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THE CONFLICT OF LAWS: THE EXPERIENCE OF THE AUSTRALIAN FEDERATION

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For American lawyers conflict of laws problems arise at two levels. One group of problems appears within the area governed by the Federal Constitution, while others arise within a wider international area. The decision of a New York forum in a case involving Michigan elements may very well differ from that reached by the same forum where the foreign elements involve England or France. The Constitution itself is often responsible for this difference. For example, questions of full faith and credit or of due process may be involved. It is not surprising, therefore, that the question has been posed whether the American conflict of laws has become a branch of constitutional law.[1] Once a problem reaches the constitutional level, there may well be a departure from the basic common law theory of the conflict of laws. This has been clearly demonstrated by Mr. Justice Jackson in the context of full faith and credit. He observes:

> "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 the individual state action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit."[2]

It may be that different results will be reached in interstate and international cases, even though no constitutional questions are involved. This may arise from the very similar character and institutions of the member states of the federation, and from the frequency of movement between them. It would be very surprising to find the English rules emphasising the preeminence of the domicile of origin[3] operating within the American federation. For America this is perhaps not the happiest example, as no special emphasis is given to the domicile of origin in international cases.[4] However, in the Australian

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1. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* 15 MINN. L. REV. 161 (1931).
2. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution,* 45 COL. L. REV. 1, 30 (1945).
3. Bell v. Kennedy, L.R. 1 Sc. App. 307 (1868); Udny v. Udny, L.R. 1 Sc. App. 441 (1869); Winans v. Attorney-General, [1904] A.C. 287; Ramsey v. Liverpool Royal Infirmary, [1930] A.C. 588.
4. In *In re* Jones' Estate, 192 Iowa 78, 182 N.W. 227 (1921), it was held that the domicil of origin did not revive, upon abandonment of a domicil of choice,

federation the rules relating to domicile have recently served as a point of contrast between the two levels of the conflict of laws. In *Walton v. Walton,* a Victorian judge after referring to English cases ruling that there is a heavy burden of proof on a person seeking to establish a domicile of choice away from the domicile of origin, made some apt observations upon the inapplicability of such a rule within Australia:

> "In the Australian community, where social ideas and customs are substantially the same throughout the continent, and where there is a common nationality and a common language, the same significance or importance cannot be ascribed to a person's conduct in moving from one State to another as when the question arises in connection with the action of a person moving to a community where by reason of a difference of language and national traditions, institutions and usages, he takes on the character of a foreigner."[5]

It may be that similar considerations would operate in other parts of the law. Constitutional questions apart, it would be surprising to find the doctrine of public policy invoked as frequently in interstate as in international conflictual problems. None the less, it must be noted that the defence of public policy is not infrequently raised in American interstate cases. It is justified on the ground that the area of power remaining with the states both permits them to engage in social and legislative experimentation and to protect themselves, at least to some extent, against encroachments by other states.[6] However, most writers are critical of its employment in interstate cases.[7] In some fields, it is surprising to see the maintenance of international conflict rules in interstate cases. An example is the rule of nonenforcement of foreign tax laws. Whatever the ground for refusal to enforce them in international cases, it might be thought that there is little justification for any such rule within the territory of a federation. The maintenance of the rule materially aids tax evasion. "The taxpayer who enjoys the protection of government should bear his share of the expense of maintaining the government, and should not be permitted to escape his obligation by crossing state lines."[8] None the less, although there is some difference of judicial opinion, there

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before acquisition of a new domicil, even though Jones was returning to his domicil of origin. *Cf.* Bell v. Kennedy, *supra* note 3; Udny v. Udny, *supra* note 3.

5. [1948] Vict. L.R. 487, 489.

6. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws,* 49 YALE L.J. 1027 (1940).

7. Goodrich, *Public Policy in the Law of Conflicts,* 36 W. VA. L.Q. 156 (1930); Nutting, *Suggested Limitations of the Public Policy Doctrine,* 19 MINN. L. REV. 196 (1935).

8. State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946).

is a substantial body of American authority which applies the rule of nonenforcement at the interstate level.

Both in the cases and in the books, considerable attention has been given to the specifically American problems of the conflict of laws. So far as Australia is concerned, there has been no comparable investigation. The peculiar federal problems arising in Australian cases have been given only sporadic and inadequate attention. Often they have been altogether ignored. It is proposed in this paper to examine some of the more important aspects of and developments in the conflict of laws in Australia.

II.

The broad pattern of the distribution of powers between the central government and the States is similar in the American and Australian constitutions. That is to say specific powers are vested in the Commonwealth[9] while the States are left with the residue of powers not specifically conferred.[10] A few powers are exclusively vested in the Commonwealth Parliament,[11] and in this area no state may intrude. The majority of Commonwealth powers are not conferred in exclusive terms;[12] and where powers are not exclusive, the state legislatures may make laws under their general powers to legislate for the peace, order and good government of the state, subject to a supremacy clause which provides that to the extent to which a state act is inconsistent with Commonwealth legislation, the state legislation is *pro tanto* inoperative.[13] The Constitution confers power on the Commonwealth to legislate with respect to negotiable instruments[14] and bankruptcy and insolvency.[15] The Commonwealth exercises of these powers has meant that intra-Australian conflicts problems do not arise in these fields. An important area of Commonwealth power derives from section 51 (xxi) and (xxii) of the Constitution. These subsections confer power to legislate with respect to marriage, and to divorce and matrimonial causes; and in relation thereto with respect to parental rights, and to the custody and guardianship of infants. No general power to legislate with respect to marriage and matrimonial causes was conferred on Congress. From the standpoint of the conflict of laws, these particular powers of the Commonwealth Parliament could be of very great importance. Commonwealth use of these powers will be examined at a later stage, but the legislation is very scanty. No doubt Commonwealth reluctance to enter this field has stemmed

9. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT §§ 51, 52.
10. *Id.* §§ 106, 107.
11. *Id.* § 52.
12. *Id.* § 51.
13. *Id.* § 109.
14. *Id.* § 51(xvi).
15. *Id.* § 51(xvii).

from an understandable desire to keep out of a highly contentious political arena, but the result is that there is an unsatisfactory hotchpotch of state legislation on a subject for which the Australian founding fathers obviously desired uniform Commonwealth treatment.

From the above account, it will be seen that in some respects Australia is a single law district for conflict of laws purposes. In general, however, as in the United States, the individual Australian states (and also such territories as the Australian Capital Territory) are separate law districts. "For the purposes of private international law, South Australia is a foreign country in the courts of New South Wales."[16]

The influence of the United States Constitution on interstate conflictual problems stems principally from the due process and full faith and credit clauses. Due process has no counterpart in Australian constitutional law; neither the assumption of jurisdiction by a particular forum, nor an inappropriate choice of law, can produce an unconstitutional result on this ground.[17] On the other hand, the Australian constitution does contain full faith and credit provisions. Here the influence of the earlier American model is obvious, although there are differences between the two sets of provisions. Article IV, Section 1 of the American Constitution at once imposes the obligation to accord full faith and credit and confers powers of implementation on Congress. In the Commonwealth Constitution, the obligation is imposed by section 118, while the implementing powers conferred on the Commonwealth Parliament are to be found in section 51. These are more elaborate than the corresponding American provisions. Section 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 section 51 (xxv) authorizes the Commonwealth Parliament to make provision for the recognition throughout the Commonwealth of the laws, the public acts and records and the judicial proceedings of the states. It is in this field of full faith and credit that the question: has the conflict of laws become a branch of constitutional law? is relevant in Australia.

In the judicature chapter of the Commonwealth and United States constitutions there are interesting points of comparison. The Australian Constitution creates a Federal Supreme Court, called the High Court of Australia, and authorizes both the creation by Parliament of inferior federal courts and the investment of other courts with federal jurisdiction.[18] The Constitution provides for the exercise of federal

16. Chaff & Hay Acquisition Committee v. J. A. Hemphill & Sons, Proprietary Ltd., 74 C.L.R. 375, 396 (1947). See also Pezet v. Pezet, 47 S.R. (N.S.W.) 45 (1946); White v. White, [1947] Vict. L.R. 434.

