Australia must have been available to the debtor in the Supreme Court of Victoria, no less than in this court."[58]

This statement of the operation of the proper law under full faith and credit is very sweeping, and would appear to deny to the forum any power to deny the operation of the proper law on the grounds of public policy. It would suggest further that the ordinary common law rules of the conflict of laws do not operate within an area bound by full faith and credit. It would indicate that there is a constitutional mandate to give effect, for example, to tax or penal laws, provided in every case that the obligation arose under the law of a sister jurisdiction *properly invested*[59] with power to impose the tax or penalty. On the point that it is not open to a court subject to the law of full faith and credit to deny an action on a sister state *judgment* on public policy grounds, it has the support of American authority.[60]

V

On these cases, Fullagar J. in *Harris v Harris*[61] had authority for holding that full faith and credit imposed a substantive obligation

[58]pp. 443–4.

[59]This raises very difficult problems which are adverted to by Justice Jackson, *op. cit.* p. 11: "Questions of faith and credit for foreign law seem inherently more difficult than questions as to recognition of judgments. There is comparatively little trouble to learn to whom and to what a judgment applies, for that is what the very process of adjudication settles. But the effect to be given to the law of a sister state generally turns on whether the state itself has the right to reach and govern a particular transaction, or property, or person, because of some relationship which confers what roughly may be described as 'legislative jurisdiction'. . . . Plainly quite different inquiries must be made and different principles applied to this class of question than to issues as to the recognition of judgments. Such questions lead into consideration of the powers of independent and 'sovereign' states and the limitations which result from their uniting in the Federal Compact. These questions are of extraordinary complexity and delicacy." See also Reese (1952) 19 University of Chicago Law Review 339.

[60]*Fauntleroy v. Lum* (1908) 210 U.S. 230. [61][1947] V.L.R. 44.

to give effect to the appropriate law of a sister state. Nevertheless, it was without reference to the Australian cases that the judge tacitly assumed that this was the character of the obligation. On this assumption, the question for the court was the determination of the appropriate law to which effect must be given. In *Harris v. Harris,* the challenge was directed at the assumption of jurisdiction by the court of a sister state. The facts posed the problem in a very simple form. Must a Victorian court recognize a New South Wales divorce decree (which was final and conclusive in New South Wales) when it could be clearly established that the parties were domiciled in Victoria at the date of the New South Wales proceedings, and the New South Wales court had itself assumed jurisdiction on the basis of domicile? Such problems are familiar to the American lawyer. The American doctrine is that the obligation to accord full faith and credit does not foreclose a jurisdictional inquiry. Recent commentators on the American law of full faith and credit have characterized the proposition that full faith and credit need not be accorded to the judgment of a sister state where jurisdiction was lacking as "wholly consistent with the command of full faith and credit".[62] This limitation upon the apparently literal command of full faith and credit was also supported by the only Australian work in which, prior to *Harris v. Harris,* this question had been considered.[63]

The rule that jurisdiction may be investigated appears to have been long established in the American cases.[64] The specific problem of the recognition of a divorce decree of a sister state had been decided by the Supreme Court of the United States only a year or two before *Harris v. Harris.* In *Williams v. North Carolina No. 2*[65] the court by a majority had held that the constitutional mandate of full faith and credit did not deny to North Carolina the power to refuse recognition to a Nevada divorce decree on the ground that the parties throughout had been domiciled in North Carolina, and that the Nevada assumption of jurisdiction on the basis of domicile was insupportable. Mr. Justice Frankfurter, for the court, clearly stated a jurisdictional limitation upon the command of full faith and credit.

[62] Reese and Johnson: *The Scope of Full Faith and Credit to Judgments* (1949) 49 Columbia Law Review 153, 170.

[63] Wynes, *op. cit.*, p. 292: "The conclusion seems to be that, so far as s. 118 is concerned, any extension of jurisdiction beyond the limits permitted at common law by one state would not necessarily be binding upon another state except so far as the second state is prepared to accept it. Otherwise any state could extend its jurisdiction indefinitely."

[64] *Thompson v. Whitman* (1873) 18 Wall. 457.

[65] (1945) 325 U.S. 226. See also *Rice v. Rice* (1948) 336 U.S. 674.

"The decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile to one state to foreclose all states in the protection of their social institutions would be intolerable."[66]

The scope of the doctrine of *Williams v. North Carolina No. 2* has been somewhat restricted by subsequent decisions of the same court. From *Sherrer v. Sherrer*[67] and *Coe v. Coe*,[68] it appears that a jurisdictional challenge is not available where the original divorce proceedings were contested: the *Williams* case is authority only for the case of an *ex parte* decree. It should be noted that in both these last-named cases there was a strong dissent by Frankfurter J., who wrote the opinion of the court in the *Williams* case.

