FULL FAITH AND CREDIT—FURTHER REFLECTIONS

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THE following article is an attempt to develop further some of the points raised by Professor Z. Cowen[1] in his suggestive paper on the subject of the Australian experience of the full faith and credit doctrine. It is not too much to say that such article has uncovered a field virtually unknown not only to the Australian practitioner but to many a law teacher in this country.

Professor Cowen has concentrated his main attention on the "full faith and credit" recognition of judgments and in that field has considered the decision of Fullagar J. in *Harris v. Harris*[2] in the light of the question whether the enactments enjoining the extending of full faith and credit to judgments permit the questioning of the judgment of a sister State on the score of lack of jurisdiction. It is my purpose to explore the question of the recognition of the *statutes* of another State under a full faith and credit provision and further to consider the possibility of the existence of avenues of attack upon a judgment other than that of jurisdictional defects. These matters are mentioned only incidentally by Professor Cowen in developing his main theme. It is proposed first to consider the actual results of decisions in Australia and America bearing on the recognition of judgments (other than on the question of lack of jurisdiction), secondly the results reached as regards legislative recognition, and thirdly to endeavour to arrive at some statement of what should be the general attitude of Australian Courts to the whole question of recognition of judgments and statutes under the "full faith and credit" enactment. Under the last head it will be necessary to arrive at some assessment of the decision in *Harris v. Harris.*

I. The Decisions on Judgments

It is not my purpose at the outset to assail or defend the bold step taken by Fullagar J. in *Harris v. Harris,* though undoubtedly the ultimate view to be taken of the matters hereinafter discussed must to a large extent be bound up with the rightness or wrongness of the general approach of the learned judge.

Now apart from the question of defective jurisdiction, the matters which, in a Court applying the normal rules of private international law apart from any constitutional direction, may rightly lead such Court to decline to entertain an action on a foreign judgment *in personam* may be (a) that it is not for a sum of money, (b) that it is

[1] Published in (1952) 6 *Res Judicatae* 27. [2] [1947] V.L.R. 44.

not final, (c) that it represents the enforcement of a penal law, (d) that it represents the enforcement of a taxation law, (e) that it is contrary to the public policy of the *forum,* and (f) that it was obtained by fraud. It is proposed to consider how these various defences have been treated by the American Courts in a full faith and credit setting. Direct Australian authority there is none.

Judgment not for a sum of money

A foreign judgment directing the doing of or abstaining from an act, for instance an equity decree for an injunction or for specific performance, does not in the ordinary conflicts field constitute a good cause of action. It has even been doubted in Australia whether it is removable and registrable under the Service and Execution of Process Act.[3]

In the United States it was said by Justice Holmes in *Fall v. Eastin*[4] that a decree for specific performance of a contract would be entitled to full faith and credit, that is to say would under the provisions of art. IV, s. 1 of the United States Constitution and the two Acts of Congress of 1790 and 1804 be recognized as constituting a good cause of action in the Courts of another State. It would seem that this represents the general position taken, though there is some, by no means unanimous, opinion that an injunction against the institution of an action in the Courts of another State need not be respected by such Courts.[5] The actual decision in *Fall v. Eastin* was merely that neither a decree made in a divorce suit in Washington whereby a husband was ordered to convey certain land in Nebraska to his wife nor a deed executed by the Commissioner of the Washington Court purporting so to convey could affect of itself the title to the Nebraska land.

Judgment not final

Under this head we recall the familiar example that "foreign" decrees for alimony or maintenance are not sufficient to ground a cause of action because they are subject to variation by the same Court or one of parallel jurisdiction. In *Lynde v. Lynde*[6] the United States Supreme Court affirmed the judgment of a New York Court which had refused to enforce future alimony ordered by a New Jersey Court though it allowed recovery of alimony already due at the time of the New Jersey judgment and covered by that judgment. In *Barber v. Barber*[7] again recovery of arrears already due at the time of the judgment of the decreeing State was allowed. The ques-

