> Suppose this society were to make a rule that they would not admit a woman to membership, so that no woman could ever become a registered pharmacist. I have no doubt that the court would intervene and declare the rule to be invalid and compel the society to admit her.[49]

He then cited *Nagle* v. *Feilden*[50] to support this proposition.

Although this dictum is merely *obiter* on the facts of *Dickson's Case*,[51] the attitude of the Court of Appeal, and especially of Lord Denning, M.R. towards this question is quite clear, for it is implied that even if no contractual relationship had yet arisen[52] between the plaintiff and the Society, the courts would still intervene, provided that the Society's decision seriously interfered with the plaintiff's livelihood. In one sense, however, *Dickson's Case*[53] does represent an extension of the *Nagle* v. *Feilden*[54] principle for the Court of Appeal granted relief not in respect of a *decision* of the Pharmaceutical Society, but in respect of a *rule* formulated by it which had not been enforced at the time, but upon which a future decision might be based.

Clearly, then, the English courts have expressed their willingness to extend *locus standi* for judicial intervention in the decisions of domestic tribunals, especially where such bodies exercise monopolistic control over a trade or profession in which the plaintiff seeks to work. At the present time, our courts, although they no longer insist upon the interference with proprietary rights before *locus standi* to seek judicial relief from the decision of a domestic body is granted to a plaintiff, have still not progressed beyond the proposition established in *Hawick* v. *Flegg*.[55] However, given the appropriate fact situations, they will probably have little hesitation in following the lead of the English courts—if not by directly following *Nagle* v. *Feilden*,[56] at least by showing their willingness to relax our present stringent requirements of *locus standi* in this area.

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THE APPLICATION OF *PHILLIPS* v. *EYRE* IN A FEDERAL SYSTEM

ANDERSON v. *ERIC ANDERSON PTY. LIMITED*

I INTRODUCTION

When an action is brought in one "country"[1] upon a tort alleged to have been committed in another, the fundamental problem is to ascertain specifically the legal system by which the rights and liabilities of the parties must be determined. Several possible choices have been postulated. The rights and liabilities of the parties may firstly be determined by an application of the *lex loci delicti*, the law of the place where the alleged wrong was committed.[2]

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[49] (1967) 2 W.L.R. 718 at 729.

[50] (1966) 1 All E.R. 689.

[51] (1967) 2 W.L.R. 718.

[52] Where the plaintiff, at the time he sought judicial intervention, had applied for membership of the Society, but had not yet received it.

[53] (1967) 2 W.L.R. 718.

[54] (1966) 1 All E.R. 689.

[55] (1958) 75 W.N. (N.S.W.) 255: that is, the dual requirement of a contractual relationship and an interference with livelihood before *locus standi* is made out.

[56] (1966) 1 All E.R. 689.

[1] In the private international law sense.

[2] We must assume for present purposes, in defining "locus delicti", that all the facts

Such an application was for many years favoured by the American courts.[3] Secondly, the court may choose the *lex fori*, the law of the place where the action is brought. The "rule" relating to the applicable law which has in fact emerged in England is a compromise which has resulted from the interpretation by judges and jurists of a passage in the judgment of Willes, J. delivered nearly a century ago in *Phillips* v. *Eyre*:

> As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.[4]

These two "conditions" or "arms" of the so-called "rule in *Phillips* v. *Eyre*" have given rise to many difficulties of interpretation and application. The second arm of Willes, J.'s rule has been the subject of much closer scrutiny by the courts than has the first, and consequently it is with the first arm that this case note will be primarily concerned. The main problem has been to ascertain whether this first arm is in fact a "choice of law" rule invoking an application of the substantive law of the forum or whether it is merely a "jurisdictional" or "threshold" rule determining the right of English courts to exercise jurisdiction in actions brought in England on "foreign torts". If we adopt a "threshold" argument, we are supported by Willes, J.'s statement that two conditions must be satisfied "in order to found a suit in England" and by his contention that "the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law".[5] We may argue that the English court will have jurisdiction once the condition of "actionability" has been satisfied. But such an argument provides us with further problems. What do we mean by "actionable"? What does "of such a character" mean? Does "actionable" mean "triable" or does it imply the need for preliminary determination of the ultimate success on the plaintiff's part according to the *lex fori?* Does "wrong" mean the alleged wrongful conduct of the defendant unaffected by any peculiarities of the *lex loci delicti?*[6] If we argue against a "threshold" theory and in favour of a "choice of law" theory, problems of interpretation still exist. What in effect is the "choice of law" rule? It is possible that whatever view we take of Willes, J.'s first condition, this last question cannot be conclusively answered.