The imposition of a jurisdictional qualification upon the mandate to accord full faith and credit raises some interesting considerations. It involves the introduction of common law rules of the conflict of laws which must be satisfied before the obligations of full faith and credit arise.[69] The *Williams* case is a striking example, for there the court based its decision upon the rule that the validity of a decree of divorce, for full faith and credit purposes, depends upon the decreeing court being the forum domiciliii. In the United States—unlike Australia—a further and vitally important problem may present itself in the shape of due process. The assumption of jurisdiction by a state court may deny due process under the Fourteenth Amendment. From this it follows that a decision based upon such an assumption of jurisdiction is wholly void, even at home, with the result that there is nothing to which full faith and credit may attach. The extent to which issues of due process under the Fourteenth Amendment bear upon this jurisdictional question raises questions of great complexity which do not call for extended discussion here.[70]

In *Harris v. Harris*, Fullagar J. did not follow the American rule that there is a jurisdictional qualification upon the literal mandate of full faith and credit. He did not reach this result by resort to any distinction between the American and Australian constitutional and legislative provisions on full faith and credit. These he treated as identical. He also declined to treat as material any distinction

[66](1945) 325 U.S. 226, 232. [67](1948) 334 U.S. 343.

[68](1948) 334 U.S. 378. See also *Johnson v. Muelberger* (1951) 340 U.S. 581: See Griswold, *op. cit.*, (1951) 65 Harvard Law Review, 193, 215–6, (1951) 25 A.L.J. 248, 259.

[69]Wynes, *op. cit*, p. 292, states this quite specifically. See footnote [63].

[70]See Powell: *And Repent at Leisure* (1945) 58 Harvard Law Review 930; Griswold, *op. cit.*, (1951) 65 Harvard Law Review 222, (1951) 25 A.L.J. 257.

between contested and *ex parte* proceedings,[71] although he noted the distinction drawn in the American cases on this point. It may be, as Dean Griswold has argued,[72] that *Harris v. Harris* is more properly in line with *Sherrer v. Sherrer* than with the second *Williams* case. But it is quite clear that Fullagar J.'s view was that if the American law governed, the *Williams* case would apply.[73] This must be decisive in estimating the *ratio decidendi* of the *Harris* case.

Fullagar J. however declined to follow the American authority. He pointed to the fact that American decisions had no binding force in Australia, and that the weight to be accorded to them in Australian constitutional cases had been prescribed by the High Court in the leading case of *Amalgamated Society of Engineers v. Adelaide Steamship Co.*[74] In rejecting the doctrine of implied prohibitions in Commonweath-State relations, that celebrated case reversed an earlier line of authority. The earlier cases had relied heavily on American decisions, and it was therefore not surprising that the Court in the *Engineers'* case had something to say about reliance on American cases. But what was said there had nothing to do with the question raised in *Harris v. Harris.* In the *Engineers'* case it was said that American authorities could not be recognized as standards to measure the respective rights of the Commonwealth and the states, although they might afford considerable assistance on "secondary and subsidiary matters".[75] In view of the close relationship between the Australian and American full faith and credit provisions, which Fullagar J. expressly acknowledged, it might have been thought that this was a case in which, on the principles stated in the *Engineers'* case, the American authorities were peculiarly relevant.

Two points appear to have weighed with Fullagar J. in reaching his decision. The first was that, on its face, s. 18 of the State and Territorial Laws and Records Recognition Act, upon which the judge preferred to rely rather than upon the more general mandate

[71] "The distinction between contested jurisdiction and assumed jurisdiction could not, I think, be accepted" (p. 58). At the date of *Harris v. Harris, Sherrer v. Sherrer* and *Coe v. Coe* had not yet been decided, but they confirmed the views of Fullagar J., pp. 54–5. The judge's uncertainty on another point: "I do not know whether, in the case of a judgment *in rem*, the fact that one person interested has had his 'day in Court' would be held to preclude other persons from contesting the jurisdiction in another state" (p. 55) has been given an answer in *Johnson v. Muelberger* (1951) 340 U.S. 581.

[72] *op. cit.*, (1951) 65 Harvard Law Review 221; (1951) 25 A.L.J. 257, 261.

[73] "I am strongly disposed to think that a logical application of . . . the second *Williams* case would compel me to say that in and for Victoria the present petitioner's first marriage is still subsisting" (p. 55).

[74] (1920) 28 C.L.R. 129. [75] p. 146.

of s. 118 of the Constitution, was framed in terms which, on accepted English canons of interpretation, provided no scope for the jurisdictional exception propounded in the American cases. The judge indicated that so far as the *constitution* was concerned, a different technique of interpretation might be permissible, and in fact had been adopted in relation to important sections of the constitution.[76] But this special technique was not open to a court in the case of a legislative enactment.

It may be that there is some justification for this distinction. Both the American and Australian constitutions are general in terms, and are relatively rigid instruments, with a difficult amendment procedure, while simple Acts of Parliament enacted under constitutional powers can generally be simply repealed or amended. There is ample authority both in the American and Australian cases for what might be described as a liberal technique of *constitutional* interpretation. At the same time, the legislative history of the section with which Fullagar J. was concerned makes it quite clear that it was never conceived as possessing the scope and meaning ascribed to it by the judge in this case. Secondly, it may be repeated that on the authority of the *Engineers'* case, invoked by Fullagar J., the judicial interpretation not only of the American full faith and credit constitutional provision, but also of the acts of Congress which so closely paralleled s. 18 of the State and Territorial Laws and Records Recognition Act, might well have been regarded as possessing a special relevance. While it would be difficult, in general, to dispute Justice Fullagar's principles of statutory interpretation, it may be suggested that this was a very special case, and, that in any event, there is no doubt that his interpretation did not accord with the intentions of the enacting legislature.