[3] *Jackman v. Broadbent* [1931] S.A.S.R. 82.
[4] (1909) 215 U.S. 1.
[5] See (1933) 46 *Harvard Law Review,* 1030; *contra Dobson v. Pearce* (1854) 12 N.Y. 156.
[6] (1901) 181 U.S. 183.
[7] (1944) 323 U.S. 77.

tion where past instalments are subject to retroactive modification by the Court of decree is a vexed one.[8]

Penal Judgment

The decision in *Wisconsin v. Pelican Insurance Co.*[9] is a strong affirmation that the general conflictual principle that an action will not lie on a foreign judgment based on a penal cause of action is not affected by the full faith and credit mandate. Whilst the actual decision was that a Federal Court had no original jurisdiction to entertain an action by a State against a resident of another State based on a judgment obtained by the former in its own State Courts for recovery of a penalty, the language is quite sufficient to cover the proposition that no State should enforce a penal judgment given by the Courts of another. It was said "The application of the rule (*that is, against penalties*) to the Courts of the several States is not affected by the provisions of the Constitution and of the Act of Congress by which the judgments of the Courts of any State are to have such full faith and credit given to them in every Court within the United States as they have by law or usage in the State in which they were rendered."[10] The judgment in *Huntington v. Attrill*,[11] with its anxiety to distinguish between penal and remedial causes of action, involves the same basic proposition. It may be that the *Wisconsin* case is somewhat weakened by *Kenny v. Supreme Lodge*[12] and by the decisions on taxation judgments. The question was left open in *Milwaukee County v. White.*[13]

Judgment on a taxation liability

The trend in the case of judgments in enforcement of a tax liability has been otherwise. In *Milwaukee County v. White* the Supreme Court answered in the affirmative a question submitted whether a Federal District Court in Illinois should entertain a suit based on a Wisconsin Court judgment for an income tax liability. A cause of action on a judgment was said to be different from that upon which the judgment was entered. "In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis."[14] This last statement does not seem to accord well with the reservation in the same case of the issue of a judgment on a penal cause of action.

Public policy

We turn to the general defence of public policy apart from the

[8] See *Sistare v. Sistare* (1910) 218 U.S. 1. [9] (1888) 127 U.S. 265.
[10] *Ibid.* at 291. [11] (1892) 146 U.S. 657. [12] (1920) 252 U.S. 411.
[13] (1935) 296 U.S. 268, 279. [14] *Ibid.* at 275.

more special questions of penalty and taxation issues. Although there are frequent statements that the mandate of full faith and credit is subject to the reservation of the public policy of the enforcing State,[15] the instances where such exception has been illustrated in actual application are but few. Justice Jackson thinks that the effect of the language insisting on a public policy reservation "has been largely dissipated recently."[16] He refers to the language in *Williams v. North Carolina* (No. 1).[17] In *Fauntleroy v. Lum*[18] it was held that a Missouri judgment was entitled to full faith and credit in Mississippi even though it was based on transactions which were in violation of laws embodying the policy of the latter State. We can be led, however, to no other conclusion than that there is a reservation of public policy which appears to depend ultimately on the view taken by the United States Court of the relative interests of the two States.[19]

Fraud

Here it seems that we should include a denial of natural justice. The question whether the enforcement of the judgment of a sister State can be resisted on the plea of fraud on the part of the Court or the parties is the subject of a surprising number of conflicting decisions and dicta.[20] Obviously when the decree could be made the subject of an attack in collateral proceedings in the home State, on the score of fraud, such fraud could be set up as a defence in the proceedings in the second State as were it otherwise the home State, judgment would be given greater credit than it would possess at home. This is the basis of such a decision as *Levin v. Gladstein*.[21]

In addition to the above possible defences American Courts have made some play with the rule of "*forum non conveniens*", that is, that although a Court is bound to give full faith and credit to a foreign judgment when it entertains a suit it is competent in some cases to refuse to provide a *forum*.[22] This is akin to the English rule as to vexatious suits. The rule in the main derives from common law, but in some cases States by *statute* have removed jurisdiction

[15] e.g. *Alaska Packers Assn. v. Industrial Accident Commission* (1935) 294 U.S. 532, 546.

[16] Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution" (1945) 45 *Columbia Law Review*, 10 (note).