The difficulties of interpretation are not confined to the English context. Difficulties also arise in countries such as the United States of America and Australia, where federal systems of government exist. In *Koop* v. *Bebb*[7] it was

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and events that are said to constitute the tort (including the tortious act and the harm suffered) have occurred in one country. The situation becomes complicated if some facts occur in one country and some in another.

[3] The American courts have found support for their application of the *lex loci delicti* in the famous "obligatio" theory which was propounded by Holmes, J. in *Slater* v. *Mexican National Railway* (1904) 194 U.S. 120.

[4] (1870) L.R. 6 Q.B. 1 at 28. Also see *The Halley* (1868) L.R. 2 P.C. 193 at 204, where Selwyn, J. stated by way of *ratio decidendi*: "It is alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability upon the person from whom the damages are claimed".

[5] *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 at 28. Also see Yntema, Book Review (1949) 27 *Can. B.R.* 116 where support for the "jurisdictional" or "threshold" approach is given.

[6] This question was considered in *Potter* v. *Broken Hill Pty. Ltd.* (1905) V.L.R. 612, where the Court had to determine whether it was to regard merely the "act" of the defendant, and consider whether, if that act were done in the State of the forum, it would give any right of action to the plaintiff. Alternatively, the court considered whether it may have to import into the State of the forum the circumstances which surrounded the act in the foreign State, including the existence of a privilege conferred on the plaintiff under the statute law of that State? The majority of the Court decided in favour of the first alternative, while A'Beckett, J. decided in favour of the latter.

[7] (1951) 84 C.L.R. 629.

affirmed that the rule in *Phillips* v. *Eyre* would be followed and applied in an action brought in one State of Australia for a tort alleged to have been committed in another State. An interesting question is thus raised. Could the fact that in Australia we have a federal system of government enable us to overcome the conflict surrounding *Phillips* v. *Eyre*? There are certain constitutional and other statutory provisions which may throw some light on the problem. We may ask ourselves whether the provisions relating to federal jurisdiction and to "full faith and credit"[8] would enable us to conclude that there is in effect a federal choice of law rule, whether this be statutory, that is to say following directly from the constitutional or other statutory provisions, or whether it might flow from some common law rule which would in effect be implied from the constitutional provisions. Judicial decisions have in no way conclusively answered any of the above questions but the necessity of sorting out some satisfactory conclusion from amongst the conglomeration of judicial and juristic opinion was brought to light in the recent decision of the High Court in *Anderson* v. *Eric Anderson*.[9]

II *ANDERSON* v. *ERIC ANDERSON*: THE FACTS

In *Anderson's Case* the plaintiff, a New South Wales resident, was employed as a union organiser and in that capacity was driving a motor vehicle in Canberra in the Australian Capital Territory, when his vehicle was struck by a three-ton International panel van driven by an employee of the defendant. The driver of the vehicle resided and worked for the defendant in Canberra. The defendant was a company incorporated in New South Wales and carrying on business in that State and in the A.C.T. The plaintiff sued the defendant company in the Sydney Metropolitan District Court for damages for the personal injuries sustained by him in the accident. The defendant company denied negligence and alleged contributory negligence on the plaintiff's part. Counsel for the plaintiff argued that s. 15 of the Law Reform (Miscellaneous Provisions) Ordinance, 1955 (A.C.T.) was the proper law to be applied. This provision of the *lex loci delicti* enacted by sub-section (1) as follows:

> Subject to this section, where a person suffers damage as the result partly of his own fault and partly of the fault of another person or other persons, a claim in respect of that damage is not liable to be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect of the damage shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

This provision was, at the time, in direct contrast to the common law of New South Wales, the *lex fori*, which was to the effect that the contributory negligence of the plaintiff afforded a complete defence to the defendant.[10] Basing his summing up to the jury upon the view that the law of the Australian Capital Territory applied, the trial judge asked them certain questions. The jury then found, in answer to these questions, (a) that the van driver, for whom the defendant company was answerable, had been negligent, (b) that the plaintiff was guilty of contributory negligence, and (c) that it was just and equitable that the damages recoverable by the plaintiff should be consequently reduced by ten percent. Judgment was entered for the plaintiff and the defendant company appealed to the Full Court, challenging the correctness of

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[8] See s. 118 Australian Constitution and s. 18 State and Territorial Laws and Records Recognition Act.