17. Harris v. Harris, [1947] Vict. L.R. 44, 57-58.

18. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 72.

jurisdiction in a variety of subject matters[19] and authorizes the Parliament to invest state courts with federal jurisdiction in respect of such subject matters. In determining the appropriate subject matters for federal jurisdiction, American models exercised a very persuasive influence. Section 75 (iv) provides for federal jurisdiction in cases arising between residents of different states, thereby reproducing the American federal jurisdiction in diversity of citizenship cases. On this particular provision, Mr. Owen Dixon (now Chief Justice of the High Court of Australia) made some interesting comments before the Royal Commission on the Constitution in 1927:

> "We can see no better reason for this provision in the Australian Constitution than the desire to imitate an American model. The courts of no State were ever, so far as we are aware, accused of partiality towards their own citizens, nor does there seem any reason for suspecting them of it. Residence seems to be a strange criterion, moreover, to adopt."[20]

The existence of federal jurisdiction raises problems of choice of law in federal jurisdictions. This problem, which has been elaborately discussed in American decisions and writings, has been much less fully considered in Australia.

There are some interesting and important differences between the American and Australian judicial structures. Australia, unlike the United States, has no separate hierarchy of inferior federal courts. The normal Australian procedure is to invest state courts with federal jurisdiction.[21] Since the same courts exercise federal and state jurisdiction, it may happen, as with the famous Monsieur Jourdain who talked prose without knowing it, that Australian state courts may exercise federal jurisdiction at least without any evident sign of awareness. Another important point for present purposes arises from the jurisdiction of the High Court of Australia. Unlike the United States Supreme Court, the High Court has a *general* appellate jurisdiction.[22] This means that the High Court is a court of appeal from the state supreme courts, exercising *state* as well as *federal* jurisdiction. The character of this jurisdiction is clearly described in a judgment of the High Court:

> "[T]his Court is not a foreign Court. It is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution and the laws made under it — matters which concern the Commonwealth as the organization

19. *Id.* §§ 75, 76.
20. ROYAL COMMISSION ON THE CONSTITUTION OF THE COMMONWEALTH, REPORTS OF PROCEEDINGS AND MINUTES OF EVIDENCE 785.
21. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 77; JUDICIARY ACT § 39(2).
22. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT § 73.

> of the whole population of this Continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth. Besides those Federal functions, this Court has by the Constitution an appellate jurisdiction, which extends to the interpretation and enforcement of purely State laws, unrelated to any Federal consideration. In this aspect, it is as truly an appellate Court for each State as if it were competently created for the purpose by State or Imperial legislation."[23]

This has important consequences. Since the decisions of the High Court as a general court of appeal bind all other Australian courts, general Australian rules of the conflict of laws have emerged. There is no such unifying element in the United States because there is no single general court of appeal. The uniformity of decision and doctrine in Australia presents a striking contrast with the often bewildering diversity of decision and doctrine in American courts.[24]

There are still further unifying forces for Australia. The Judicial Committee of the Privy Council which sits in London exercises a defined jurisdiction as the ultimate Australian court of appeal. The decisions of this court bind all Australian tribunals, and the Judicial Committee has made some extremely important pronouncements on the conflict of laws. Three illustrations may suffice: *Le Mesurier v. Le Mesurier*,[25] laying down the rule that divorce jurisdiction is vested exclusively in the *forum domicilii*; *Attorney-General for Alberta v. Cook*,[26] stating as a dogmatic and inflexible rule of common law that a married woman cannot acquire a domicil separate from that of her husband so long as the marriage subsists; and *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*,[27] which lays down sweeping rules relating to the governing law of a contract in cases where an intention as to that law is expressed by the parties.

This jurisdiction of the Privy Council serves also to bring Australian conflict of laws rules into close conformity with English doctrines. Technically, the Privy Council is not an English court, although its judges tend largely to be drawn from English appellate tribunals. Occasionally, and no doubt *per incuriam*, judges in the Privy Council have used language which suggests that they regard themselves as stating English law.[28] From the other side, writers on the English Conflict of Laws have remarked upon the fact that important Privy

23. Commonwealth of Australia v. New South Wales, 32 C.L.R. 200, 209 (1923).
24. See 2 BEALE, CONFLICT OF LAWS 1077 (1935).
25. [1895] A.C. 517.
26. [1926] A.C. 444.
27. [1939] A.C. 277.
28. Jaber Elias Kotia v. Katr Bint Jiryes Nahas, [1941] A.C. 403, 413. See CHESHIRE, PRIVATE INTERNATIONAL LAW 124 (3d ed. 1947); MORRIS, CASES ON PRIVATE INTERNATIONAL LAW 19 (2d ed. 1951).

Council decisions in conflict of laws cases, such as *Le Mesurier v. Le Mesurier,* have been treated by English courts as stating the English rules of law, notwithstanding the fact that the Privy Council is not an English court, and has no position of binding authority within the English judicial hierarchy.

Another point serves to emphasise the importance of English conflict of laws rules in Australian courts. The High Court has propounded in recent years a rule obliging Australian courts to follow the decisions of the English House of Lords in cases falling within the purview of the common law.[29] Much of the conflict of laws falls within the ambit of this rule. The High Court has also stated that great respect must be paid to decisions of the English Court of Appeal[30] in similar circumstances. These rulings of the High Court stem from the desire to preserve as far as possible a *single* and uniform common law. The stress on uniformity at the expense of the decision which might be preferred in principle has been questioned.[31] However, so far as the decisions of the Court of Appeal are concerned, the following of English authorities is not slavish. In *Koop v. Bebb,*[32] four judges of the High Court adversely criticized the decision of the English Court of Appeal in *Machado v. Fontes,*[33] an important case on the conditions giving rise to tort liability in the conflict of laws. It was not strictly necessary in *Koop v. Bebb* for the High Court to disapprove this decision, although the language of the judgment indicates that it is unlikely that *Machado v. Fontes* would be followed on due occasion. It is perhaps worthy of note that *Machado v. Fontes* has been followed by the Supreme Court of Canada in *McLean v. Pettigrew.*[34] There are other areas of the conflict of laws in which Australian courts have indicated dissent from English doctrines.[35] However, in general, the great respect paid to English authorities, the jurisdiction of the Privy Council and the general appellate jurisdiction of the High Court all combine to produce a substantially uniform body of conflicts rules which closely follow the English law.

29. Piro v. W. Foster & Co., Ltd., 68 C.L.R. 313 (1943); Cowen, *The Binding Effect of English Decisions upon Australian Courts,* 60 L.Q. REV. 378 (1944).
30. Cowen, *supra* note 29.
31. Parsons, *English Precedents in Australian Courts,* 1 ANNUAL L. REV. 211 (1949).
32. 84 C.L.R. 629 (1951).
33. [1897] 2 Q.B. 231. See Cowen, *Torts in the Conflict of Laws,* 68 L.Q. REV. 321 (1952). *Machado v. Fontes* had earlier been adversely criticized by a distinguished Victorian judge, Sir Leo Cussen, in Varawa v. Howard Smith & Co., [1910] Vict. L.R. 509.
34. [1945] 2 D.L.R. 65.
35. *Cf. In re* Hoyles, [1911] 1 Ch. 179; McLelland v. Trustees Executors & Agency Co., Ltd., 55 C.L.R. 483, 493 (1936).

III.