[17] (1942) 317 U.S. 287, 294-5.

[18] (1908) 210 U.S. 230. See too *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 440-1.

[19] *Alaska Packers* case, *supra*, at 547-8.

[20] See *Christmas v. Russell* (1866) 5 Wall. 290; *Hanley v. Donoghue* (1885) 116 U.S. 1, 4; *Jaster v. Currie* (1905) 198 U.S. 144; *Levin v. Gladstein* (1906) 142 N.C. 482.

[21] *Supra*, note 20.

[22] See *Gulf Oil Corporation v. Gilbert* (1947) 330 U.S. 501.

from their Courts to entertain claims arising in another State and this has been upheld.[23] Whether in the particular case the power comes from general law or statute is for this purpose not of importance. The doctrine in the main has been confined to actions arising out of the *forum* State and brought by non-residents. It has tended to be confined within narrow limits[24] and to be applicable only to the case where there is lacking any close relationship to the state of the *forum*.[25]

Lastly it has always been recognized that an enforcement may be subjected to the procedural requirements of the *forum*, for instance by a provision that action must be brought on a judgment within a certain prescribed period.[26]

It was never asserted by any Court even in the full flowering of the full faith and credit doctrine that such doctrine enabled the judgment of a sister State to be directly enforced by execution in the second State without the necessity of a further action.[27] It was however asserted and frequently reiterated in language of similar import that "the judgment of a State Court should have the same credit validity and effect in every other Court in the United States which it had in the State where it was pronounced and that whatever pleas would be good to a suit thereon in such State, *and none others*, could be pleaded in any other Court of the United States".[28] It is obvious from the foregoing that this rule has not been observed, but the vagueness of the exceptions is most marked. The character of the judgment as being penal in character and the fact that the judgment is not final may be regarded as certain exceptions and the rule of policy preserves a vague existence. The fact that the judgment enforces a tax liability is not recognized as an exception nor apparently is the fact that the judgment is not for a money sum.

As against the volume of American case law, there is almost a complete dearth of Australian authority on the subject. The decision in *Merwin Pastoral Co. v. Moolpa Pastoral Co.*,[29] for what it is worth, may indirectly suggest an exclusion of the public policy concept, but apart from this there is nothing to constitute a guide save the decision in *Harris v. Harris* itself bearing on the competence of the

[23] *Anglo-American Provision Co. v. Davis Provision Co.* (1903) 191 U.S. 373.
[24] Jurisdiction for instance cannot be denied merely because the *forum* state does not recognize the cause of action – *Fauntleroy v. Lum, supra.*
[25] *Hughes v. Fetter* (1951) 341 U.S. 609, 613.
[26] *McElmoyle v. Cohen* (1839) 13 Pet. 312.
[27] *Thompson v. Whitman* (1873) 18 Wall. 457, 463; *McElmoyle v. Cohen* (1839) 13 Pet. 312, 325.
[28] *Hampton v. McConnel* (1818) 3 Wheat 234. See also *McElmoyle v. Cohen, supra,* at 316. Above italics are mine.
[29] (1933) 48 C.L.R. 565.

Court in the second State to inquire into the jurisdictional facts surrounding a sister-State judgment. As has been fully demonstrated in Professor Cowen's article the American decisions show that full faith and credit there has not been regarded as precluding an inquiry into jurisdiction and jurisdictional facts: such point and the decisions thereon are not here examined.

II. Decisions on Legislative Recognition

It has been pointed out in the United States that the obligation to accord full faith and credit to the "public acts" of a State raises far more difficult questions than does the corresponding obligation in relation to judgments.[30] In the case of judgments the field of application is made apparent by the terms of the judgment and whether that field is a legitimate area is tested by the relevant jurisdictional rules. In the case of legislation however it is difficult to determine to what extent a State has a right to reach a particular transaction, piece of property or person. What is the criterion of "legislative jurisdiction"? It is obvious that the *forum* of a State which is competent to legislate on a particular subject matter by reason of the fact that certain acts or things or persons occur or are on its soil is not bound by virtue of the full faith and credit clause to disregard its own law or its own statute in favour of the statute of a State which has none or a more tenuous link with the facts of the transaction.[31] A literal rendition of the full faith and credit mandate cannot be insisted on in such a case. Nor can it be insisted on in the much more difficult case where two States possess inconsistent statutes bearing on a transaction or thing which has true and important links with both States.[32]