[9] (1965-66) 39 A.L.J.R. 357.

[10] See now Law Reform (Miscellaneous Provisions) Act, 1965 (N.S.W.) s. 10.

the decision of the trial judge that the Australian Capital Territory Ordinance applied. It was urged that the common law of New South Wales applied and that, in view of the finding of contributory negligence, the company had a complete defence and judgment should have been entered for it. A majority of the Court[11] regarded itself as bound to accede to the defendant company's argument and consequently upheld the appeal. An appeal to the High Court by the plaintiff was dismissed.

III *ANDERSON* v. *ERIC ANDERSON*: THE ARGUMENTS

In both the Supreme Court and the High Court the defendants argued that the relevant law to be applied was the *lex fori*. This, they said, followed naturally from the rules set down ninety years earlier in *Phillips* v. *Eyre*. Counsel for the plaintiff in effect put forward three different arguments:

1. Although he did not deny that the doctrine of *Phillips* v. *Eyre* was an established rule, he did attempt to show that a proper interpretation of the first condition must lead to an application of the *lex loci delicti* in determining the substantive right of the parties. It was argued that the first condition must be taken to mean that the only inquiry involved therein is as to the character of the wrongful conduct and that it is not necessary in order to satisfy this condition, to apply the whole of the substantive law of the State in which the action is brought to the particular facts in order to ascertain whether the plaintiff could have recovered had the wrongful act been committed in that State. This in effect was a "threshold" interpretation of the first condition. Once this condition was satisfied by determining whether the wrongful act of the defendant, considered alone, was actionable (that is, triable) in New South Wales, the substantive law to be applied was the Australian Capital Territory Ordinance.
2. Secondly, counsel for the plaintiff contended that a claim for damages in New South Wales in respect of an act of negligence committed in the Australian Capital Territory is a claim arising by virtue of the combined operation of s. 6 of the Seat of Government Acceptance Act, 1909-55 (Commonwealth) (which gave statutory force in the Territory to the common law as to negligence) and s. 12 of the Seat of Government (Administration) Act, 1910-1963 (Commonwealth) (which gave the force of law in the Territory to s. 15 of the Law Reform (Miscellaneous Provisions) Ordinance, 1955). Consequently the claim was a "matter" arising under laws made by the Commonwealth Parliament and in which original jurisdiction could be conferred on the High Court under s. 76 (II) of the Constitution. By virtue of this fact it was a "matter" in which, by s. 39(2) of the Judiciary Act, 1903-1959 (Commonwealth), federal jurisdiction was conferred on the several courts of the States within the limits of their several jurisdictions. Thus the New South Wales court was exercising "federal jurisdiction" and was thereby subject to ss. 79 and 80 of the Judiciary Act, 1903-1959 (Commonwealth). By ss. 79 and 80 a court exercising federal jurisdiction is directed to apply the law of the State in which it is sitting unless there is provision to the contrary in the Constitution or the laws of the Commonwealth. In the present case there was in fact an implied federal choice of law rule to the contrary which directed the application of the *lex loci delicti*. This rule was implied from general considerations of federalism as reinforced by the full faith and credit provisions of the Constitution. Thus, it was argued, it followed that the laws of the Australian Capital Territory were applicable whatever the court and wherever it sat, exactly as they would be applied by a court of the Territory sitting in the Territory itself. The Australian Capital Territory Ordinance

[11] Brereton and Hardie, JJ.

being therefore the applicable law in the present case, the plaintiff was entitled to recover the reduced damages.

3. Thirdly, counsel for the plaintiff argued that because of s. 18 of the State and Territorial Laws and Records Recognition Act, 1901-1964,[12] the District Court was bound to give "full faith and credit" to and thus to apply s. 15 of the Australian Capital Territory Ordinance. Although the plaintiff's "full faith and credit" argument was purportedly bound up with the supposed exercise of "federal jurisdiction" by the New South Wales Court, we should, it is submitted, treat this as a separate argument. As Kitto, J. put it, ". . . it is not clear to me why the argument needs to begin by asserting that the District Court in the present case was exercising federal jurisdiction".[13]

