1936

Full Faith and Credit in a Federal System

G.W.C. Ross

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1351

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
"FULL FAITH AND CREDIT" IN A FEDERAL SYSTEM

By G. W. C. Ross*

Section 1 of article IV of the United States constitution reads as follows:

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

The historic antecedents of this provision are not so readily traceable as are those of the more famous "due process" clauses. The last sentence of article IV of the articles of confederation is almost identical with the first sentence of the constitutional section.¹ Prior to the articles of confederation the provision is not found in American constitutional documents;² nor do the framers of the constitution appear to have adopted the section from any of the European federal constitutions known to them.³ The earliest use of the precise locution "faith and credit" that has been found occurs in an English translation made by Richard Eden, the Sixteenth Century British publisher, of the bull of Pope Alexander VI that assumed to delimit the New World between Spain and Portugal.⁴ But while the Latin text of this bull uses the word "faith" ("fides"), it says nothing of which the further words "and credit" are a literal translation. Unless Eden coined his exact phrase, he must have used it because he was accustomed

*Of the Minnesota Bar; Professor of Public Law and History, College of St. Thomas, St. Paul, Minnesota.

¹Not quite identical, however. The sentence in the articles of confederation reads:

"Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."

²Cf., e.g., the New England Confederation of 1643, William Penn's Plan of Union for the Colonies (1697), and Benjamin Franklin's Albany Plan of 1754. These instruments are reprinted in Commager, Documents of American History 26, 39, 43. Cf., however, article 6 of Penn's plan.

³Nothing of the kind is found in the original league of the Swiss Cantons of 1291, in the Union of Utrecht, the act of union between England and Scotland under Queen Anne, or the Swiss Federal Constitution of 1815. Newton, Federal and Unified Constitutions 41, 43, 56, 100.

⁴An appendix to the late John Fiske's Discovery of America prints the
to it in English legal and public documents. Yet it may be noted that no such terms are found in Glanvil's earliest formulation of the common law of England.

The provision does not appear in the original draft of the articles of confederation; but on November 11th, 1777, a committee appointed to consider "sundry propositions" that had been laid before Congress for suggested additions to the articles recommended, inter alia, an additional section to read as follows:

"Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state, and . . . an action of debt may lie in (the) (a) court of law in any state for the recovery of a debt due on (a) judgment of any court in any other state, provided the judgment creditor gives . . . bond . . . to (respond) (answer) Latin text and Eden's translation of this bull in parallel columns, in part as follows:

"Verum quia difficile foret prae-sentes literas ad singula quaeque loca in quibus expediensuerit deferri, volumus . . . quod illarum transsumptis manu publici notarii inderogati subscriptis . . . ea propris fides in judicio et extra ac alias ubilibet adhibeat, quae praesentibus ad-liberetur si essent exhibita vel ostensae."

(The italics are mine.)

"But forasmuch as it shulde bee a thyng of great difficultie for these letters to bee caryed to all suche places as shulde bee expedient, we wyll . . . that wher so euer the same shalbe sent, or wher so euer they shalbe recaueed with the subscrip-sion of a common notarie therunto requyred . . . the same fayth and credite to bee gyuen thereunto in judgement or els where, as shulde bee exhibyted to these presentes."

5Conjecturally, Eden's phrase may have been intended as a redundancy, to translate the Latin "propris," a word of emphasis. Cf. Bartolus:

"Credo tamen, quod instrumenta a tale notario confecto in territorio, ubicunque extra territorium faciunt fides. Sic emancipatio facta coram eo, qui habet jurisdictionem a lege municipali habetur rata ubicunque. . . . Praeterea, acta coram uno judice faciunt fides coram aliis." (Bartolus 36, 37, as printed in an appendix to Guthrie's translation of Savigny, Private International Law, 442. Italics, mine.)