So far is this latter proposition true, that there is a tendency for Australian courts to approach conflict of laws problems from the standpoint of the English common law rules without any consideration of the question whether specific constitutional provisions affect the issue in any way.[36] In the Australian Constitution, for questions involving the conflict of laws, we have seen that the important constitutional provisions are those relating to full faith and credit. Section 118 of the Constitution provides 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." This differs from the corresponding provision in Article IV, section 1 of the United States Constitution which refers only to public acts, records and judicial proceedings. It may be argued that the reference to "laws" in section 118 imposes an obligation to accord full faith and credit to *common law* rules. So far as the United States is concerned this is very uncertain.[37] The Commonwealth's implementing powers derive from sections 51 (xxiv) and (xxv). The former subsection authorizing legislation with respect to the service and execution of process will be separately considered. Section 51 (xxv) authorizes legislation for the recognition throughout the Commonwealth of the laws, the public acts and records and the judicial proceedings of the states. Commonwealth legislation under this head again reflects the influence of the congressional legislation under Article IV, section 1. Pursuant to this power, the Commonwealth Parliament in its first session in 1901 enacted the State and Territorial Laws and Records Recognition Act which, in section 18, provides 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 states from whence they are taken."

Mr. Justice Jackson's observation that he could "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,"[38] is equally applicable to Australia. The discussions in the Australian

36. Thus in Koop v. Bebb, 84 C.L.R. 629 (1951), it was stated that the rules in Phillips v. Eyre, L.R. 6 Q.B. 1 (1870), govern interstate tort cases. *Sed quaere.* See page 651, *et seq. infra.*

37. "It is not far fetched to argue that full faith and credit for judicial proceedings requires recognition of their effect as decisional law, if they have that effect in the state where rendered, as well as of their res judicata effect." Jackson, *supra* note 2, at 12. INDIAN CONST. OF 1949 § 261 (1) follows the American pattern in this respect, and omits any reference to "laws."

38. Jackson, *supra* note 2, at 6.

Constitutional Conventions and also in the Commonwealth Parliament in the course of the debate on the State and Territorial Laws and Records Recognition Act were very meagre. There was little interest in these matters. The general view was, clearly enough, that these provisions were designed to obviate the necessity for resort to cumbrous common law rules of proof within the area embraced by full faith and credit.[39] That full faith and credit imposed *substantive* obligations, that is to say, imposed constitutional obligations to apply a specific rule of law of a sister state, does not appear to have been within the contemplation of the Australian Founding Fathers.

Although the Commonwealth took early steps under sections 51 (xxiv) and (xxv) to enact the Service and Execution of Process Act and the State and Territorial Laws and Records Recognition Act there has been no other signifiant legislative intervention in this field. The discussion of full faith and credit in the books has been very slight.[40] For the first quarter century of the Commonwealth's existence, full faith and credit was not considered in any Australian court. The first judicial reference was in *Jones v. Jones*,[41] a decision of the High Court of Australia. There, it was only invoked by a dissenting judge, Higgins, J., who had been a member of the constitutional conventions which had drafted the Constitution in the nineties. The very interesting feature of this reference was that Higgins, J., used full faith and credit in support of an argument that the High Court was bound to give effect to an order of a New South Wales court. Thus the very first Australian resort to full faith and credit was in aid of a *substantive* as opposed to an *evidentiary* application.[42] The clause was invoked again in the same way by three judges of the High Court in *Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd.*[43] The defence, in an action on a contract governed by New South Wales law, was a New South Wales Moratorium Act modifying the obligation. Action was brought in Victoria, and the trial judge declined to apply the New South Wales statute on the ground that it violated the public policy of the Victorian forum. This decision was reversed by the High Court. Rich and Dixon, JJ., very briefly stated that this application of the public policy rule appeared to contravene the full faith and credit provisions in the Constitution. Evatt, J., reached the same conclusion, after a short discussion of American authority.

The interesting and highly important point which emerges from this case is the acceptance by three members of the Court of the proposi-

39. See Cowen, *Full Faith and Credit — The Australian Experience*, 6 RES JUDICATAE 27, 33-35 (1952).
40. *Id.* at 28-29.
41. 40 C.L.R. 315 (1928).
42. Cowen, *supra* note 39, at 35-37.
43. 48 C.L.R. 565 (1933).

tion that full faith and credit imposed a substantive obligation to apply the law of a sister state. Similar conclusions were also reached in two South Australian cases, both decided by Napier, J.: Re *Commonwealth Agricultural Service Engineers Ltd.*[44] and Re *E & B Chemicals and Wool Treatment Pty. Ltd.*[45] In the latter case, the judge stated this view of full faith and credit in clear terms:

> "I think that this [Constitution, sec. 118] 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 probably 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."[46]

In reaching the conclusion that this was the character of the obligation of full faith and credit, the Australian courts arrived at results substantially similar to those reached in the United States. In America, however, the obligation to accord faith and credit has been judicially qualified. One qualification in the law of judgments, which is of respectable antiquity, is that the mandate of full faith and credit does not preclude a jurisdictional inquiry. It is only to a judgment which satisfies rules laid down by the courts as to the assumption of jurisdiction that full faith and credit must be given.[47] In the field of divorce law this has been given prominence in recent years. In *Williams v. North Carolina* (No. 2)[48] domicil was stated to be the jurisdictional prerequisite, and it was held that it was open to a state court called upon to give full faith and credit to a divorce decree of a sister state to determine for itself, in appropriate circumstances, whether the jurisdictional finding of the domicil by the court pronouncing the decree was justified. The policy of this qualification was stated by Frankfurter, J., "To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."[49] Subsequent decisions of the Supreme Court have limited the operation of the *Williams* doctrine to cases in which jurisdiction was assumed *ex parte*. It is not permitted to reopen jurisdictional issues when the original proceedings were contested.[50]

The question whether this jurisdictional qualification was written into the Australian law of full faith and credit was squarely raised in

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44. [1928] S.R. (S.A.) 342.
45. [1939] S.R. (S.A.) 441.
46. *Id.* at 443-44.
47. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897 (U.S. 1873).
48. 325 U.S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945).
49. 325 U.S. at 232.
50. Sherrer v. Sherrer, 334 U.S. 343, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948); Coe v. Coe, 334 U.S. 378, 68 Sup. Ct. 1094, 92 L. Ed. 1451 (1948).

the Victorian case of *Harris v. Harris*.[51] The facts posed the problem in a simple form. Must a Victorian court recognise 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 domicil? This question was raised shortly after the decision in the second *Williams* case, and the American authorities were considered at some length by Fullagar, J. The decision of the court was that the American authorities should not be followed, and that it was not open to the court to investigate the assumption of jurisdiction in New South Wales. The only question open to the court was whether the decree of the New South Wales court was final and conclusive in that state. That being affirmatively established, full faith and credit must be given to the decree in a sister state.

Fullagar, J., in reaching this conclusion, stated that he did so upon the basis that there was no relevant distinction between the American and Australian full faith and credit provisions. He further rejected any distinction between *ex parte* and contested proceedings and dealt with the case on the footing that it involved precisely the same issue as the second *Williams* case.[52] In considering the American authorities, the judge pointed to the fact that there were wide diversities between the divorce laws of the American states, while no comparable diversities existed as between the states of Australia. Further, the Commonwealth Parliament, unlike Congress, possessed general power to legislate with respect to divorce. Another consideration to which Fullagar, J., pointed was that in the United States the issues were complicated by the due process provisions of the Fourteenth Amendment, while no due process issue could arise in Australia. Also a caution had been given earlier by the High Court of Australia as to the weight to be accorded to American decisions in Australian courts. On this last point, Fullagar, J.'s, reference to authority was rather unhappy, as the High Court decision which he cited was in terms concerned with the relevance of American authority in a wholly different constitutional field.[53]

The decision in *Harris v. Harris* was finally reached, not by application of the constitutional provision for full faith and credit (section

51. [1947] Vict. L.R. 44.