IV *ANDERSON* v. *ERIC ANDERSON*: THE JUDGMENTS

1. *Interpretation of the First Limb of the Rule in Phillips* v. *Eyre*

Their Honours in the High Court were divided as to the precise effect of the first condition laid down by Willes, J. Basically, all of their Honours agreed that the problem was initially one of jurisdiction. But a difference in approach was evident when it came to a consideration of the effect of the plaintiff's contributory negligence. The whole Court agreed that the determination of the ultimate rights of the parties had to be divided into two steps. The first step involved the abovementioned question of jurisdiction. The second involved the problem of "choice of law". The majority of the Court (Barwick, C.J., Windeyer, and Taylor, JJ.) took the view that in taking the first step they should ignore the question of contributory negligence. All the Court had to do was to determine whether the wrongful act of the defendant would found a cause of action in New South Wales. This was solely a jurisdictional question, an affirmative answer to which would satisfy Willes, J.'s first condition.

It was only on taking the second step that the Court should have to consider the effect of the plaintiff's contributory negligence. The plaintiff's success would depend on the applicable "choice of law" rule. Thus, if the *lex fori* were the applicable law, contributory negligence would be a complete bar to the plaintiff's recovery, whereas if the *lex loci delicti* were the appropriate law, the plaintiff would at least recover reduced damages.

Their Honours, in taking this approach, were, at least as regards the first step, in effect supporting the plaintiff's initial contention. Windeyer, J. pointed out that in order to satisfy the first condition it must be shown that "the *acts* that a plaintiff alleges were done" are such "that had they been done in the country of the forum, here New South Wales, they would have given him a good cause of action there against the defendant according to the *lex fori*, here the municipal law of New South Wales".[14] In support of a "threshold" interpretation of the first condition, his Honour pointed out that a plaintiff may have a good cause of action even though a matter may exist which would defeat it.[15]

Having satisfied himself as to the meaning of the first of Willes, J.'s conditions, his Honour then posed the question as to whether this condition had been satisfied in the present case. In analysing this question, the problem

[12] Section 18 of the State and Territorial Laws and Records Recognition Act requires that "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 public offices of the State or Territory from where they are taken". *Cf.* s. 118 of the *Constitution*—only the former applies to Territories.

[13] (1965-66) 39 A.L.J.R. 357 at 362.

[14] *Id.* at 365.

[15] *Ibid.*

again arose as to what was the "wrong" which must be "actionable" in New South Wales. This led to a further question: "Is it correct to regard an absence of contributory negligence on a plaintiff's part as an ingredient in the tort of which he complains, an element that is in a cause of action for negligence?"[16] If the answer to this were yes, then the "wrong" could be said to consist of the negligent act of the defendant plus a lack of contributory negligence on the part of the plaintiff, in which event the plaintiff would be barred at the "threshold". But his Honour was of the opinion that an affirmative answer could only be given if contributory negligence was looked at merely in terms of causation—was the plaintiff's negligence the "proximate cause" of the damage? This would place an onus on the plaintiff of negativing negligence on his part and it is clear that "an allegation of contributory negligence is a matter of defence, more in the nature of a plea in confession and avoidance than of a traverse".[17] Thus his Honour seems to have built up the plaintiff's hopes—the first condition was satisfied. But once it was determined that the plaintiff's action was "justiciable" in a New South Wales court his Honour assumed that the substantive law to be applied was the municipal law of New South Wales and that by this law the plaintiff was defeated by his contributory negligence. His choice of New South Wales law as the substantive law to be applied was seemingly justified by looking to "authority" which shows that "under our system of private international law as it stands at present, a court that entertains an action based on a foreign tort must (unless there be a statute to the contrary), decide the rights of the parties as it would in an action based on a similar event occurring within its own domain".[18] His Honour based this view on what was said by Selwyn, L.J. in *The Halley*[19] by way of *ratio decidendi*. Barwick, C.J. and Taylor, J. were in complete agreement with Windeyer, J. that Willes, J.'s first condition had a seemingly "threshold" application. Like Windeyer, J., they came to the conclusion that the substantive law to be applied in determining ultimately the rights of the parties was the *lex fori*.

A different approach was adopted by Kitto, J. He took the view that the contributory negligence of the plaintiff prevented their being an "actionable wrong" which would satisfy the first of Willes, J.'s conditions. There was no need to ascertain the relevant "choice of law" rule as this first condition had not been satisfied and the New South Wales court lacked jurisdiction. His Honour made it clear that he did not regard the negligent "act" of the defendant as being the "wrong" which was "of such a character" as to be "actionable" in the New South Wales court. Accepting (unwillingly) the English doctrine as laid down by Willes, J., his Honour discussed the steps by which that doctrine was to be applied in the present case and stated.