Bartolus's word "rata" might be well enough translated as "credit" ("rating"). Attesting a judicial record of Jamaica for use in court in England early in the Nineteenth Century, a Jamaican notary public certified that the clerk of court who had issued the copy of the record was the clerk of the Jamaican court and that "to all acts and instruments by him signed and attested in such his capacity as aforesaid, full faith and credit is and ought to be given." (Appleton v. Lord Braybrook, (1817) 6 M. & S. 34, 2 Stark. 6. Italics, mine.)

Certainly British officialdom had not adopted this phrase only since the American Revolution, in imitation of the American constitution or articles of confederation. Our constitutional draftsmen undoubtedly used the formula because it was a common law term with which they were familiar.

8Leges & Consuetudines Angliae; Cf. Book VIII, which develops the common law doctrine of "the Record."

7Secret Journals of the Continental Congress 283 ff. (July 21, 1775; June 12, 1776).
in damages . . . in case the original judgment should afterwards be reversed or set aside."¹⁸

Congress next day adopted the first part of the report, ending with the words, "the courts and magistrates of every other state," but rejected the remainder. Yet this latter part of the recommendation gives the clue to the motives of the whole proposal. The creditor and commercial classes in the colonies had felt the pinch of debtors absconding across colonial boundaries. Although the several Colonies stood under common allegiance to the Crown, they were wholly independent of each other; before about the middle of the Eighteenth Century no court or magistrate in America had any inter-colonial authority.⁹ As early as 1650 a codification of the laws of Connecticut shows an attempt to deal with the situation.¹⁰

Then on the eve of the Revolution Massachusetts passed an act "to enable persons to . . . maintain actions of debt in the executive courts within this Province upon judgments recovered in the neighboring governments."¹¹

---

¹⁸ Journals Cont. Cong. 887. The parentheses indicate cancellations and interlineations in the chirographic draft of the report in the Library of Congress.

⁹ Apparently certain "vice-admiralty" courts established pursuant to the Navigation Act of 1696 did have jurisdiction wider than a single Colony: Cf. 9 Pickering's Stats. at Large 428 ff; Jernegen, The American Colonies 260-61, 276, 295-97.

¹⁰ Under the title "VERDICTS:"

"That love and peace may continue and flourish in these confederated colonies . . . Ordered, that any verdict or sentence of any court within the colonies, presented under authentique testimony, shall have a due respect in the several courts of this jurisdiction, where there may be occasion to make use thereof, and shall be accounted good evidence for the partye, until better evidence or other just cause appear to alter or make the same voide: And that in such case the issuing of the cause in question be resorted for some convenient time, that the court may be advised with, where the verdict or sentence first passed. Provided . . . That this order shall be accounted valid and improved only for the advantage of such as lie within some of the confederated colonies; and where the verdicts in the courts of this colony may receive reciprocall respect by a like order established by the generall court of that colonye."

¹¹ (1774) 14 Geo. III. (Mass.), ch. 322:—

"Sec. 1: . . . where any person . . . shall recover judgment . . . in any court in any or either his majesty's neighboring colonies in America, and [such judgment debtor] shall remove into or reside within this province, or . . . acquire any real or personal estate within this province . . . it shall . . . be lawful for [the judgment creditor] to . . . maintain . . . action . . . of debt upon such judgment . . . in any executive court within this province proper to try the same, in such way and manner as he . . . might have done if such judgment . . . had been originally recovered in the executive court in this province, where said action of debt shall be brought.