52. Dean Griswold has suggested that *Harris v. Harris* was in line with *Sherrer v. Sherrer* and *Coe v. Coe* rather than with *Williams v. North Carolina*. See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees*, 65 HARV. L. REV. 193, 221 (1951). However, Fullagar, J., expressly rejected any such distinction. See Harris v. Harris, [1947] Vict. L.R. 44, 58.

53. Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd., 28 C.L.R. 129 (1920). This was the most famous of all Australian constitutional cases. The question of the weight to be given to American authorities was considered only in relation to the respective rights of the Commonwealth and the States. See Cowen, *supra* note 39, at 44.

118), but by reference to the State and Territorial Laws and Records Recognition Act, section 18. This provides 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 states from whence they are taken. On Fullagar, J.'s, view, the ordinary rules of statutory interpretation permitted him to ask only one question: what was the effect of the New South Wales decree in that State? Since it was final and conclusive there, it must be recognised in Victoria. Even though different standards of statutory interpretation might be applied in relation to *constitutional* provisions, it was not open to courts to depart from ordinary grammatical rules of interpretation in relation to *statutes*. Fullagar, J., made it quite clear that this was his general conclusion about the scope of full faith and credit under the statute:

> "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. Sec. 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."[54]

It may be observed that American courts have not felt constrained by very similar congressional legislation to reach this result. It may also be remarked — and this can scarcely be disputed — that Fullagar, J.'s, interpretation of the section gives it an operation which was never contemplated by the legislature. Neither objection is necessarily decisive. In general, it is difficult to avoid giving to statutes the meaning which they plainly bear; and, from a grammatical point of view, it is difficult to avoid the judge's conclusion. On the other hand, it may be argued that some implications ought reasonably to be drawn from a federal constitution in which wide areas of power are reserved to the states. The American qualifications on the ambit of full faith and credit stem from an attempt to strike a balance between the legitimate interests of the federation and the states. It should be stated that Fullagar, J., showed by his citation of American authority that he was aware of this. His point was that the obligation to interpret the plain words of the statute overrode any such implications.

There is ample scope for debate on the merits of the conflicting views. A Western Australian judge, Wolff, J., has expressed disagreement with *Harris v. Harris,* in a paper written some little time after the case was decided.[55] Justice Wolff's point was simply that there was

54. Harris v. Harris, [1947] Vict. L.R. 44, 58-59.
55. Wolff, *Res Judicata in Divorce,* 1 ANNUAL L. REV. 369, 371-72 (1950). The decision of Pring, J., in MacKenzie v. Maxwell, 20 W.N. (N.S.W.) 18 (1903),

no good and convincing ground for the departure from the American authority. The view of the present writer inclines against the decision in *Harris v. Harris*. Having regard to the problem of balance and reconciliation in a federal constitution, the technique of the judge in disposing of the issue seems not altogether satisfactory.[56]

Harris v. Harris was a decision of a single state judge at first instance, so that this problem awaits a decision of an appellate court. As the matter stands, it opens wide areas of doubt. Having regard to the *ratio* of the case, is there any scope left within the full faith and credit area for many of the traditional rules of the conflict of laws? Can a judgment of a sister state, final and conclusive in that state, ever be refused recognition on the ground that it offends the public policy of the forum,[57] that it is penal[58] or that it is for taxes?[59] Can a New South Wales judgment *in personam* ordering a conveyance of Victorian land be refused recognition in Victoria?[60] Does the decision affect the rule that procedural matters are governed by the *lex fori*? Will a Victorian forum be permitted to apply its statutes of limitation and frauds as matters of procedure to obligations substantively governed by the law of a sister state?[61]

Great difficulties arise outside the field of judgments. It is relatively easy to apply the *Harris v. Harris* analysis to a judgment. But when must full faith and credit be given to a state statute? In what legal area does a statute operate? This was in issue in *Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd.* where the High Court held that the New South Wales Moratorium Act applied to the contract in question. But it can be seen that in resolving this problem, questions of "extraordinary complexity and difficulty"[62] may arise. It is very doubtful whether, right or wrong, *Harris v. Harris* helps to provide any solution. For it is always necessary to provide an answer to the question: which law is it, to which full faith and credit must be given?

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also appears to be against *Harris v. Harris*. See Morison, *Extra-Territorial Enforcement of Judgments within the Commonwealth of Australia*, 21 AUST. L.J. 299-300 (1947).

56. For further discussion, see Cowen, *supra* note 39, at 48-51.

57. Merwin Pastoral Co., Proprietary Ltd. v. Moolpa Pastoral Co., Proprietary Ltd., 48 C.L.R. 565 (1933), does not provide an absolutely clear answer on this point. The decision was that in that case public policy could not be invoked. See Fauntleroy v. Lum, 210 U.S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908).

58. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239 (1888). See Jackson, *supra* note 2, at 10.

59. Milwaukee County v. M. E. White Co., 296 U.S. 268, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935).

60. Fall v. Eastin, 215 U.S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65 (1909). See Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 YALE L.J. 591 (1925).

61. Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919); Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311 (1923).

62. Jackson, *supra* note 2, at 11; Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. OF CHI. L. REV. 339 (1951).

In *Harris v. Harris,* Fullagar, J., did not refer to earlier Australian decisions on full faith and credit. He assumed without discussion that the obligation was substantive in character; and this, as we have seen, was not the original intendment of these provisions. On the authorities, Fullagar, J., was clearly justified in this assumption because the Australian courts throughout have treated the obligations of full faith and credit as substantive. What, however, is extraordinary in the treatment of conflict problems by Australian courts is the failure to discuss full faith and credit in cases in which it might be thought to be directly in point. Two cases may be taken: one in the field of judgments, and the other raising a question of the application of statutes. The judgment question concerns the recognition of sister-state decrees of judicial separation. In the United States, such cases have been decided as questions of full faith and credit. It has been held by the Supreme Court of the United States that a decree of the domicil is constitutionally entitled to recognition under the full faith and credit clause.[63] In *Ainslie v. Ainslie*[64] this question was discussed by the High Court. The Court by a majority held that a decree of the domicil was entitled to full faith and credit. But the decision was based solely on general principles of the conflict of laws; no reference was made to the American decisions or to the constitutional provisions. It is quite clear that neither counsel nor the court thought that any constitutional question was involved. In *Perry v. Perry*[65] it was held that a decree of judicial separation made by the court of the residence of the parties, which was not the domicil of the parties, was not entitled to recognition in a sister state. Once again, no reference was made to full faith and credit, although the case was decided in the Victorian Supreme Court in the year following *Harris v. Harris,* and is reported in the same volume of reports! Similar cases have arisen in the United States; in *Pettis v. Pettis*[66] it was held that a decree based simply on residence was not entitled to full faith and credit. The significant point is that in all these cases of judicial separation decrees, it was immediately obvious to the American courts that questions of full faith and credit were directly in issue.

It is extraordinary that the relevance of full faith and credit provisions should not have occurred to Australian courts in this obvious case. Perhaps less obvious are the statutory cases. In *Koop v. Bebb*[67] an interstate wrongful death claim was decided on appeal by the High Court. Wrongful death claims are regulated by statutes in the

63. Thompson v. Thompson, 226 U.S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347 (1913); Harding v. Harding, 198 U.S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066 (1905).
64. 39 C.L.R. 381 (1927).
65. [1947] Vict. L.R. 470.
66. 91 Conn. 608, 101 Atl. 13 (1917).
67. 84 C.L.R. 629 (1951).

various Australian states. Here the injury from which death resulted occurred in New South Wales, although the actual death took place in Victoria. The court treated the fact of death in Victoria as not affecting the New South Wales character of the cause of action. Action was brought in Victoria under the Victorian, and not under the New South Wales, wrongful death statute.

The relevance of full faith and credit provisions in such circumstances has been demonstrated by a recent writer on torts in the conflict of laws.