> The wrong complained of consisted of negligent conduct of the defendant which, combining with a lack of due care by the plaintiff for his own safety, caused damage to the plaintiff. Such conduct of the defendant, if it had occurred in N.S.W., would not have constituted an actionable wrong in that State, for the law of the State knows no action for breach of a duty of care save one for damage which results from the breach without being contributed to by a lack of reasonable care on the part of the party who has sustained the damage.[20]

Actionable negligence involves the concurrence of two things, firstly negligent conduct on the part of the defendant, and secondly, "no want of ordinary care to avoid (the consequences) on the part of the plaintiff".[21] As

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[16] *Id.* at 366.
[17] *Id.* at 367 citing *Curran* v. *Young* (1965) 37 A.L.J.R. 452.
[18] *Id.* at 366.
[19] (1868) L.R. 2 P.C. 193 at 204—see footnote 4 *supra*.
[20] (1965-66) 39 A.L.J.R. 357 at 360.
[21] *Ibid.*

if to seal the lid on the coffin as regards any argument to the contrary, his Honour concluded:

> . . . in an action of negligence in N.S.W. arising out of an occurrence in the Territory contributory negligence by the plaintiff may be relied on by the defendant to defeat a proposition which is necessary for the plaintiff's success according to the doctrine of *Phillips* v. *Eyre,* namely that the wrong complained of would have been actionable if it had happened in N.S.W.[22]

Thus Kitto, J. decided against the plaintiff without having to consider what substantive law was applicable in determining the ultimate rights of the parties. The plaintiff could not succeed merely because the first limb of the rule in *Phillips* v. *Eyre* had not been satisfied.

In effect the only distinguishing feature between the approach adopted by Barwick, C.J., Windeyer and Taylor, JJ. on the one hand, and that adopted by Kitto, J. on the other hand would seem to be in their Honours' respective views as to the effect of contributory negligence. What is important is that all of their Honours were in basic agreement that the problem involved in Willes, J.'s first condition was one of jurisdiction.

However, it will be suggested later that the choice by three of the judges of the *lex fori* as the applicable law is debatable.

2. *Federal Jurisdiction*

The argument by the plaintiff that the New South Wales court was exercising "federal jurisdiction" and should therefore have applied the A.C.T. ordinance, was soundly rejected by all but one of the High Court judges. None of their Honours except Menzies, J. considered it necessary to determine what effect an exercise of federal jurisdiction by a State court would have on the question of choice of law. They merely dismissed the plaintiff's argument by saying that the District Court was not exercising federal jurisdiction. Windeyer, J. stated that "federal jurisdiction depends upon the grant by Commonwealth law of a power of adjudication rather than upon the law to be applied in adjudicating".[23] Although the New South Wales court had to consider the A.C.T. Ordinance, which happened to be based on a law made by the Commonwealth Parliament, in order to ascertain whether the defendant's conduct was wrongful where it occurred, this did not mean that the "matter" before the New South Wales court arose under a law of the Commonwealth Parliament. It in fact arose under the law of New South Wales.

Kitto, J. agreed that the present claim was a claim to recover damages in accordance with the law of New South Wales, and not according to Australian Capital Territory law. He pointed out also that even if federal jurisdiction is conferred upon a State court in a class of matters, this conferral will not "change the law which the court is to enforce in adjudicating upon such matters"; it will merely "provide a different basis of authority to enforce the same law".[24]

3. *Full Faith and Credit*

The plaintiff's argument that because of the "full faith and credit" provisions of the Australian Constitution and of the Commonwealth State and Territorial Laws and Records Recognition Act, 1901-1964, the New South Wales court had to determine the substantive rights of the parties by applying the law of the Australian Capital Territory, was based on the view that such

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[22] *Ibid.*
[23] *Id.* at 367.
[24] *Id.* at 361.

provisions necessitate a substantive application of the laws of sister States. This view would in effect lead to an application of the American "obligatio" theory which was so roundly rejected by the High Court in *Koop* v. *Bebb*.[25]

This argument did not receive much attention by the High Court. None of their Honours thought that the "full faith and credit" doctrine had any application in the present case, at least to the extent of allowing an application of the substantive laws of the A.C.T. Referring to the State and Territorial Laws and Records Recognition Act, Windeyer, J. took the view that the statute had "no bearing on the matters under consideration in this appeal. The 18th section, which is the section relied on, is really an *evidence* section, and does not affect the principles on which the courts of one State take cognizance of wrongs committed in another State".[26] The "principles" which his Honour was referring to were the two arms of the rule in *Phillips* v. *Eyre*.