In the United States the problem is made particularly difficult because of the constitutional framework. The Supreme Court has no jurisdiction to hear appeals from State Courts in ordinary matters of private law and this of course includes conflictual matters. Such matters may come into Federal Courts only if a Federal statute is directly involved, or there is a case involving citizens of different States or the State legislatures have infringed a constitutional mandate such as the due process clause or the full faith and credit clause. Undoubtedly this has prevented the growth of uniform State law on conflictual questions. The significance of this is that had uniform State laws on conflicts been developed the question of "legislative jurisdiction" might have become much easier.

[30] Jackson, *op. cit.*, p. 11.

[31] *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939) 306 U.S. 493, 501; *Olmsted v. Olmsted* (1910) 216 U.S. 386.

[32] *Alaska Packers Association v. Industrial Commission, supra,* at 547.

For instance if the States had all adopted a rule that all questions of the validity of contracts were to be determined by the *lex loci contractus* then a statute of State A purporting to invalidate a contract could be given effect to in the Courts of another State only if State A was the place of contract; the mandate of full faith and credit could intelligibly be limited to such a statute. As it is, there is no such uniformity, and if the question of the full faith and credit to be given to a State statute, where the transaction impinges on two State systems, arises as a constitutional question in the Supreme Court, the latter has no clear common State doctrine of conflicts to look to as a limiting factor and has no clear guide unless it creates a Federal law of conflicts so far as statutes are concerned. The latter it has so far refused to do, though possibly that course is open.[33]

It seems that the problem may arise in three forms:

(a) The case where the strong and paramount link of the transaction is undoubtedly with State A which has passed a statute on the matter but the Court of State B has adopted the attitude that the statute is penal or offends the public policy of State B. This was one of the issues in *Bradford Electric Light Co. v. Clapper*.[34] The local "policy" may or may not be embodied in a statute.

(b) The case where the transaction has links with both States, for instance a contract made in one State but to be performed in the other, where the statute of the first State is directly contrary to the law of the other, and the question arises whether the Courts of the latter State are bound to accord full faith and credit to a right of action or a defence given by the statute of the former. It may be that the conflictual law of the second State would not refer the question to the law of the first State at all.

(c) The case where both States have inconsistent statutes which affect rights under transactions or dealings, material incidents of which occur in both States. This has frequently occurred in workers compensation cases where both States possess statutes which purport to prescribe certain amounts of compensation exclusively recoverable before their own respective tribunals, or where the statute of one State provides an exclusive statutory remedy and purports to exclude any right of suit at common law, whereas the other statute recognizes and provides for such right.

As regards the first general type of case the problem here is whether the mandate to accord full faith and credit is subject to a

[33] See Cheatham, Goodrich, Griswold, and Reese, *Cases on Conflict of Laws*, 3rd Ed., p. 535.

[34] (1932) 286 U.S. 145.

qualification in favour of the non-enforceability of laws which are penal or tax laws or which offend public policy. It is assumed in this case that there is but little or slight connection between the country of the *forum* and the *res* acts or persons involved. The Supreme Court in *Moore v. Mitchell*[35] found it unnecessary to express an opinion on the question whether the revenue laws of one State will be enforced by a Federal Court though the decisions of the Courts below were quite clear in answering such question in the negative. In a Missouri case an action by the State of Oklahoma for the collection of an income tax obligation was allowed.[36] The Court concluded that there was a clear distinction between a penal law and a law imposing taxation. As regards penal laws *simpliciter* it appears that the consensus of opinion drawn from various dicta is that the penal laws of another State do not constitute a good cause of action even under a "full faith and credit" clause.[37] In *Loucks v. Standard Oil Co. of New York*[38] it was held that a statute allowing exemplary damages for a tort was not penal in character. The judgment reveals a clear assumption that a true penal action would not be entertained.