[76]Thus, after referring to the observations of Stone J. in *Yarborough v. Yarborough* (1933) 290 U.S. 202, 214–5 that the mandate of full faith and credit is not absolute, Fullagar J. said: "The view taken of . . . s. 116 of our Constitution may be thought to be the result of a similar approach in Australia to the problem, and an even more conspicuous recent example of the same approach may be thought to be found in . . . decisions on s. 92". [1947] V.L.R. 44, 57. S. 116 provides that "the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth". A striking illustration of the interpretation of this section is to be found in *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116. S. 92 of the Constitution provides, so far as material, that "trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free". The interpretation of this section has caused the greatest difficulty. See Stone: *A Government of Laws and Yet of Men* (1950) 25 New York University Law Quarterly 451.

Thirdly, the judge adverted to "a number of very special considerations which exist in the United States but do not exist[77] in Australia. There is a very wide diversity among American state divorce laws. Had the second *Williams* case been decided in a contrary manner, Nevada would have been able to impose her divorce laws on all other states. As Justice Frankfurter put it in a subsequent case: "to permit such states to bind all others to their decrees would endow with constitutional sanctity a Gresham's Law of domestic relations".[78] In Australia, on the other hand, although the bulk of divorce laws have been enacted by the several states, there are, at present, no diversities comparable with those existing in America. Moreover, the Commonwealth parliament is invested with constitutional authority to prescribe a nation-wide law of divorce.[79] From this, it would follow that policy considerations of great cogency in the United States had virtually no importance within Australia; there were no strong pressures, so far as the law of matrimonial causes was concerned, to fall in with the decision in the second *Williams* case. This consideration, in Fullagar J.'s view, had "a bearing . . . on the sound interpretation of the full faith and credit clause, and may . . . dispose towards different interpretations in the United States and in Australia".[80]

However, it is clear that the argument which finally prevailed with the judge was that the words of s. 18 of the State and Territorial Laws and Records Recognition Act, literally and grammatically interpreted, led to the inexorable conclusion that a judgment of a sister state must be given precisely that measure of recognition to which it was entitled at home. This is stated in terms which do not confine it to matrimonial causes, or to any other case involving special policy considerations.

> "Lastly and travelling now beyond the field of divorce, I do not think that it is possible for us to adopt the American view subject to the established exception. Sect. 18 . . . seems to me to be a specific and precise direction to me to accord to a judgment given in New South Wales the same effect as that judgment would receive in the Courts of New South Wales."[81]

[77][1947] V.L.R. 44, 56. [78]*Sherrer v. Sherrer* (1948) 334 U.S. 343, 366–7.

[79]S. 51 gives power as follows: "The Parliament (of the Commonwealth) shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . (xxi) Marriage: (xxii) Divorce and matrimonial causes." This power has been exercised in the Commonwealth Matrimonial Causes Act 1945 which is primarily concerned with jurisdictional problems in matrimonial causes. See Cowen: "The Conflict of Laws in Australia and the United States"; published in *Lectures on the Conflict of Laws and International Contracts* (University of Michigan Press, 1951).

[80][1947] V.L.R. 44, 58. [81]pp. 58–9.

The judge made a brief reference to the due process clause and its effect upon the American law of full faith and credit. Without expressing a decided opinion on this question, it was suggested that due process did affect the question considerably.[82] It is quite clear that an improper assumption of jurisdiction by an American court may involve a denial of due process. The result in such a case will be that a judgment depending upon such an assumption of jurisdiction will be void *at home*. From this, it follows that in such a case there is nothing to which full faith and credit can attach. How far this bears on the problem in the second *Williams* case is not clear. Justice Fullagar apparently thought that that case, as decided, did not raise an issue of due process, as his interpretation of the decision was that the Nevada decree was perfectly good in Nevada.[83] This view of the *Williams* case has not gone unchallenged. Dean Griswold regards the *Williams* case as raising an issue of due process. In discussing that case and *Harris v. Harris* he writes:

> "The difference is that there is a Due Process Clause in the United States Constitution; and nothing corresponding to that clause is applicable in Australia. In the United States, if a judgment is granted by a court in a state, without jurisdiction, it is invalid even in that state, because of the Due Process Clause. Consequently, it follows rather naturally that the Full Faith and Credit Clause does not require it to be given any greater effect in another state. That is in essence the decision in the second *Williams* case. In Australia, however, it may be that a judgment cannot be re-examined in the state which granted it, even on jurisdictional grounds. It would not be surprising, therefore, that it would have to be given the same effect in other states. Thus the difference between *Harris v. Harris* and the second *Williams* case is not in the application of the respective Full Faith and Credit Clauses. The difference is in the effect of the Due Process Clause in making invalid the judgment granted without jurisdiction even in the state where it is granted."[84]

This is a difficult area of American constitutional law. The opinion may be ventured that a reading of the second *Williams* case does

[82] "As to how far the United States view has been affected by the presence of the 'due process' clause of the Fourteenth Amendment, I would not express any opinion, though I think it has certainly been affected to a considerable extent." [1947] V.L.R., 44, 57–8.