"Sec. 2: . . . a true copy of the record and proceedings of the . . . court . . . in the said neighboring colony . . ., where said judgment . . . shall be recovered, attested under the hand of the clerk of the court . . . shall be . . . as, good and sufficient evidence of such judgment, and have the same effect
Though Congress excised all mention of the "action of debt" from the provision inserted into the articles of confederation, that is the only way in which inter-state enforcement of judgments has ever been effectuated in this country. At common law it was only thus that a foreign judgment could be made effective for the creditor in England. The procedure had not been devised for that purpose; nor was it confined to foreign judgments. The various common law writs from which the modern "execution" derives were available for only short periods of time; but after (or before) they had expired, a new action could be brought, counting on the judgment already obtained as a "debt" or "contract of record." In such new action defendant might show, if he could, that no such judgment had ever been rendered against him ("nul titel record"), or, that since its entry it had been paid or otherwise discharged, as by his bankruptcy; but he could not make any defense grounded on the contention that although the judgment had been taken against him it ought not to have been, i.e., that it was "erroneous" for any reason (the so-called doctrine "res judicata"). In the technical lingo of common law pleading, defendant could not plead "nil debet." Not only could the judgment creditor thus bring a new action, treating his earlier judgment as a "debt," but he could only do precisely that (after expiration of the time within which writs of execution could be issued); he was not allowed to maintain a new action for his original claim or actual debt. That is the concrete meaning of the doctrine of "merger": that the original "cause of action" is extinguished by "merger" in a (domestic) judgment once obtained upon it, so that thereafter that judgment is the only legal claim that the creditor has.

Foreign judgments were treated somewhat differently. The English court could know about the foreign judgment and the proceedings that led up to it only at second-hand; and the English judges harbored a (possibly provincial) dislike and distrust of foreign laws and procedure. So it was held that a foreign judgment did not merge the plaintiff's original cause of action; if he chose he could disregard his foreign judgment and sue now in England on his original claim. Yet if he did that he was often allowed at the trial to prove that he had obtained the foreign judgment; that was competent evidence that he had a genuine and valid claim against the defendant. But it was not always held conclu-

and operation, as if the original and [sic!] proceedings had been rendered and had in the court where such action of debt shall be brought..." (Italics, mine.)
sive; defendant might show, if he could, that the foreign judgment did not represent the truth and justice of the matter. Or, the creditor if he preferred might bring his action in England directly upon his foreign judgment, disregarding his original claim as though the foreign judgment had merged it, as an earlier English judgment would have done. But if the judgment creditor did that, the defendant was still often allowed to prove that the foreign judgment ought not to have been rendered; so that whichever "form of action" the creditor chose, his substantial position was pretty much the same: his foreign judgment was prima facie evidence in his favor, but not conclusive, as an earlier English judgment would have been.12

It will be seen that the colonial act of Connecticut already cited did little more than state the general doctrine of the common law.18 The Massachusetts act went further. Its terms show that it was designed to meet two difficulties: (1) evidentiary—how shall the creditor now prove to the Massachusetts court that he did sue and get the earlier judgment in another colony; and (2) substantive—just what or how much advantage shall that fact give him now, in his present Massachusetts action. And so the Act made a copy of the earlier judgment, "attested under the hand of the clerk of the court" that rendered it, conclusive in the later Massachusetts litigation. The action in Massachusetts was to be brought directly upon the judgment of the other colony, as "if such judgment . . . had been originally recovered . . . in this province;" and such duly authenticated copy of the record from the other colony was to have the "same effect and operation as if the original proceedings had been . . . had" in the very Massachusetts court in which the creditor was now proceeding.14 The act thus assimilated judgments taken in "His Majesty's neighboring Colonies" not to foreign judgments (as judgments rendered in the Colonies and

12 The rules seem not to have been fully settled at the time of the American Revolution. Cf. Walker v. Witter, (1778) 1 Doug. K. B. 1; Hall v. Odber, (1809) 11 East 118; Foote, Private International Law, 5th ed., p. 593. But a plaintiff who had sued abroad and obtained a judgment and collected it could not sue again in England on his original claim for the purpose of getting more than the foreign judgment had awarded him. Barber v. Lamb, (1860) 8 C. B. N. S. 95, 29 L. J. C. P. 234, 2 L. T. 238. By the same token, a plaintiff who had sued abroad and been defeated on the facts no doubt would find the foreign judgment a conclusive bar to his later action in England; i.e., the doctrine res judicata would be applied to a foreign judgment against the plaintiff therein, as to the facts.