> "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."[68]

Recent decisions of the Supreme Court of the United States have given practical content to this point. In *Hughes v. Fetter*[69] the question was whether Wisconsin must provide a forum for an action brought in respect of a wrongful death occurring in Illinois. The Wisconsin wrongful death statute specifically confined actions under it to wrongful deaths occurring in Wisconsin. The Court by a majority held that full faith and credit required Wisconsin to entertain the action notwithstanding the statutory inhibition. A similar result was reached in *First National Bank of Chicago v. United Air Lines, Inc.*[70] where the wrongful death occurred in Utah and action was brought in Illinois. Both cases were concerned with the question whether a forum must be provided, and not with the further question: what law must the forum apply. However, it was a perfectly clear implication from the decisions that the constitutional obligation to accord full faith and credit required the forum to apply the *lex loci delicti commissi.* This was expressly stated by Jackson, J., in the *United Air Lines* case. He had been a dissentient in *Hughes v. Fetter.*

> "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."[71]

The American view is that full faith and credit obliges a forum

68. HANCOCK, TORTS IN THE CONFLICT OF LAWS 38 (1942).
69. 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).
70. 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952).
71. 342 U.S. at 400.

subject to that constitutional mandate to give effect to the statute law of the place of wrong because that law is controlling in such cases, that is to say, possesses legislative jurisdiction in the sense already indicated.

It is submitted that this is a sound application of the rule requiring full faith and credit to be given to legislative acts, *i.e.*, statutes. But the Australian cases have been decided in entire disregard of any such application of full faith and credit. In *Koop v. Bebb*, it was stated that the rules which govern tort liability in cases involving points of contacts with more than one state are as stated in the English case of *Phillips v. Eyre*.[72] Earlier Australian decisions have likewise applied these rules to the solution of interstate tort problems.[73] Applying the rules in *Phillips v. Eyre* to such a case as *Koop v. Bebb*, the questions for the Victorian court would be (1) was the act not jusifiable by New South Wales law, the *lex loci delicti commissi*? (2) was it actionable by Victorian law, the *lex fori*?

In *Koop v. Bebb*, the High Court suggested that so far as the first rule was concerned, 'justifiability' and 'actionability' might be equated, so that it might be necessary to establish civil actionability by the *lex loci delicti commissi*. But the Court does not appear to have entertained any doubt about the applicability of the second rule, requiring actionability by the *lex fori*. When we look to the origin of this rule in *Phillips v. Eyre*, we find that it derives from the earlier decision in *The "Halley."*[74] In that case, the plaintiff sued in England on facts actionable under the *lex loci delicti commissi*. The claim was in respect of the act of a compulsory pilot, and no such action was available by domestic English law. The Court thought it outrageous that a defendant should be saddled with liability for the negligent acts of a pilot whose services were foisted upon him in foreign parts. However, instead of refusing to allow the action to proceed on grounds of public policy, a well-established defence in the English conflict of laws, the court in *The "Halley"* laid down a sweeping rule of requirement of actionability by the *lex fori*. This sweeping rule has been adversely criticised by most commentators[75] who point out that there is no comparable rule in other parts of the law. There is, for example, no requirement that a contract valid by its proper law must also be actionable by English domestic law. The application of specific rules

72. L.R. 6 Q.B. 1, 28-29 (1870).
73. Potter v. Broken Hill Proprietary Co., Ltd., [1905] Vict. L.R. 612; Varawa v. Howard Smith & Co., [1910] Vict. L.R. 509; Musgrave v. The Commonwealth, 57 C.L.R. 514 (1936-37).
74. L.R. 2 P.C. 192 (1868).
75. CHESHIRE, *op. cit. supra* note 28, at 373-74; DICEY, CONFLICT OF LAWS 800 (6th ed. 1949); HANCOCK, *op. cit. supra* note 68, at 12 *et seq.*, 86 *et seq.*; Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws*, 4 MOD. L. REV. 28 *et seq.* (1940).

of public policy may, of course, deny a remedy in specific cases.

The argument advanced is that the second rule in *Phillips v. Eyre* is on analysis an extreme statement of the rule that a forum can refuse a remedy where the refusal is imperatively demanded by its public policy. On this footing, can it operate within the area of a full faith and credit clause? Having regard to the expression of views by three judges of the High Court in the *Merwin Pastoral Co.* case, it is very difficult to see much scope for the doctrine of public policy within such an area. Yet the High Court in *Koop v. Bebb,* without submitting the rules in *Phillips v. Eyre* to any analysis, failed altogether to consider whether full faith and credit has any effect on these rules. There is a strong case for arguing — and the argument is reinforced by the recent American cases — that in such a case as *Koop v. Bebb,* and in other interstate tort cases, the application of the *Phillips v. Eyre* rules would be unconstitutional.

There are, no doubt, other fields of the Australian conflict of laws which may be affected by the operation of the full faith and credit provisions.[76] The point to which the foregoing discussion is directed is that these provisions have had a very curious history in Australia. After a quarter century of neglect, provisions which were intended to have only a modest evidentiary application emerged in a handful of decisions, with a clearly substantive operation. In *Harris v. Harris,* full faith and credit was given a far wider operation than the American cases would allow. Whether *Harris v. Harris* will be followed and how far its implications will extend are, as yet, unresolved questions. In other areas of the law, including fields in which full faith and credit has occupied the centre of discussion in the United States, cases have been decided in Australia in total disregard of any possible application of it. Fullagar, J., the judge who decided *Harris v. Harris,* was a member of the court which applied the rules in *Phillips v. Eyre* in *Koop v. Bebb.* It is clear that deeper consideration and a far greater awareness of the problems posed by full faith and credit provisions are called for from Australian courts and lawyers. Mr. Justice Jackson has described the full faith and credit clause as the "orphan clause"[77] of the American Constitution. When regard is had to the abundance of judicial and juristic discussion of the subject in the United States, it is clear that this charge of neglect is much more appropriately levelled at Australia.

76. In the field of judgments, see Pezet v. Pezet, 47 S.R. (N.S.W.) 45 (1946); Morison, *supra* note 55, at 7. In the field of statutes see Chaff & Hay Acquisition Committee v. J. A. Hemphill & Sons, Proprietary Ltd., 74 C.L.R. 375 (1947). In neither case was there any reference to full faith and credit.

77. Jackson, *supra* note 2, at 34.

IV.

In some of the principal American writings on full faith and credit, the Australian provisions have been highly praised. Justice Jackson has spoken of the Australian enactments as representing "a judgment upon our weaknesses and defects pronounced by people of purpose and tradition much like our own,"[78] while Cook has written in a similar strain.[79] In view of the poverty of the discussion on full faith and credit in Australia, it is clear that this praise must relate to the Australian legislation providing for the registration and execution of sister-state judgments and the extra-state service of judicial process. This legislation, which was enacted in the first session of the Commonwealth Parliament in 1901, is contained in the Service and Execution of Process Act, the constitutional warrant for which is section 51 (xxiv) of the Constitution.[80] It is an interesting commentary on the American Founding Fathers' notion of the scope of the full faith and credit clause that Madison's proposal to confer power on Congress to legislate for the registration of state judgments was rejected.[81] There are some special American provisions for the registration of judgments of federal courts in other federal courts,[82] but there is no general machinery either for the registration of state judgments or the extra-state service of process. Having regard to the American interpretation of the full faith and credit clause, it has been argued that existing legislative power would allow Congress to go some appreciable distance in making provision in these cases.[83]

The relevant provisions of the Service and Execution of Process Act have been adequately summarized by Cook,[84] and no point is served by repeating the details here. It need only be stated that Part IV of the Act provides a simple machinery for the registration and enforcement of judgments. A certificate that a judgment has been obtained in a state or territory of the Commonwealth may be produced to the appropriate official of the state or territory in which it is desired to have the judgment registered. On registration the judgment ranks as, and has the effect of, a judgment of the law district in which it is registered.