Barwick, C.J. in rejecting the plaintiff's argument that the "full faith and credit" provisions were relevant in the present case, stated that "there is no failure to give full faith and credit to the Ordinance of the A.C.T. by deciding that they do not apply to the trial of an action in a court of the State of N.S.W. for a cause of action given by the laws of that State".[27] What his Honour was in effect saying was that under the common law rules of private international law the Australian Capital Territory law was not the appropriate law. The *lex fori* was the substantive law to be applied in determining the rights of the parties and this choice of law could not be affected in the circumstances by any considerations of "full faith and credit". This was an implicit rejection of the "obligatio" theory.

Kitto, J. also acknowledged that the full faith and credit provisions could have no application in such a case as the present where, he impliedly suggested, the substantive law to be applied was the *lex fori*. His Honour stated that the Australian Capital Territory Ordinance purported to do no more than enact a rule which was to form "part of the general body of the law of the Territory relating to civil liability for wrongs".[28] He then went on to say that if the application of the Ordinance is "confined to events happening in the Territory, that is merely a consequence. The respondent's counter-suggestion that it applies only to cases arising for adjudication in the courts of the Territory must likewise derive any strength it may have, not from any implications of restrictive words, but from the essential character of the provision as an enactment for the government of the Territory".[29] What his Honour was saying in effect was that the Ordinance only altered the general law of torts in the Territory. It did not purport to change the rules of private international law in force in New South Wales. The court could not, in the present case, give effect to the law of the Australian Capital Territory, when, according to the private international law rules of New South Wales, the substantive law to be applied was the *lex fori*. His Honour believed that "whatever may constitute giving faith and credit to the laws of the Territory, it is faith and credit to those laws as they stand, not as notionally altered".[30] Thus the Ordinance could only be binding on the New South Wales court in the sense that the court shall look to it as it stands "whenever a necessity arises to know what is the law of the Territory for the class of cases with which it deals".[31] The full faith and credit provisions could not, then, in Kitto, J.'s view, be said to displace the common law rules. They

[25] (1951) 84 C.L.R. 629.
[26] (1965-66) 39 A.L.J.R. 357 at 368.
[27] *Id.* at 359.
[28] *Id.* at 362.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

simply act in aid of these rules. The only problem with his Honour's view is that he does not attempt to explain the circumstances in which the "necessity" arises of knowing what the Australian Capital Territory law is. But it seems only logical that the "necessity" will arise in any case where an action is being brought on a foreign tort. But if we accept, as the High Court seems to have done, that in such a case the applicable law is the *lex fori*, the full faith and credit provisions can never lead to an application of the *lex loci delicti* in determining the substantive rights of the parties. Professor Sykes[32] has suggested that in any conflicts situation, whether it be tort or non-tort, the full faith and credit doctrine does not mean that the courts should blindly apply the laws of the sister State. All that the doctrine means is that the court must enforce the law properly applicable in a given situation according to the common law rules of private international law. Thus it seems that according to his view the common law rules of private international law have been constitutionally enshrined, but it remains to be seen whether this view will be acceptable in all situations. There is some support for the view in *Re E. & B. Chemicals & Wool Treatment Pty. Ltd.*[33] where Napier, J. expressed the opinion that s. 118 of the Constitution was a direction "to ascertain and apply the proper law of the matter or transaction that is in question".