13 See ante, note 10. But note the doctrine of reciprocity imported into the Act by its final clause. See post, note 33.

14 See ante, note 11.
overseas dependencies of the Empire were treated in England), but to domestic (Massachusetts) judgments, yet not so as to enable the creditor to have execution in Massachusetts directly upon the judgment of the other colony, but applying to such judgments the technical doctrines of merger and res judicata that were applied by common law to domestic judgments. The similarity of this act to the latter part of the committee report to the Continental Congress grounds surmise that the members of the committee had the Massachusetts act specifically in mind. The "action of debt" upon an earlier judgment, foreign or domestic, was perfectly familiar common law procedure. The elision of express mention of it from the articles of confederation did not have the effect of inhibiting such actions; but did leave it possible to question whether the vague term "full faith and credit" should be taken to have the substantive as well as the evidentiary purport of the Massachusetts statute. The provision as finally incorporated into the articles of confederation suffered from the defect that vitiated their entire operation: there was no way of securing any uniform, nation-wide interpretation or enforcement of it. It rested with each state in or for its own courts to say for itself just how much and what sort of "faith and credit" should be deemed "full faith and credit" to the judgments of other states.

By the time the constitutional convention met it had occurred to some of its members that the conception of "faith and credit" might be extended beyond the recognition of judgments from other states. The articles of confederation require full faith and credit only to the "records, acts and judicial proceedings of the courts and magistrates" of other states. The constitutional section is broader: full faith and credit must be given to "the public acts, records and judicial proceedings" of every other state. The full implications of this altered phraseology are only now coming

---

15See ante, note 8. The members of the committee, however, were Richard Law, Richard Henry Lee and James Duane,—not New Englanders. (Nov. 11, 1777). 9 Journals Cont. Cong. 887.

16Reports have been found of only three cases decided under the articles of confederation. James v. Allen, (1786) 1 Dall. (Pa.) 188; 1 L. Ed. 93; Kibbe v. Kibbe, (1786) Kirby (Conn.) 119; Phelps v. Holker, (1788) 1 Dall. (Pa.) 261, 1 L. Ed. 128. Their general position is that the "full faith and credit" provision had only evidentiary force, and that it remained for each state (or its courts, on common law principles) to say for itself what effect the foreign judgment should have on the result of the litigation now pending. The second sentence of the constitutional section was new and was of course inserted to cure this defect. See Madison's guarded statement (sub nom. "Publius," in Jan'y. 22, 1788) in The Federalist.

17See ante, note 1. Italics, mine.
into clear view; but it is certain the change was made deliberately
and with something definite in mind. Neither the original "Vir-
ginia Plan" nor the "New Jersey Plan" contained any "full faith
and credit" provision. But the "Pinckney Plan" contained an
article 12, as follows:

"Full faith shall be given in each state to the acts of the legis-
lature and to the records and judicial proceedings of the courts and
magistrates of every other state."

The "Hamilton Plan," though never formally before the conven-
tion, followed more closely the final diction of the constitution:

"Full faith and credit shall be given in each state to the public
acts, records and judicial proceedings of another."

On September 1st a committee recommended the following:

"Full faith and credit ought to be given in each state to the
public acts, records and judicial proceedings of every other state,
and the legislature shall by general laws prescribe the manner in
which such acts, records and proceedings shall be proved, and the
effect which judgments obtained in one state shall have in an-
other."

Two days later the convention shortened this language to the form
in which the constitution states it. The revision made a significant
and unmistakable change in the meaning: Under the committee
report Congress might have prescribed only the effect which judg-
ments obtained in one state should have in another; but the final
constitutional authority of Congress is to prescribe the inter-state
effect of all "public acts, records and judicial proceedings."

The purport of this change did not escape mention on the floor of the
convention. When the subject was being referred to committee
on August 29th, Madison observes:

"Mr. Wilson and Dr. Johnson supposed the meaning to be, that judgments in one state should be the ground of action in other
states, and that acts of the legislatures should be included for the sake of acts of insolvency, etc."