78. *Id.* at 19.
79. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 90 *et seq.* (1942).
80. This 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."
81. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 448 (Rev. ed. 1937).
82. 62 STAT. 958 (1948), 28 U.S.C.A. § 1963 (1950); 62 STAT. 977 (1948), 28 U.S.C.A. § 2508 (1950). See Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 COL. L. REV. 881 (1950). See also note, 50 COL. L. REV. 971 (1950).
83. See COOK, *op. cit. supra* note 79, at 90 *et seq.* See also Morison, *Extra-Territorial Enforcement of Judgments within the Commonwealth of Australia*, 21 AUST. L.J. 298 (1947).
84. COOK, *op. cit. supra* note 79, at 90 *et seq.*

This applies not only to money judgments, but also to orders in the nature of decrees of specific performance and injunctions. There has been little judicial gloss on this part of the Act. There is a decision of the Full Supreme Court of New South Wales in *Davis v. Davis*.[85] It was held that the registration provisions could only operate upon a final and conclusive judgment. The case involved a Victorian judgment for permanent maintenance which the plaintiff sought to register in New South Wales. As such orders were capable of variation by the courts which made them, both in New South Wales and Victoria, it was held that the plaintiff's action must fail.

Provision is made in sections 11 and 12 of the Service and Execution of Process Act for the extra-state service of process in appropriate cases. It is provided that a judgment against a defendant upon whom service of process is effected under the act has the same force and effect as if the writ had been served on the defendant in the state or part of the Commonwealth in which it was issued. A judgment based on service under the act is entitled to recognition under the full faith and credit clause.[86]

Of these provisions Cook has observed that they "enable litigants in Australia to enforce their legal rights throughout the Commonwealth, in many classes of cases with a simplicity and directness unknown to our law. To be noted is that in area Australia is almost as large as the United States."[87] Cook raises the question whether similar enactments would be constitutional in the United States. His conclusion is that it is arguable that the powers conferred on Congress under Article IV, section 1 would authorize similar provisions for the extra-state service of process. He is more confident that the existing congressional powers would support legislative provision for the registration of state judgments. It is not for an Australian lawyer to enter upon an American constitutional debate nor is it the concern of this paper. It is, however, interesting to note that the Australian Founding Fathers in drafting their Constitution rather more than a hundred years after the American Constitution was enacted saw fit to confer specific power on the Commonwealth Parliament for these purposes. Of the wisdom both of the grant of the power and of its exercise there can be no doubt.

V.

The exercise of federal jurisdiction involves problems of considerable importance in the conflict of laws. In the United States, the problem has arisen in connection with the choice of law in diversity of

85. 22 S.R. (N.S.W.) 185 (1922).
86. *Re* E. & B. Chemicals & Wool Treatment, Proprietary Ltd., [1939] S.R. (S.A.) 441.
87. COOK, *op. cit. supra* note 79, at 98.

citizenship cases. *Erie Railroad Co. v. Tompkins*,[88] disapproving the earlier doctrines propounded in *Swift v. Tyson*,[89] has been applied in conflict of laws cases. In *Klaxson Co. v. Stentor Electric Mfg. Co., Inc.*,[90] the Supreme Court of the United States held that the *Erie* case precluded independent determination of conflict cases. The general obligation was to apply the law of the state in which the federal court was sitting. "It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law." The paramount policy was to maintain uniformity of decision; in diversity cases it was inappropriate that different decisions should be reached simply because a federal rather than a state court was seised of the matter.[91]

We have already seen that federal jurisdiction is exercised in Australia by the High Court, by inferior federal courts, and by the state courts specifically invested with federal jurisdiction. The inferior federal courts are few in number and specialised in function; they are exclusively concerned with bankruptcy and industrial law. For general purposes, there is no separate hierarchy of federal courts subsisting alongside a similar body of state courts. The American pattern was not followed because the burden of staffing and maintaining a separate federal judicial hierarchy would have been very heavy in a large country of small population. In these circumstances it was thought appropriate to use the existing state judicial machinery for federal purposes.[92] The High Court was invested with original jurisdiction in respect of a number of matters by section 75 of the Constitution.[93] By section 76 the Commonwealth Parliament was empowered to make laws conferring original jurisdiction on the High Court in specified matters.[94] This power was exercised by Parliament in the

88. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
89. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842).
90. 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941). See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Wolkin, *Conflict of Laws in the Federal Courts: Thirteen Years of Erie R.R. Co. v. Tompkins*, 3 SYRACUSE L. REV. 47 (1951).
91. For a critical commentary, see COOK, *op. cit. supra* note 79, at 108 *et seq.*
92. There is an excellent study of the federal jurisdiction of state courts by K. H. Bailey, Solicitor-General of the Commonwealth, published in 2 RES JUDICATAE 109-17, 184-96 (1940-41).
93. Section 75. "In all matters — (i) Arising under any treaty: (ii) Affecting consuls or other representatives of other countries: (iii) In which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party: (iv) Between States, or between residents of different States, or between a State and a resident of another State: (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction."
94. Section 76. "The Parliament may make laws conferring original jurisdiction on the High Court in any matter (i) Arising under this Constitution or involving its interpretation: (ii) Arising under any laws made by the Parlia-

Judiciary Act 1903, section 30.[95] The federal jurisdiction of the State courts derives from powers conferred on the Parliament under section 77 of the Constitution.[96] It has already been noted that federal jurisdiction exists in diversity of residence cases, and such jurisdiction may be exercised either by the High Court or by a federally invested state court. We have seen that this head of federal jurisdiction has been criticised as an unwarranted and slavish copy of an American model.[97] It has been held that corporations are not "residents" for this purpose,[98] and this considerably restricts the scope of this jurisdiction.

Part XI of the Commonwealth Judiciary Act contains two important provisions under the heading of "Application of laws." The first of these is section 79 which provides that "the laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable." Section 80 is somewhat oddly phrased and provides that

> "[S]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England (*sic*) as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

Section 79 is a modified copy of the section of the American Judiciary Act which was interpreted in *Swift v. Tyson*[99] and reinterpreted in *Erie Railroad Co. v. Tompkins.*[100] It may be observed that the language of the Australian section is more precise and suggests more clearly that it is the law of the state in which the federal court — whether the

ment: (iii) Of Admiralty and maritime jurisdiction: (iv) Relating to the same subject matter claimed under the laws of different States."

95. Section 30. "In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation."

96. The Commonwealth legislation under which the state courts were invested with federal jurisdiction is the JUDICIARY ACT § 39.

97. See page 641-42 *supra.* See also QUICK AND GROOM, THE JUDICIAL POWER OF THE COMMONWEALTH 112-13 (1904).

98. Australasian Temperance & General Mutual Life Assurance Society Ltd. v. Howe, 31 C.L.R. 290 (1922); Cox v. Journeaux, 52 C.L.R. 282 (1934). See PATON, THE COMMONWEALTH OF AUSTRALIA 31-32 (1952).

99. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842).

100. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). The section reads: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

High Court or a federally invested state court — is sitting, which is applicable.

Section 80 also reflects the influence of an earlier American provision. The reference to the common law of England suggests a general common law applicable throughout Australia. The existence of a general Australian common law was asserted by Sir Samuel Griffith, the first Chief Justice of the High Court, in *R. v. Kidman*.[101] In many areas of the common law, there is substantial identity between the decisions in the various states. This results both from substantially identical common law training and traditions and from the general appellate jurisdiction of the High Court and Privy Council. However, so far as the law of torts is concerned — and the reasoning applies to other branches of the law — the Supreme Court of New South Wales has denied the existence of a single common law.[102] It was pointed out that, at the date of federation, there were six bodies of tort law including common law, with substantial similarities but with some points of difference. These separate bodies of law continued to exist. It is submitted that this view is correct and that sections 79 and 80 of the Judiciary Act would involve the application, where relevant, of the common law as enunciated in the appropriate state. This does not deny the existence of common law outside the area of state law. The existence of such rules has been affirmed in the United States, subsequent to *Erie Railroad Co. v. Tompkins;*[103] and it is not hard to envisage cases in Australia involving boundary or other disputes between states, and other questions, in which such rules might be invoked.