[83] "There is no suggestion in the second *Williams* case that the Nevada decree was not final and conclusive in and for Nevada on the question of jurisdiction as on every other question, and this is not overlooked in the dissenting judgment" (p. 57). This must mean that the Nevada decree was good at home, and was not void for denial of due process.

[84] *op. cit.* 65 Harvard Law Review 193, 221–2; 25 A.L.J. 257, 261.

not clearly support Dean Griswold's position, and it might be thought by one not versed in the intricacies of American constitutional law that there was fair warrant for Fullagar J.'s view that only a full faith and credit problem, and no issue under due process, was involved in the second *Williams* case.[85]

The opinion in *Harris v. Harris* was that of a single judge of a State Supreme Court,[86] and there have been no further Australian curial pronouncements on its soundness. Another state judge has adversely criticized the decision, albeit extra-curially.[87] This criticism is very short and rests upon the assumption that the American jurisdictional exception is well founded. The remarkable aspect of *Harris v. Harris* was the judge's willingness to lay down the broadest propositions about full faith and credit. That it imposes a substantive obligation to give effect to the appropriate law was assumed without any discussion of the Australian authorities, which do, however, support this interpretation. But, beyond this, the case lays down the sweeping proposition that the terms of s. 18 of State and Territorial Laws and Records Recognition Act impose an unqualified obligation in all cases to give a decree of the court of a sister state precisely the same effect as it possesses at home. The ratio of the case cannot be confined to judicial decrees: it is equally applicable, for example, to statutes, although the determination of the *appropriate* statutory law may, as in the United States, give rise to some very difficult problems.

If *Harris v. Harris* provides the correct interpretation of full faith and credit for Australia, it follows that many of the common law rules of the conflict of laws will disappear within the area in which full faith and credit operates. This, in itself, is not a criticism. Indeed, Justice Jackson has argued convincingly that this is one of the necessary consequences of the substantive obligations imposed by a full faith and credit clause.[88] From the decided cases, it would appear that the American courts have never squarely faced the implications of this argument. As the American cases stand, it is at

[85]See footnote [83], Powell: *And Repent at Leisure* (1945), 58 Harvard Law Review 930, does not appear to agree with Dean Griswold's view on this point.

[86]Fullagar J. was subsequently appointed to the High Court of Australia.

[87]Wolff J. of the Supreme Court of Western Australia: "This decision is doubtful and is not in line with decisions in the United States of America. The reasoning in the judgment by which the court distinguished *Harris's* case is not convincing." *Res Judicata in Divorce* (1950) 1 Annual Law Review (University of Western Australia) 369, 371–2.

[88]"In considering claims of foreign law of faith and credit courts of course find the Conflict of Laws a relevant and enlightening body of experience to provide analogies. But while the . . . law of conflicts is a somewhat parallel and contemporaneous development with the law of faith and credit, they are

best very doubtful whether full faith and credit imposes an obligation to accord recognition and effect to a sister state judgment for a penalty.[89] While it is now settled that full faith and credit obliges a state to give effect to a sister-state judgment for taxes,[90] it is still an open question on the authorities whether there is an obligation under the full faith and credit clause to allow an action for taxes in a sister state, when the tax claim has not yet been reduced to judgment.[91] It would appear that public policy cannot be invoked to deny effect to a sister-state judgment, in an action on that judgment.[92] However, outside the area of judgments, the public policy rule does not appear to have been wholly excluded by the full faith and credit clause.[93] Again there is considerable uncertainty as to the extra-state effect of an equitable decree *in personam*.[94] The rule that questions of procedure are governed by the *lex fori*, as often applied in such fields as statutes of frauds and statutes of limitation, operates in effect to deny full faith and credit to substantive obligations arising under the laws of sister states.[95]

Such problems as these did not fall to be considered by Fullagar J. in *Harris v. Harris*. It would, however, be difficult, following the principal steps which led the judge to the conclusion that it was not open to him to introduce jurisdictional qualification into the Australian law of full faith and credit, to argue that any other limita-

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also quite independent evolutions, are based on contrary basic assumptions, and at times support conflicting results. We must beware of transposing conflicts doctrines into the law of the Constitution. . . . Private international law and the law of conflicts extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self interest. The constitutional provision extends recognition on the basis of the interests of the federal union which supersedes freedom of individual state action by the compulsory policy of reciprocal rights to demand and obligations to render faith and credit." Jackson, *op. cit.* p. 30.

[89] *Wisconsin v. Pelican Ins. Co.* (1888) 127, U.S. 265. Mr. Justice Jackson, however, speaks of *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268 as casting "some shadow on the whole penalty exception", *op. cit.* p. 10.

[90] *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268.

[91] Left open by the Supreme Court of the U.S. in *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268. Cf. *Moore v. Mitchell* (1929) 30 F 2d. 600 and *Oklahoma Tax Comm. v. Rodgers* (1946) 238 Mo. App. 1115. See Restatement, 1948 Supplement p. 175. See also Goldstein, *Interstate Enforcement of the Tax Laws of Sister States* (1952) 30 Taxes 247.

[92] *Fauntleroy v. Lum* (1908) 210 U.S. 230.

[93] See for example *Alaska Packers Assn. v. Industrial Accident Commission* (1934) 294 U.S. 532; *Pacific Employers Ins. Co. v. Industrial Accident Commission* (1939) 306 U.S. 493; *Hughes v. Fetter* (1951) 341 U.S. 609.