V CONCLUSIONS

We cannot argue with the High Court's "threshold" interpretation of the first condition laid down by Willes, J. in *Phillips* v. *Eyre*, but the unquestioning application of the *lex fori* by the High Court as the law determining the substantive rights of the parties seems regrettable, although, on the facts in *Anderson's Case*, such a choice may have been correct. The majority of their Honours in the High Court were content to rely on "authority" and although certain dicta were directed towards criticizing the traditional choice of law rule, no attempt was made to reappraise this rule in the light of the fact that we have in Australia a federal system of government. Whatever form reappraisal takes, one hopes it will not be assumed that, as a means of overcoming undue emphasis on the *lex fori*, we should move to the opposite extreme and arbitrarily apply the *lex loci delicti*. Windeyer, J. suggested that we may arrive at a more "logically satisfactory solution" by so doing, but this would not necessarily "produce a more just result". His Honour submitted that "what is really needed is not a different choice between conflicting laws, but an elimination of the conflict, so that Australians, being one people, should not be troubled by differing laws on a topic such as negligence on which the law could well be made uniform".[34] It is, he suggests, not up to the courts to set right any difficulties relating to conflicting laws. How then do we proceed to eliminate the conflict? The ideal answer would seem to lie in uniform legislation throughout the Commonwealth. Such uniformity has been arrived at in fields such as Matrimonial Causes and (to a great extent) Companies law. Uniformity is gradually being reached in the field of contributory negligence and in fact New South Wales is now in line with Victoria and the Australian Capital Territory in this respect.[35] But we must contrast uniform legislation throughout the Commonwealth with similarity of legislation in different States. We must ask ourselves whether the latter approach really solves our problem. As one writer has suggested, if the facts of *Anderson's Case* were repeated today, the applicable law would still be the *lex fori*, that

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[32] (1954) 6 *Res. Judicatae* 352.
[33] (1939) S.A.S.R. 441 at 443-4.
[34] (1965-66) 39 A.L.J.R. 357 at 368.
[35] See the Law Reform (Miscellaneous Provisions) Act, 1965 (N.S.W.) s. 10.

is to say the new legislation in New South Wales and not s. 15 of the Australian Capital Territory Ordinance.[36]

Short of complete uniformity of legislation it would seem that we must look elsewhere for any solution to our choice of law problem. We could, first, look to the United States of America whose federal system is not unlike our own. Although originally the United States courts tended towards an arbitrary application of the *lex loci delicti,* they have now begun to develop a doctrine of the "proper law of a tort",[37] thus adopting the approach that has succeeded so well in the case of contract. Such a doctrine, if applied in Australia, would lead to a greater flexibility than exists at present and would, in the absence of complete uniformity of legislation, lessen somewhat the existing conflict as regards the choice of law rules. Professor Morris has suggested that by adopting the "proper law" approach we can choose the law which on policy grounds "seems to have the most significant connexion with the chain of acts and consequences in the particular situation before us".[38] Such an approach would lead to a "more sophisticated enquiry into problems of causation and foreseeability coupled with a balancing of the interests of the States whose law is involved".[39] By applying the "proper law" doctrine in a fact situation similar to that which occurred in *Anderson's Case* we would be provided with a more adequate analysis of the social factors involved. This approach was considered in the recent American decision of *Babcock* v. *Jackson*[40] where it was stated by Fuld, J. that "the local law of the State which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort". [41] This theory has not received universal acceptance and we must look to our own Australian situation and consider, in the light of *Anderson's Case,* whether any solution lies in our constitutional and statutory provisions.

First, looking to the question of federal jurisdiction, it is not proposed in the present context to attempt any analysis of the High Court's conclusion that the New South Wales Court in *Anderson's Case* was not exercising federal jurisdiction. That is solely a matter for constitutional law. But, even in the sphere of private international law, we must consider the possibility that a court which is in fact exercising federal jurisdiction may be governed by what is in effect a federal "choice of law" rule, a rule that may require the application of the *lex fori* in all cases. Such a possibility was considered and subsequently rejected by Windeyer, J. in *Anderson's Case.* As he put it, "the laws of the Commonwealth are not a transcendent system of jurisprudence supernally hovering over the laws of the States".[42] However decisive a rejection of a federal choice of law rule this may be, it is submitted that the possibility of the existence of such a rule cannot be completely discarded. The existence of such a rule was hinted at in *Musgrave* v. *The Commonwealth*[43] where the High Court was exercising its original (and therefore federal) jurisdiction. A libel action was brought against the Commonwealth and it was held by Evatt and McTiernan, JJ. that "the law to be applied in cases where the tort alleged

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[36] P. R. H. Webb, "Conflict of Laws—Contributory Negligence and the Rule in *The Halley*" (1966) 44 *Can. B.R.* 666 at 672.

[37] See J. H. C. Morris, "Proper Law of a Tort" (1951) 64 *Harv. L.R.* 881.

[38] *Id.* at 888.

[39] *Id.* at 890.

[40] 12 N.Y. 2d. 473; 191 N.E. 2d. 279; 240 N.Y.S. 2d. 743 (1963), reported in England (1963) 2 Lloyds Rep. 286.