Although there are very few cases, it seems reasonably clear that sections 79 and 80 of the Judiciary Act provide rules of decision for at least some conflict of laws cases in Australian federal jurisdictions. Some little uncertainty arises from a judicial suggestion in *Lady Carrington S.S. Co., Ltd. v. The Commonwealth*[104] that section 79 did not apply to the High Court. No reported reason was given for this assertion. However, in *Cohen v. Cohen*,[105] which was a diversity of residence case in which the High Court assumed original jurisdiction in its Victorian Registry, Dixon, J., expressed doubts about the validity of this view. That was an action by a wife against a husband involving a money claim arising out of various transactions which

101. 20 C.L.R. 425, 435-36 (1915). See Paton, *Liability of the Crown in Tort (Australia)*, 22 CAN. B. REV. 731 (1944). See also Dixon, Comment, 17 AUST. L.J. 138 (1943).

102. Washington v. The Commonwealth of Australia, 39 S.R. (N.S.W.) 133, 139-40 (1939). This was a decision of the court invested with federal jurisdiction in an action for wrongful death against the Commonwealth.

103. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938).

104. 29 C.L. R. 596 (1921).

105. 42 C.L.R. 91 (1929).

took place outside Victoria. Dixon, J., observed that if it had not been for the doubts expressed earlier, he would have supposed that the Judiciary Act, sections 79 and 80, would have applied to the case, with the result that the Victorian statutes of limitations would have been applied. In *Musgrave v. The Commonwealth*,[106] Latham, C. J., specifically stated that the view expressed in the *Lady Carrington S.S. Co.* case was wrong, and that sections 79 and 80 applied to all courts exercising federal jurisdiction. Although the case law is slight, it would appear that the duty of a court exercising federal jurisdiction, in diversity of residence cases, is to apply the law of the state in which it is sitting. Law for this purpose means either statute law or common law. It need hardly be stated that this is subject to overriding constitutional provisions — full faith and credit may affect the issue. Again there may be a Commonwealth statute which is directly applicable.

A complication arises in cases in which the Commonwealth is itself involved as a party. There is one decision of the High Court on this point raising a conflict of laws problem. In *Musgrave v. The Commonwealth*[107] an action in tort was brought against the Commonwealth in the High Court in its New South Wales Registry in respect of an alleged libel published in Queensland by a Commonwealth officer. Latham, C. J., who tried the case at first instance[108] held that section 79 of the Judiciary Act applied, so that the High Court was bound to apply the rules (including, of course, the conflict of laws rules) of New South Wales law. On appeal, Evatt and McTiernan, JJ., held that section 79 did not apply, and that the governing law was the *lex loci delicti commissi*. "Whatever may be the precise limits to be assigned to sec. 79 of the *Judiciary Act*, it does not introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard at Sydney."[109] Rich and Dixon, JJ., did not express a settled opinion. Whether liability was established by reference to a choice of law rule under section 79 or by the *lex loci delicti commissi*, the same conclusion followed in the instant case. However, Dixon, J., gave some support to the view expressed by Evatt and McTiernan, JJ.,

> "[O]nce an intention is discovered, either in sec. 75 of the Constitution or in Part IX. of the *Judiciary Act* 1903-1934, that the Commonwealth should be under a substantive liability for tort, it may well be thought to be part of this intention that the liability should be that otherwise

106. 57 C.L.R. 514 (1936-37).
107. *Ibid.*
108. This action, like *Cohen v. Cohen*, was brought in the High Court in its original jurisdiction.
109. 57 C.L.R. 514, 551 (1936-37).

> flowing from the law of the State or territory in which the wrongful act or omission is committed or made."[110]

In *Washington v. The Commonwealth*,[111] the Supreme Court of New South Wales in a tort claim against the Commonwealth (not raising a conflict of laws problem) held on the authority of *Musgrave v. The Commonwealth* that the *lex loci delicti commissi* governed. The court relied upon section 56 of the Judiciary Act in reaching this result. On these cases, it has been stated that the better view in tort claims against the Commonwealth is that the substantive law applicable is the law of the state in which the cause of action arose.[112]

Why this should be the case has not been very clearly stated. It would seem that the argument, excluding the application of the law of the state in which the federal court was sitting, proceeds from an analysis of the basis of Commonwealth liability in tort, which, on the cases, is somewhat uncertain.[113] There are two main views. It has been suggested that section 75 (iii) of the Constitution conferring original jurisdiction on the High Court in cases in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, operates to impose a substantive liability in tort on the Commonwealth. As against this, it is argued that this subsection is merely concerned with jurisdiction and not with substantive rights and liabilities. On this view it is argued that the source of Commonwealth liability is to be found in Part IX of the Judiciary Act. Section 56 provides that any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit in the High Court or in the Supreme Court of the state in which the claim arose, while section 64 declares that in any suit to which the Commonwealth or a state is a party the rights of the parties shall as nearly as possible be the same and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

So far as tort claims against the Commonwealth are concerned, there is much to be said for the view that section 56 of the Judiciary Act operates to exclude section 79. Section 56 allows tort claims against the Commonwealth to be brought either in the High Court, without restriction as to locality, or in a specific state court: the Supreme Court of the state in which the claim arose. It cannot have been intended that an election to proceed in the High Court rather than in a state supreme court should produce different legal results. In *Musgrave v. The Commonwealth*, the libel was published in Queensland,

110. *Id.* at 547-8.
111. 39 S.R. (N.S.W.) 133, 143 (1939).
112. Renfree, *A Brief Conspectus of Commonwealth Liability in Tort*, 22 AUST. L.J. 102, 107 (1948).
113. See Paton, *Liability of the Crown in Tort (Australia)*, 22 CAN. B. REV. 731 (1944).

and action was brought in the New South Wales Registry of the High Court. In the view of the High Court, no difference in result followed the application either of New South Wales conflict of laws rules or Queensland domestic law. But it can easily be seen that the various state laws of tort, especially statute law, may differ. The application of one set of rules rather than another might in such cases produce different results. This diversity of result, based simply upon accident of forum, would follow if Latham, C. J., were right in *Musgrave* in holding that section 79 applied to tort actions against the Commonwealth. Upon the assumption, which must be correct, that section 56 envisages an idential result whatever the forum, the conclusion must be that the same law is to be applied whether the action is heard in the High Court or in the State Supreme Court. Since the appropriate state court is the court of the state in which the claim arose, it seems reasonable to assume with Evatt and McTiernan, JJ., and very probably Dixon, J., in *Musgrave v. The Commonwealth,* and with the new South Wales Supreme Court in *Washington v. The Commonwealth,* that the legislative intention is that the *lex loci delicti commissi* should apply.

The question could be disposed of at another level. Section 79 of the Judiciary Act can only operate subject to the Constitution. It has been argued that a proper application of the full faith and credit provisions of the constitution might well lead to the application of the *lex loci delicti commissi* in tort claims having interstate elements. But this, as we have seen, has never been suggested to or considered by Australian courts.[114]

VI.

Matrimonial causes have given rise to important and difficult problems in the conflict of laws. In the United States, these have arisen principally in connection with the recognition of the divorce decrees of sister states. The questions at issue are jurisdictional, and involve consideration of the ambit of the full faith and credit clause. Similar problems have arisen in Australia. *Harris v. Harris,* which provides the most elaborate Australian discussion of full faith and credit, involved the recognition of a divorce decree of a sister state.