[94] *Fall v. Eastin* (1909) 215 U.S. 1. See Lorenzen (1925) 34 Yale Law Journal 591.

[95] See Lorenzen: *The Statute of Limitation and the Conflict of Laws* (1919) 28 Yale Law Journal 492; *The Statute of Frauds and the Conflict of Laws* (1923) 32 Yale Law Journal 311.

tion drawn from the common law rules of the conflict of laws might be imposed upon the mandate to accord full faith and credit. Certainly the introduction of any such qualification would be very difficult to reconcile with the *ratio decidendi* of *Harris v. Harris.* The ratio is, simply and generally, that *as a matter of statutory construction,* limitations upon the absolute mandate of full faith and credit cannot exist.

If *Harris v. Harris* were accepted as a satisfactory statement of the Australian law of full faith and credit, considerable difficulties would still be encountered. *Harris v. Harris* raised the comparatively simple problem of a *judgment.* It was said that if a judgment is final and conclusive in the state in which it is pronounced, full faith and credit must be accorded to it. But if the problem is the measure of faith and credit to be accorded to a *statute,* issues of legislative jurisdiction of "extraordinary complexity and difficulty"[96] may be raised. The question whether the legislation of state A is the appropriate law to govern a transaction in an interstate conflictual situation (within the context of a full faith and credit problem) has only arisen in Australia on simple facts, as in the *Merwin Pastoral Co.* case where it was quite clear that New South Wales law governed the transaction. But where the problem of legislative jurisdiction arises on a complex set of facts, as it has in many cases in the United States, notably in the field of workmen's compensation, there will be extremely difficult problems to resolve before the seemingly simple rule in *Harris v. Harris* may be called into operation.

When all such difficulties are resolved, the question still remains whether the interpretation of full faith and credit propounded in *Harris v. Harris*—which drastically departs in principle from American doctrine—is satisfactory. This involves high policy considerations which turn principally upon the inter-relation of the component parts of the Australian federal structure. This question will be considered in the final section of this paper. But whether or not, on this basis, *Harris v. Harris* provides a desirable interpretation of full faith and credit in Australia, it may be suggested that the grounds on which Justice Fullagar based his decision were not very happy. Conceding that, in general, statutory interpretation should proceed along the lines indicated by the judge, it may be argued that this is a very special case. It may be repeated that it is too clear for argument that the draftsman of s. 18 of the State and Territorial Laws and Records Recognition Act never intended

[96] Jackson, *op. cit.*, p. 11; Reese (1951) 19 University of Chicago Law Review 339.

it to impose the mandate which *Harris v. Harris* held, as a matter of construction, it did impose. Secondly, having regard to the American interpretation of provisions upon which Australian full faith and credit provisions were obviously modelled, it may be thought that Mr. Justice Fullagar gave no really convincing reasons for departing from American doctrine, which has, from the earliest days, engrafted qualifications upon the mandate to accord full faith and credit.

VI

In the same volume of the Victorian Law Reports in which *Harris v. Harris* appears, the case of *Perry v. Perry*[97] is reported. In that case, an order having the effect of a decree of judicial separation was made in favour of a wife in Western Australia where jurisdiction was assumed on the basis of the residence of the parties who were domiciled throughout in Victoria. Subsequently the husband petitioned for divorce in Victoria, the *forum domicilii,* on the ground of the wife's desertion. If the Western Australian decree was entitled to recognition in Victoria, the petiton must have failed as the wife would have had just cause or excuse for living apart from her husband. Macfarlan J. held that the Victorian court was not bound to recognize the Western Australian decree.

In the course of his opinion, the judge referred to, and distinguished *Ainslie v. Ainslie,*[98] a decision of the High Court of Australia. There a Western Australian decree of judicial separation had been made, the parties being then domiciled and resident in that state. Subsequently, the husband having acquired a domicile and residence in New South Wales, petitioned there for restitution of conjugal rights. The wife's defence was that under a valid Western Australian order she had lawfully withdrawn from cohabitation. The High Court, by a majority, held that the Western Australian decree was a good defence to the New South Wales suit. The court's reasons were that the domiciliary decree was entitled to recognition elsewhere on general principles of the conflict of laws.[99] The court declined to deal with the question whether the Western Australian decree would have been entitled to recognition had Western Australia not been the *forum domicilii,* but merely the forum of residence. Two judges, Higgins and Powers JJ., dissented on the ground

[97] [1947] V.L.R. 470. This case was decided in July 1947. Judgment was delivered in *Harris v. Harris* in May 1946.

[98] (1927) 39 C.L.R. 381.

[99] "On settled principles of English law, (the order) is entitled to recognition in the courts of New South Wales and other states and countries." Isaacs J. p. 409.

that a decree of judicial separation operated only within the law district within which it was pronounced.