As regards distinctive public policy, much the same remarks hold good as were made in relation to judgments. There are indeed strong *dicta* to the effect that full faith and credit does not compel a Court to subordinate its domestic policy to the laws of another State[39] but these remarks are usually made in a context which shows that it is assumed that some elements of the transaction took place in the *forum*. Moreover, there are but comparatively few cases where local policy was asserted with success where the facts had no substantial connection with the *forum*, and these are mainly State decisions.[40] In *Bradford Electric Light Co. v. Clapper*,[41] where the contract of employment was made in Vermont between parties resident in that State and the death of the employee occurred in New Hampshire, a plea that a Vermont Workers Compensation Statute, which purported to make the statutory compensation prescribed by the State the sole remedy to the exclusion of any common law remedy, should not be given full faith and credit in New Hampshire because it was

[35] (1930) 281 U.S. 18.

[36] *State ex rel. Oklahoma Tax Commissioner v. Rogers* (1946) 238 Mo. App. 1115.

[37] See, e.g. *Galveston H. & S. Rwy. Co. v. Wallace* (1912) 223 U.S. 481, 490; *The Antelope* (1825) 10 Wheat 66, 123.

[38] (1918) 224 N.Y. 99.

[39] *Bradford &c. v. Clapper, supra*, at 164; *Stewart v. Baltimore & Ohio Railroad Coy.* (1897) 168 U.S., 445, 448-9.

[40] e.g. *Mertz v. Mertz* (1936) 271 N.Y. 466; *Ciampittiello v. Campitello* (1947) 134 Conn. 51.

[41] *Supra*. The argument that recognition of the Vermont statute would be giving effect to an extra-territorial application of an Act was also rejected.

obnoxious to New Hampshire public policy was rejected. The treatment of the argument based on public policy in relation to the wrongful death statutes is a good instance of the rejection of that plea. In *Hughes v. Fetter*[42] it was held that the Wisconsin Courts were not entitled to disallow a claim brought in those Courts in respect of a tortiously caused death in Illinois made actionable under the wrongful death statute of the latter State merely because there was a local policy of Wisconsin against entertaining suits under the wrongful death Acts of other States. There remains however considerable conflict as to whether the second State is bound to provide a *forum* for the enforcement of such statutes.[43]

The second and third sets of circumstances assume that both States have some intimate connection with the transaction in question, for instance a question as to workmen's compensation where the contract of employment was made in one State but the injury occurred in another,[44] and either the two States have inconsistent statutes or the statutory rights or defences created by the one are void or subject to modification by the common law or distinctive policy of the other. It is submitted that in Australia the Court of the State hearing the case or the High Court could reach an intelligible conclusion in such cases by confining the statutes by reference to common law conflictual rules uniform in all States. In the United States the problem has been rendered difficult by the diversity between the conflictual rules of the various States. An attempt to cut down "foreign" statutes by reference to the State's conflictual law would lead to a hopeless lack of conformity of decisions in the Federal Court itself. Moreover the statute of *each* State may clearly show an intention to apply to fields in which according to the respective conflictual notions current in each State the ordinary State non-statutory law would not apply. The Supreme Court, which has so far abstained from any attempt to create a Federal system of private international law, has endeavoured to grapple with this question by appraising the governmental interests of each competing jurisdiction, by applying an extremely vague concept of "superior State interest".[45] Into a common melting pot appear to be thrown the concepts of national interest and of State interests, whether the latter are manifested by the notions of distinctive public policy or by the degree of relation between the transaction and the competing States. It appears that *prima facie* the *forum* is competent to apply its own law; the "foreign state" has a

[42] (1951) 341 U.S. 609. [43] See discussion by Cowen 6 *Res Judicatae* 27, 54.
[44] See *Alaska Packers Association v. Industrial Commission* (1934) 294 U.S. 532. [45] *Alaska Packers* case, *supra*, at 548, 549

certain *onus* to surmount to prove the superiority of its policy.[46] How this technique is applied and with what results can be seen from a study of such decisions as the *Alaska Packers* case,[47] *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[48] *Pink v. A.A.A. Highway Express*,[49] and *Klaxon Co. v. Stentor*.[50] It is noteworthy that, although the first two cases were workmen's compensation cases, in the first the statute of the place of hiring was preferred whilst in the second preference was given to the State where the accident occurred.