The American and Australian situations differ in at least two significant respects. Congress has no general power to legislate on the subject of matrimonial causes; the Commonwealth Parliament, on the other hand, has power under section 51 (xxii) of the Constitution to make such laws. If the Parliament had made full use of these powers, matrimonial causes would in all probability be a subject of little interest in the intra-Australian conflict of laws. Although the Commonwealth Parliament has been urged to enact Australia-wide matri-

114. See p. 653 *infra. Cf.* Wolkin, *supra* note 90, at 51.

monial legislation, it has done very little. The Commonwealth Matrimonial Causes Act 1945 will be considered hereunder, but divorce law remains very largely, as in the United States, a matter for the states.

The second important difference concerns the law of domicil. It is well settled in the United States that in appropriate circumstances a wife may acquire a separate domicil during the currency of the marriage.[115] Australia however follows the English rule which inflexibly imposes the husband's domicil upon the wife. In *Lord Advocate v. Jaffrey*[116] the House of Lords unanimously affirmed this rule in a case in which the husband who had been domiciled in Scotland was sent out to Australia, and acquired a domicil in Queensland, where he also went through a bigamous form of marriage. The lawful wife who did not leave Scotland was held to have died domiciled in Queensland. The House of Lords entertained no doubt that this was a sound result. Lord Haldane pointed to the consequences which would follow the concession of a separate domicil to the wife. He pointed to the possibility that divorce proceedings might be instituted in two states. Lord Shaw was prepared to defend the single domicil rule even after judicial separation. "The ordinary rule . . . . works conveniently. It prevents confusion. It regulates succession by one set of rules instead of possibly by two, and it preserves that unity of idea and fact with regard to the domicil of married parties which has hitherto always been upheld."[117] Just how the unity of fact was demonstrated on the facts of *Jaffrey's* case, it is difficult to see. However, in *A.G. for Alberta v. Cook*,[118] a decision of the Privy Council on appeal from Canada, it was held that even after judicial separation a wife's domicil followed that of her husband. The Court specifically disapproved earlier judicial suggestions that a deserted or judicially separated wife might acquire a separate domicil.[119] Most commentators criticize this result[120] which has been described as "reactionary and shortsighted."[121] However, as a decision of the Privy Council, it provides binding authority for Australia.

From a common sense point of view, there seems to be much to be said for the American doctrine, and very little for the Anglo-Australian rule. If domicil is intended to provide a realistic point of contact,

115. See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative Study*, 65 HARV. L. REV. 208-09 (1951).
116. [1921] 1 A.C. 146.
117. *Id.* at 171.
118. [1926] A.C. 444.
119. Dolphin v. Robins, 7 H.L. Cas. 390, 418, 11 Eng. Rep. 156 (1859); Le Sueur v. Le Sueur 1 P.D. 139, 142 (1876).
120. See, *e.g.*, CHESHIRE, PRIVATE INTERNATIONAL LAW 478 (3d ed. 1947); DICEY, CONFLICT OF LAWS 107 (6th ed. 1949); Graveson, 3 INT'L. L.Q. at 380 (1950).
121. READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 242 (1938).

the rule under discussion is not calculated in all circumstances to achieve this result. It is clearly desirable to provide rules which operate as simply as possible, but in a case like this simplicity may be achieved at a cost which defeats the social policy of the domicil rule.

As the common law rule bases divorce jurisdiction on domicil, it can very readily be seen that the single domicil rule causes hardship to a wife. This has been recognised both by Australian state legislatures and by the Commonwealth in one of its rare interventions in this field. The forms of the various state acts are interesting. Some states resort unashamedly to fictions. Thus it is provided in the Victorian Marriage Act section 75 that "a domiciled person shall for the purposes of this section include a deserted wife who was domiciled in Victoria at the time of desertion, and such wife shall be deemed to have retained her Victorian domicil notwithstanding that her husband may have since the desertion acquired any foreign domicil."[122] This does not mean that a wife whose case falls within this provision cannot petition in the state of her husband's domicil: she can opt as between two jurisdictions. The situation has been described in the following terms: "The effect is that she may rely on her former domicil, if she so desires, in which case, by providing that she is deemed to retain it, the statute prevents any contest that she no longer possesses it, but the statute in no way affects the position that she has, in fact, acquired a new domicil."[123]

A more radical approach has been adopted in the Western Australian Matrimonial Causes and Personal Status Code 1948. Section 14 provides in actions for dissolution of marriage[124] that jurisdiction may be assumed by a Western Australian court in cases where (a) the husband is domiciled in Western Australia at the commencement of the proceedings, (b) both parties are resident in that state and by the law of the husband's domicil the plaintiff would be entitled to obtain relief on substantially similar grounds, (c) the wife was deserted by her husband who was domiciled in Western Australia immediately prior to the desertion, (d) the wife was judicially separated or separated by agreement from her husband and he was domiciled in Western Australia immediately prior to the separation, (e) the wife has lived in Western Australia for not less than three years immediately prior to the commencement of the action if in the circumstances she would, had she been unmarried, be deemed to have a domicil in the state.

With these provisions may be compared those in the Commonwealth Matrimonial Causes Act 1945. This includes some temporary provision

122. See also NEW SOUTH WALES, MATRIMONIAL CAUSES ACT § 16; QUEENSLAND, MATRIMONIAL CAUSES JURISDICTION ACT § 26; SOUTH AUSTRALIA, MATRIMONIAL CAUSES ACT § 43; TASMANIA, MATRIMONIAL CAUSES ACT § 9(4).

123. PATON, THE COMMONWEALTH OF AUSTRALIA 131-32 (1952).

124. Also nullity and judicial separation.

for war marriages which need not concern us here.[125] However sections 10 and 11 contain provisions which are intended to have permanent operation. It is provided that any person domiciled in an Australian state or territory who is resident in some other state or territory and has resided there for not less than one year immediately prior to the institution of proceedings may petition in any matrimonial cause in the state of residence. It is provided that a forum assuming jurisdiction shall decide the case by applying the *lex domicilii* of the petitioner.[126]

All these various provisions were enacted because of the hardships which result from the single domicil rule; in appropriate circumstances they provide a local remedy for a wife who would otherwise, under the rule in *Le Mesurier v. Le Mesurier*,[127] be restricted to her husband's domicil for a divorce forum. The odd thing is that the recognition of the hardships has not led to a critical examination of the single domicil rule. The remedies which are now granted raise the possibility so much feared in the cases in which the single domicil rule was emphatically affirmed, that proceedings for matrimonial relief may be instituted in more than one jurisdiction. Moreover, the relief which may be granted is not always adequate. The only advice that can be given to a girl who was domiciled in Victoria immediately before her marriage, and who married an American serviceman, lived with him in the United States and then returns to her family in Victoria after the marriage had broken down is (a) that she should go back to the United States and petition in the court of the husband's domicil (b) that she should go to Western Australia, reside there for three years, satisfy the requirement that she would have been domiciled there if she were unmarried, and then petition there! Both pieces of advice must sound grotesque. Another important problem presented by the various state rules involves questions of recognition. Is a Western Australian decree based on residence entitled to recognition in Victoria? The answer given in *Harris v. Harris*[128] would seem to be yes; but whether *Harris v. Harris* is a correct statement of the law is not certain. If it is not, and if divorce jurisdiction within Australia depends upon domicil, as a condition precedent to recognition under the full faith and credit clause, the patchwork of state legislation may very well create a series of limping marriages within Australia. It seems too clear for argument that there is a demand for adequate Commonwealth legislation in this field. This should provide for separate domiciles for husband and wife, and should authorize the recognition

125. COMMONWEALTH MATRIMONIAL CAUSES ACT, 1945 §§ 4-8.
126. Except in matters of practice and procedure, which are governed by the *lex fori*. White v. White, [1947] Vict. L.R. 434.
127. [1895] A.C. 517.
128. [1947] Vict. L.R. 44. See pp. 648 *et. seq. infra.*

throughout Australia of a decree pronounced by the courts of the domicil of either spouse. Such legislation would recognise that the single domicil rule is out of accord with common sense.