In *Perry v. Perry,* Macfarlan J. distinguished *Ainslie v. Ainslie* on the footing that in that case the court pronouncing the decree of judicial separation was the *forum domicilii,* while in the case he was considering jurisdiction depended upon residence only. "The determination of a court of a country which was at the date of such determination the domicile of the parties stands in quite a different position.[100]

It is remarkable that there is not one word of reference to full faith and credit in either case. Both were decided by reference to general principles of the conflict of laws without the slightest suggestion that a full faith and credit problem was in any way involved. This is the more surprising in light of the fact that identical problems had been raised earlier in the Supreme Court of the United States and in American state courts. In these cases, the courts had approached the problem by asking the specific question whether an obligation to accord full faith and credit was imposed. In *Harding v. Harding*[101] a separation decree had been made in Illinois, then the domicile of the spouses. Subsequently the husband, having removed to California, petitioned for divorce there on the ground of desertion. The Supreme Court of the United States, speaking through Justice White, asked whether the Supreme Court of California, which had declined to recognize the Illinois decree, had failed to obey the constitutional obligation to accord full faith and credit. The court's answer was that it had failed to do so, and that the Illinois decree was entitled to recognition. *Thompson v. Thompson*[102] was a similar case. *Pettis v. Pettis*[103] was a case in which a Connecticut court declined to recognize a New York decree of judicial separation on facts which disclosed that the parties were not domiciled in New York at the material date. But the question for the court was framed again in terms of full faith and credit.

The fact that such important and well-established American authority was available to the Australian courts makes it quite extraordinary that the courts should have proceeded in utter disregard of the existence of the full faith and credit provisions. Counsel do not appear to have brought the provisions to the attention of the courts. In *Ainslie v. Ainslie* the result reached was the same as that reached by the United States Supreme Court in the *Harding* and *Thompson* cases. But the Australian court chose to decide the

[100][1947] V.L.R. 470, 473.
[101](1905) 198 U.S. 317.
[102](1913) 226 U.S. 551.
[103](1917) 91 Conn. 608.

case by reference to the general common law principles rather than by applying both a constitutional and legislative mandate to accord full faith and credit which ought to have been considered in priority to common law rules. Higgins J. who very shortly after *Ainslie v. Ainslie* invoked the full faith and credit clause in *Jones v. Jones*[104] apparently thought the clause in no way relevant. It is not intended to suggest that recourse to full faith and credit would have produced a different result in the dissenting analysis. On the view that, by its very nature, a separation decree had no force at all outside the territorial limits of the decreeing forum, it followed that there was nothing outside that area to which full faith and credit could attach. But this does not justify or explain an entire disregard of the existence of the clause.[105]

A similar problem arises in relation to interstate tort actions. Here,

> "the significance of the full faith and credit clause is obvious. Suppose an action arising out of an alleged tort in one state is brought in the courts of another state. The court, for one reason or another, refuses to enforce a statute of the state of wrong. Such a refusal might, in some circumstances, constitute a refusal to obey the command of the full faith and credit clause."[106]

This observation was made in relation to the American law. Mr. Justice Jackson has noted that American tort cases arising out of wrongful death statutes have been decided on general conflict of laws principles, rather than by reference to the apparently appropriate full faith and credit clause.[107] However, in *Hughes v. Fetter,*[108] the Supreme Court of the United States recently decided an interstate tort case involving wrongful death statutes squarely upon the constitutional command of full faith and credit. Action was brought in Wisconsin on the Illinois wrongful death statute in respect of a death in Illinois. The Wisconsin courts had declined to entertain the action on the ground that the claim contravened a local public policy against Wisconsin courts entertaining actions brought under the wrongful death statutes of other states. It was held that this decision violated the constitutional requirement to accord full faith

[104](1928) 40 C.L.R. 315. See pp. *supra.*

[105]It may be recorded that Judge Goodrich, *Conflict of Laws* (3rd edn. 1949) p. 416, thinks that a decree of judicial separation pronounced by the forum of residence should be entitled to full faith and credit.

[106]Hancock: *Torts in the Conflict of Laws* (University of Michigan Press, 1942) p. 38.

[107]*op. cit.* p. 3.

[108](1951) 341 U.S. 609 (1951) 31 Boston University Law Review 538; (1951) 100 University of Pennsylvania Law Review 126; Reese (1951) 19 University of Chicago Law Review 339.

and credit to Illinois law. The Supreme Court did not hold that full faith and credit imposed a mandate *in every case* to give effect to the statute law of a sister state so that a public policy defence was invariably excluded: it was held, on the facts of this case, that such a defence was inconsistent with full faith and credit obligations.

A similar result was reached in *First National Bank of Chicago v. United Air Lines*[109] where the court held by a majority that Illinois must entertain an action for wrongful death which had occurred in Utah, notwithstanding that the Illinois wrongful death statute denied a remedy in Illinois. Justices Jackson and Minton concurred in the result on different grounds. On the full faith and credit aspect of the question, they adhered to the views which they had expressed in dissent in *Hughes v. Fetter*. These views were amplified in the later case. While the full faith and credit clause did not oblige Illinois to provide a forum, it did compel Illinois to apply Utah law, if Illinois chose to entertain the action.[110] From this it is clear that while only a bare majority in the present court holds that the full faith and credit clause commands a state to provide a forum in such circumstances, a more substantial majority is of opinion that full faith and credit is directly involved once the question of the application of the appropriate law in tort cases is raised.