In the Australian sphere two decisions only can be regarded as having any significant bearing on the topic. The first is the decision in *Re E. & B. Chemicals & Wool treatment Pty. Ltd.*[51] where it was held that a contract to take shares in a Victorian company was governed by Victorian law and that the liability of the contributory for calls existed even though the issue of the form of application was in the circumstances an offence by the law of the *forum* (South Australia).[52] The remarks of the Court[53] indicate a view that the effect of s. 118 of the Constitution (the "full faith and credit" clause) was a direction to apply the "proper law" of the transaction irrespective of local statutory law. The other case is *Merwin Pastoral Co. v. Moolpa Pastoral Co.*[54] There the Court, recognizing that the appropriate law to govern a contract of sale of realty is the proper law of the contract, New South Wales was held to be the proper law and accordingly a statute of New South Wales applying to the transaction determined the rights of the parties. An argument that the Victorian Court was not bound to give effect to the statute as being contrary to public policy was rejected by three Judges on the grounds of "full faith and credit". It may be noted however that the argument based on public policy was distinctly weak; no Victorian public policy was shown to exist and it is probable that even without "full faith and credit" assistance the decision would have been the same. The public policy argument was not the basis of the decision of Macfarlan J. in the Court below. He had decided that Victorian law was the proper law and the point that the New South Wales Moratorium Act was against public policy rested on the assumption that New South Wales was the proper law. The argument was of the "if I am wrong on this point" category. Neither case throws any light on the question which would arise where a State passes an Act which is deliberately intended to cover a field which by

[46] *Alaska Packers* case, *supra*, at 547-8. [47] *Supra*.
[48] (1935) 306 U.S. 493. [49] (1941) 314 U.S. 201. [50] (1941) 313 U.S. 487.
[51] [1939] S.A.S.R. 441.
[52] Query whether it would not have been valid even if it had been a South Australian contract. See report at 445. [53] *Ibid.* at 443-4. [54] *Supra*, note 29.

ordinary conflictual principles would not be governed by the law of that State.

III. Conclusions

The whole question can be considered together, as it is submitted that the two questions of recognition of Acts and recognition of judgments are more interdependent than has been so far recognized. It is submitted that Mr. Justice Fullagar was correct in discarding the American approach and that his actual decision in *Harris v. Harris* was correct but that his reasoning showed a failure to appreciate that in Australia the mandate of full faith and credit must be subject to one important limiting implication, viz. that full faith and credit is given only to a judgment or Act which conforms to the common law categories of private international law whether these be choice of law categories or jurisdictional ones.

Let us look at the legislative field. The absurdity of giving a literal interpretation to the mandate to afford full faith and credit to another State law *in all circumstances* is patent. The *Merwin* decision was a simple instance of a case where the New South Wales Act was merely part of the system of law which, according to common conflictual doctrine, properly applied, viz. the proper law of the contract. Suppose, however, the proper law of the contract was Victorian. In that case of course the New South Wales statute would by normal canons of statutory interpretation be held to be intended to apply only to New South Wales contracts. Suppose, however, that the New South Wales legislature clearly in terms applied its Act to a contract the proper law of which was Victoria. How should the Victorian Court react? One must be careful here. If the New South Wales legislature purported to reach transactions which had no *nexus* with New South Wales at all then the Act would be invalid on constitutional grounds as not being one for the peace, order, and good government of New South Wales.[55] We must postulate that the New South Wales legislature is explicitly trying to regulate a contract which has some slight territorial *nexus* with New South Wales but which on all proper conflictual principles is clearly a contract the proper law of which is Victoria. Let us take an easier instance. It is a well recognized conflictual principle that the validity of a will of movables is governed by the law of the last domicil of the deceased. Assume a New South Wales statute which provides that all wills which shall hereafter be executed in New South Wales shall be absolutely void unless at-

[55] See *Trustees Executors & Agency Co. v. Federal Commissioner of Taxation* (1933) 49 C.L.R. 220.

tested by six witnesses "notwithstanding that the domicil of the testator at the time of his death shall be fixed in some State or country other than New South Wales". A person dies domiciled in Victoria having had his will attested only by two witnesses. Is a Victorian Court bound to hold that the will is invalid? This is the hub of the matter so far as full faith and credit is concerned. Here the New South Wales Act would not be invalid on general constitutional grounds as there is a slight territorial *nexus* but it certainly purports to affect a document, the normal governing law of which is that of another State.