[41] His Honour was here embracing the view expressed in the latest revision of the Conflict of Laws Restatement. See Restatement, 2 ed., Conflict of Laws, P. 379 (1). *Cf.* the recent decision of *Dym* v. *Gordon* (1965) 209 N.E. 2d 792, a case with similar facts to those in *Babcock* v. *Jackson.*

[42] (1965-66) 39 A.L.J.R. 357 at 367. *Cf.* the comments by Windeyer, J. in *Suehle* v. *The Commonwealth* (1967) 41 A.L.J.R. 23 at 24.

[43] (1937) 57 C.L.R. 514.

is the publication of a libel in one of the States of the Commonwealth and action has been brought in the High Court, is the same law as must be applied where the action is brought in the Supreme Court of the State where the claim arose by reason of the publication of the libel viz., the law of such State".[44] By extending this reasoning it may be possible to argue that when a court is exercising federal jurisdiction, the choice of law rule to be applied is different from the traditional rule, in that the *lex loci delicti* is likely to be considered rather than the *lex fori.*

In our discussion of the High Court judgments in *Anderson's Case* some consideration was given to the meaning of the "full faith and credit" provision of the Australian Constitution and of the State and Territorial Laws and Records Recognition Act. Although there was little discussion of this issue in the High Court it is clear that their Honours were not willing to interpret these provisions as requiring an application of the *lex loci delicti* in a case where they considered the *lex fori* to be the applicable law according to the private international law principles of New South Wales. Although many earlier Australian decisions seem to have taken the view that the full faith and credit provisions have imposed substantive obligations upon a forum to give effect in appropriate circumstances to the law of a sister State,[45] it has never been conclusively decided when these "appropriate circumstances" would come into existence and it would seem that in any event the full faith and credit provisions must be limited in their application.

The full faith and credit provisions have in fact been applied in two different ways, neither of which has completely overridden the common law rules of private international law. The two modes of application may be termed firstly the "procedural or evidentiary" mode and secondly the "substantive" mode. If we interpret the "full faith and credit" provisions in a "procedural" sense[46] we are able to overcome the common law rules of private international law in the following way. A foreign law must generally be proved as a matter of fact—it is never accepted as a matter of law. But as between sister States in a federal system, judicial notice will be taken of the laws of a sister State and such laws will not have to be proved as a matter of fact. This procedural approach, however, would be of no assistance as regards any argument in favour of a substantive application of the *lex loci delicti* in a federal system.

Used in the "substantive" sense, two differing views have been taken as regards the relationship between "full faith and credit" and the common law rules of private international law. On one view "many of the common law rules of the conflict of laws will disappear within the area in which full faith and credit operates".[47] The other view was considered earlier in our discussion.[48] On this view the constitutional and statutory provisions are clearly subordinated to the common law rules of private international law. Substantive effect will be given to the laws of a sister State only when those laws are deemed to be applicable according to the rules of private international law. If we accept the "traditional" choice of law rule as applied in *Anderson's Case,* substantive effect would never be given to the laws of a sister State in a "tort" situation.

Whatever view we take of the full faith and credit provisions of the

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[44] *Id.* at 550-51.

[45] See e.g., *Jones* v. *Jones* (1928) 40 C.L.R. 315 at 320 *per* Higgins, J.; *Merwin Pastoral Co.* v. *Moolpa Pastoral Co.* (1933) 48 C.L.R. 565 at 577 *per* Rich and Dixon, JJ. and at 587, 588 *per* Evatt, J.; *Harris* v. *Harris* (1947) V.L.R. 44.

[46] As did Windeyer, J. in *Anderson's Case.* See *supra* n. 26.

[47] Zelman Cowen, "Full Faith and Credit—The Australian Experience" in Mr. Justice Else-Mitchell (ed.), *Essays on the Australian Constitution* at 317.

[48] The view taken by Professor Sykes. See *supra* note 32.

Australian Constitution it is clear that we are not provided with an adequate solution to our choice of law problem. Even the suggested federal choice of law rule and the "proper law" approach would not prove completely satisfactory, although they would be a step in the right direction. As far as providing a satisfactory answer to our problem is concerned, *Anderson's Case* has been of little help. What this case has done, however, is to emphasize that it is for the legislature, and not the courts, to provide the ultimate solution. Advantage must be taken of the fact that we have a federal system of government and attempts must be made to overcome the label of "foreign country" whenever one State has regard to the laws of a sister State. The only really satisfactory answer would seem to be in a complete uniformity of legislation throughout the Commonwealth.

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