From the reported Australian cases there does not appear to be the slightest indication that the tort rules require any modification in the light of the full faith and credit mandate. In a recent decision of the High Court of Australia, *Koop v. Bebb*,[111] involving a wrongful death claim, it was said by the High Court that in the existing state of the authorities, an action of tort lay in one Australian state for a wrong alleged to have been committed in another if two conditions were fulfilled: (1) the wrong must be of such a character that it would have been actionable if committed in the state in which the action is brought, (2) it must not have been justifiable by the *lex loci delicti commissi*. This is the rule in the celebrated case of *Phillips v. Eyre*,[112] and is unquestionably the English

[109](1952) 96 L. Ed. 360.

[110]"I believe, as expressed in *Hughes v. Fetter*, that the state was free to refuse this case a forum, but, if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah, because all elements of the wrong alleged here occurred in Utah. For the essence of the full faith and credit clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred." See also Jackson, *op.cit.* p. 13.

[111][1952] A.L.R. 37, esp. 40–41. [112](1870) L.R. 6 Q.B. 1.

common law rule governing liability in tort in the conflict of laws. It would clearly be applied by Australian courts in cases arising outside the full faith and credit area. It should, however, be noted that the rule in *Phillips v. Eyre* has been subjected to severe criticism. That part of it which requires the act to be actionable as a tort by the *lex fori* stems from an earlier decision in *The Halley*.[113] The ground for criticism is stated by Dicey who regards the rule as imposing "an unreasonable restriction upon the right to bring an action for damages in respect of a matter recognized as tortious by the *lex loci delicti commissi*. English law has not refused to enforce a contractual obligation, valid by its proper law, merely because it would not be a valid contract and hence actionable by the rules of English domestic law. It would have been more reasonable to have refused to allow an action to be brought in England only when to permit it would offend a rule of English public policy."[114]

As between Australian states, it would seem, for the purposes of full faith and credit, that this part of the rule in *Phillips v. Eyre* ought to be regarded very much in the same way as the doctrine of public policy. The tort rule of the common law is, in effect, an extreme statement of the rule that a forum can refuse a remedy when the refusal is imperatively demanded by its public policy. Having regard to the expression of views by three judges of the High Court in the *Merwin Pastoral Co.* case, it is difficult to see, at most, more than a very restricted area of operation for this doctrine of public policy in a forum bound by a full faith and credit clause.[115] This point does not appear to have been considered by the High Court in *Koop v. Bebb* where the tort rule was stated for *interstate purposes* as being the rule in *Phillips v. Eyre*. This disregard for full faith and credit is also apparent in earlier cases. In *Potter v. Broken Hill Pty. Co. Ltd.*[116] an action was brought in Victoria by a Victorian plaintiff against a Victorian company carrying on business in New South Wales in respect of an infringement in New South Wales of a New South Wales patent. In the Supreme Court of Victoria it was assumed that *Phillips v. Eyre* applied. There was a difference between the members of the court as to what the rule that the act must be actionable by the *lex fori* meant. Did

[113](1868) L.R. 2 P.C. 193.

[114]*Conflict of Laws* (6th edn., 1949) p. 800. For similar criticisms, see Cheshire, *Private International Law* (3rd edn., 1947) pp. 373–4; Hancock *op. cit.* pp. 12 *et seq.*, 86 *et seq.*; Robertson, (1940) 4 Modern Law Review 28 *et seq.*

[115]The dissent in *Hughes v. Fetter* however suggests that special considerations may apply in the field of commercial law "where certainty is of high importance", which do not operate in equal measure in tort law.

[116][1905] V.L.R. 612.

it mean that an act of this general character (i.e., patent infringement) must be actionable? Or did it mean that the very act alleged must be actionable? It might have been thought that such considerations were irrelevant. This was an infringement in New South Wales of a New South Wales patent. It would seem that this was clearly a case in which legislative jurisdiction was vested in New South Wales and that full faith and credit demanded of the Victorian court that at least in the absence of any imperious policy mandate (query in view of the *Merwin Pastoral Co.* case) it should apply the law of New South Wales.[117] In other cases, it has been likewise assumed that as between the states of Australia, the rule in *Phillips v. Eyre* operates.[118]

No doubt there are other fields of the conflict of laws which raise the same points. It is both unsatisfactory and extraordinary that in such cases as these there should have been a total disregard of full faith and credit provisions which ought, obviously, to have been considered. The warning uttered by Mr. Justice Jackson against allowing full faith and credit to become the "orphan clause"[119] of the American constitution would seem to be applicable in greater degree to Australia. It would seem to be a remarkable doctrine of compensation for such neglect that when a full faith and credit problem was brought to the attention of an Australian court in *Harris v. Harris,* a far more extensive interpretation was assigned to the clause than has even been accorded to it in the United States!

VII

Finally, some general observations about the scope and character of full faith and credit may be offered. If we turn to the American discussion of the problem, we are left, perhaps inevitably, with no settled conclusions about the principles which govern the judicial application of full faith and credit provisions. In respect of the measure of full faith and credit to be accorded to judgments, the Supreme Court of the United States has given some clear answers, although here—as for example in the case of judgments for penalties—it is not possible to give a certain answer in all cases. When we turn to the problem in relation to statutes and choice of law, the difficulties become very great indeed. Mr. Justice Jackson has expressed this very clearly:

[117]The decision of the Supreme Court of Victoria was affirmed on other grounds by the High Court of Australia (1906) 3 C.L.R. 479.