It is submitted that in the instance given the Victorian Court would hold, and would be entitled to hold, that the matter was governed by Victorian municipal law as the law of the last domicil and that the full faith and credit rule would not oblige it to enforce the New South Wales statute which was no part of that law. It is misleading however to suppose that Victoria in so deciding would be applying its own law of conflicts as such, that it would be rejecting the New South Wales statute because the *Victorian* law of conflicts referred such matters to the *lex domicilii* of the deceased. Superficially it might appear to be so, but that appearance is only due to the fact that, unlike the position in America, there is very little difference between the various State rules of private international law. Let us suppose, however, that Victoria changed by statute its own rules for conflicts. We may assume a case where a deceased *did* die domiciled in New South Wales and a New South Wales statute was applicable to his will but the Victorian legislature has by a special Act changed its conflictual principles by providing that henceforth all questions of will validity shall be governed by the law of the place where the will is made or the *lex fori* or some other system. In such a case, it is submitted that the Victorian Court would be offending "full faith and credit" by ignoring the New South Wales Act.

It seems to be a justifiable conclusion that the law to determine the limits of "legislative jurisdiction" must be the common law of conflicts as it exists in the six States, unaffected by any statute-made conflictual principle created by any of them which departs from any of it.[56] The reference is not to a State law of conflicts as such but to the common law part of all the State systems. If the question is as to the recognition to be accorded to a State Act which deliberately proclaims extra-territorial effect, then the question whether it, in the Courts of another State, should be held to govern a particular

[56] This approach is consistent with the language of Napier J. in the *E. & B. Chemicals* case [1939] S.A.S.R. 441, 443-4.

transaction must be settled by the question whether according to common law conflictual concepts that statute is part of the law governing such transaction. The body of law to which reference would be made would not be static but one which would be extended from time to time by the ordinary judicial technique of State judicial decision; State statutory law alone is to be excluded. The ultimate arbiter of the legislative "value" of Acts would be the High Court which of course would have adequate power to resolve any apparent inconsistencies between State Court decisions bearing on the body of common law conflictual principles. No doubt the jurisdiction would be a Federal one but the conflictual law would not be Federal law nor would any assertion that a power to legislate in the field of private international law generally is possessed by the Federal Parliament be necessarily involved.[57]

It is thought that the principle suggested above as the true one is the corect key to unlock even such complicated cases as those which have occurred in the United States involving competing and inconsistent Workmen's Compensation Acts. After all, in essentials these are merely cases where legislatures have sought to give their Acts what one might call "extra-conflictual" operation or where the conflictual operation is in doubt. Many of such questions must lurk in our system of Australian Workmen's Compensation law with its six legislative jurisdictions or our State laws regarding such taxation as stamp duties or death duty. They appear to be affected by the full faith and credit command and may emerge some day into the light.

No different analysis is made necessary when one passes to judgments. A judgment must adhere to the recognized common law conflictual criteria of jurisdiction. If a New South Wales decree purports to be based on a ground not justified by the law of that State, for instance a divorce granted on the ground that the marriage occurred within New South Wales (assuming by some chance it was not subjected to appeal in the home State), it would of course not be entitled to full faith and credit in a sister-State Court. What is of more moment however is that a judgment granted in pursuance of some State Act which extended the existing bases of jurisdiction as known by the common law of Australian private international law, for instance by making service of process within the State a sufficient basis of jurisdiction in a divorce case, would not be entitled to respect under the full faith and credit clause though of course it would be unchallengeable "at home".

[57] It may be of course that under placitum (xxv) of the Constitution the Commonwealth Parliament has this power.

Once however it is clear that the judgment or Act conforms to the conflictual requirements of jurisdiction or choice of law respectively, then it is thought that the full faith and credit doctrine commands that it be treated as having the same validity as it has in the State which created it. It is submitted that Fullagar J. was correct in rejecting the American restrictive implications in view of the totally different character of the American State system and the character of the American Constitution. The American decisions as to the effect, for instance, of judgments based on penal and taxation statutes are most difficult to reconcile and the differences seem to depend on factors peculiar to the American scene. The American exception of policy as a ground for non-recognition of statutes appears to depend on a method of approach which stems from fundamentals of relations between the Federal government and the States. Consistently with this submission it is thought that the doctrines attaching to penal and taxation statutes and laws are to be discarded, and that in the realm of judgments no objection can be taken on the score that the judgment is not final or that it is not for a money claim. Fraud of course will constitute a bar but only because the judgment is not good "at home" if tainted by fraud.

It is thought too that Fullagar J. was correct in discarding the notion that he was permitted to make inquiry into the jurisdictional facts on which the "foreign judgment" of divorce was founded. The Court has jurisdiction for full faith and credit purposes if it has *bona fide* proceeded on the basis of one of the grounds recognized by the common law conflictual system. To allow challenge of the finding of fact whereby the element justifying jurisdiction is determined is to allow the finding of fact of another tribunal to prevail, and to ascribe any kind of paramount magic to the finding of a second tribunal on the same facts appears to be tantamount to the recognition of a principle of distinctive public policy. Such policy of course may be justified in the American environment but scarcely here. It is thought that Fullagar J.'s judgment is open to criticism only by virtue of the fact that on his reasoning the Victorian Court would have been compelled to accord recognition to a New South Wales judgment based on a jurisdictional element foreign to the common law of conflicts altogether or to a New South Wales statute of wide and sweeping extra-territorial power.

In short and by way of summary it may be said that it is essential that the requisite jurisdictional element exist whether it is a judgment or an Act that is being considered but once that is satisfied the "full faith and credit" enactment sweeps away all the "national"

qualifications with which English law overlaid the doctrine of the recognition of foreign acquired rights save in cases where the foreign law itself recognizes them and this is the fundamental submission of this article. Whether one is compelled to treat the first branch of the rule in *Phillips v. Eyre*[58] as a mere instance of public policy in the wider sense is a matter which is perhaps arguable. Cheshire[59] regards the rule as being more than an emanation of policy and as representing a combination of the application of the *lex fori* and the *lex loci delicti.* English law is applied in its quality as being the *lex fori.* Space does not remain to pursue this topic further.

One or two points remain for brief notice.

It is thought that, as in America, it is quite competent for a State to attach its own procedural requirements, including a limitation statute, to a suit on a sister-State judgment or for a State Court to hold that judgments are subject to such requirements.

It is difficult to know whether some doctrine akin to that of the American *forum non conveniens* would infringe the full faith and credit doctrine. The furthest that common law has gone in the British jurisdictions has been the doctrine of *lis alibi pendens* and the rather different rule that the Court may refuse jurisdiction where the action is an abuse of the process of the Court by reason of the consideration that all the relevant facts are closely linked to another country and technical jurisdiction exists only because of service of the writ.[60] Such doctrines could hardly constitute a denial of full faith and credit but there is always the possibility that more extensive limitations will be contained in statute or Rule of Court.

Lastly, whilst doubt might well be felt to arise from the language of s. 18 of the State and Territorial Laws and Records Recognition Act requiring full faith and credit to be given to a judicial proceeding by every "public office" (which would include a State Office charged with the execution of judgments), and while the whole question could bear re-examination, it is felt that it is probable that Australian Courts would follow the view adopted in America that full faith and credit does not compel or authorize the direct execution of a sister-State judgment. The structure of the Service and Execution of Process Act is of course built on that assumption.

It remains for me to state that in this survey my task has been made much easier by the "opening-up" process to which Professor Cowen has subjected some of the American decisions.

[58] (1869) L.R. 4 Q.B. 225.

[59] *Private International Law,* 4th Ed., p. 257.

[60] Power to stay frivolous or vexatious proceedings is also given by Rule of Court in some of the States.