[118]See *Varawa v. Howard Smith & Co.* [1910] V.L.R. 509; *Musgrave v. The Commonwealth* (1939) 57 C.L.R. 514.

[119]*op. cit.* p. 34.

> "Nowhere has the court attempted, although faith and credit opinions have been written by some of its boldest-thinking and clearest-speaking Justices, to define standards by which 'superior state interests' in the subject matter of conflicting statutes are to be weighed. Nor can I discern any consistent pattern or design into which the cases fit. Indeed, I think it difficult to point to any field in which the court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the constitution."[120]

In some of the cases the emphasis has been upon the importance of the clause as a unifying force, and as altering the former status of the states as independent foreign sovereignties. This view emphasizes the strength of the bonds imposed by full faith and credit, and regards with some hostility the claims of local public policy to frustrate this large object.[121] Mr. Justice Jackson has again put this view most clearly:

> "By the full faith and credit clause, they (the founding fathers) sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."[122]

On the other hand there have been many judicial statements imposing qualifications upon the literal mandate to accord full faith and credit. Judges who have in one place stressed its *binding* aspect have elsewhere made it clear that the clause is not an inexorable and unqualified command.[123] It is worthy of note that Mr. Justice Jackson, whose Cardozo lecture stresses the great importance of paying due attention to the command of the clause, has in recent decisions of the Supreme Court dissented from the majority view that full faith and credit imposes an obligation on a state, in opposition to its own statutes, to provide a forum for a cause of action arising under the law of a sister state.[124] In *Hughes v. Fetter* Mr. Justice

[120] *op. cit.* p. 16.

[121] See, e.g., *Milwaukee County v. M. E. White Co.* (1935) 296 U.S. 268. See footnote [47].

[122] *op. cit.* p. 17.

[123] See, e.g., *Pink v. AAA Highway Express Inc.* (1941) 314 U.S. 201, 210. These are the words of Stone J. who in the *Milwaukee* case stressed the *binding* aspect of full faith and credit.

[124] *Hughes v. Fetter* (1951) 341 U.S. 609; *First National Bank of Chicago v. United Air Lines* (1952) 96 L. Ed. 360.

Jackson joined Mr. Justice Frankfurter in asserting that vital interests of the states should not be sacrificed to a literal reading of the full faith and credit clause.[125] The conclusion which must be drawn from the American cases, therefore, is that the apparently literal command to accord full faith and credit is subject to exceptions and qualifications.[126] The precise scope of these exceptions and qualifications is far from clear, and the most distinguished writer on this subject has confessed that in the present state of the law no clear or certain answer can be given.[127]

The question has never been seriously discussed on this level in Australia. Most often, full faith and credit has been wholly ignored by courts, counsel and law teachers. Problems which have squarely raised a discussion of full faith and credit in the United States have, in Australia, been treated as ordinary common law problems of the conflict of laws. Here it is necessary to repeat Mr. Justice Jackson's warning that while common law rules may provide analogies, they do not always point the answer to full faith and credit problems, and indeed proceed on contrary basic assumptions.[128]

The American difficulties in charting the law of full faith and credit must be of immediate relevance in the Australian law. It is this which makes the rather cursory treatment of this problem by Fullagar J. in *Harris v. Harris* especially unsatisfactory. The situation in Australia, as in America, is that a large residue of power is left with the several states. It may be in some cases, as for example in the field of divorce, that the differences in the laws of the several states are not as dramatic in Australia as they are in the United States. But this should not affect the point that the constitution leaves wide scope for legal and social experimentation to the several Australian states. This being the case, it is submitted that the problems arising out of full faith and credit cannot be satisfactorily resolved by a simple essay in literal statutory interpretation. In recent years in Australia, there has been a fresh judicial emphasis upon the *federal* character of the constitution.[129] This has not,

[125]"The only question before us is how far the Full Faith and Credit Clause undercuts the purpose of the Constitution made explicit by the Tenth Amendment to leave the conduct of domestic affairs to the states. Few interests are of more dominant local concern than matters governing the administration of law. The vital interest of the states should not be sacrificed in the interest of a merely literal reading of the Full Faith and Credit Clause."

[126]Reese and Johnson, *Scope of Full Faith and Credit to Judgments* (1949) 49 Columbia Law Review 153, 178.

[127]Jackson, *op. cit. passim.*

[128]*op. cit. p.* 23. See footnote 88.

[129]See Sawer: *Implications and The Constitution* (1948–49) 3 Res Judicatae 15, 85.

however, involved any consideration of full faith and credit problems. But it might be thought that particularly in the interpretation of such provisions account should be taken of the federal character of the constitution, of the wide powers vested in the states, and of the American interpretations of virtually identical provisions. As in the United States, this would raise many complex problems of interpreting the mandate to accord full faith and credit. But it is submitted that it does much more justice to the underlying problems than does the treatment suggested by Mr. Justice Fullagar in *Harris v. Harris.* In Australia, to a special degree, the full faith and credit clause has been, in Mr. Justice Jackson's telling phrase, the orphan clause of the constitution. The first task of Australian courts and law teachers is to recognize full faith and credit problems when they arise. Then the difficult problem of interpreting these provisions, and of giving appropriate weight to various policy considerations, will arise for Australian, as it has for American, courts.