The states had been industriously passing laws for the relief of in-
solvent debtors, and undoubtedly the authors of the proposal de-
sired that any discharge pursuant to such an act of the legislature
of the state of the debtor's residence should have nation-wide
effectiveness. On September 3rd, when the committee report was
under consideration, Madison remarks:

Italics, mine.
18 Art. 9. of the Hamilton Plan; Cf. 3 Farrand, Records of Federal Con-
vention 617, 629.
212 Farrand, Records of Federal Convention 447.
"FULL FAITH AND CREDIT"

"Col. Mason favored the motion, particularly if the 'effect' was to be restrained to judgments.... Dr. Johnson thought the amendment as worded would authorize the general legislature to declare the effect of legislative acts of one state in another state. Mr. Randolph was for not going farther than the report, which enables the legislature to provide for the effect of judgments." Yet the motion prevailed, to shorten and revise the report so as to read: "the effect thereof" (i.e., the effect of "public acts, records and judicial proceedings").

By Act approved May 26th, 1790, Congress prescribed in detail a method for authenticating the records of one state before the courts of another, and that such records, "authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are... taken." This formula has been repeated virtually verbatim in all the later revisions of our federal statutes. In one respect Congress reversed the standards of the Massachusetts Act of 1774. By that Act the judgment of a "neighboring colony" was to have the same effect in Massachusetts as though it had been given in Massachusetts; but under the Act of Congress a judgment from another state is to have the same effect in, e.g., Massachusetts, as it has "in the courts of the state" where it was rendered. This might have been construed to mean that without any preliminary "action of debt" in Massachusetts the same writs of execution on such a judgment should be directly issuable in Massachusetts that could be issued on it in its original state. On the other hand, the careful reader will have noted that Congress does not use the word "effect;" what it says precisely is that a judgment shall have "such faith and credit" given it in other states as in its home state. This made it possible to urge that Congress had laid down no rule of substantive effectiveness at all, but intended only to make copies of judgments from other states, authenticated in the prescribed manner, conclusive evidence of the fact that they had been rendered; but leaving it still for each state to say for itself what effect it would give to such judgments. But in its first case squarely to

222 Farrand, Records of Federal Convention 488; cf. at p. 486.
23Ch. 11, Acts of the 1st Congress, 2nd session.
25See ante, note 11; and the text, to note 14.
26And so held explicitly in New York, which refused effect to a judgment rendered in Vermont against a New York resident on his general
the point the United States Supreme Court did give the judgments of each state conclusive effect throughout the country; it also held,—rather, it took for granted—that this effect was to be given only by bringing the common law action of debt upon the judgment in the foreign state. No counsel at the bar of the court are known ever to have suggested that the Act of Congress could be held to make judgments directly "executive" in other states. Yet the idea was not unheard of. In the debates in the constitutional convention Madison had remarked that he "wished the legislature [Congress] might be authorized to provide for the execution of judgments in other states . . . . He thought that this might safely be done and was justified by the nature of the Union. Mr. Randolph said there was no instance of one nation executing judgments of the courts of another nation. Wherein Mr. Randolph was probably mistaken, for the procedure is familiar to the civil law countries, which not uncommonly make the judgments of foreign countries directly "executive" in their own courts. Their willingness to do that is no doubt largely attributable to the fact that they have all "received" the Roman law, so that they all have the same general body of legal doctrines and conceptions. But so our American law is all a development of the English common law and equity jurisprudence. If a Minnesota judgment ought to have conclusive effect in Wisconsin, why should that effect not be given to it in the cheapest and most expeditious manner practicable? Foreign judgments were treated as "debts" to begin with merely from habit and appearance and the verdict of a jury. Hitchcock v. Aicken, (1803) 1 Caimnes (N.Y.) 460. Sed cf. Bissell v. Briggs, (1813) 9 Mass. 462, 6 Am. Dec. 88,—an exceedingly interesting case. Cf. post, note 90.

27Mills v. Duryee, (1813) 7 Cranch (U.S.) 481, 3 L. Ed. 411.
28Farrand's Records of Federal Convention 448 (Aug. 29, 1787).
29Foote, Private Int. Law, 5th ed., p. 592:
"Recognition may be accorded in three ways: The foreign judgment may be adopted by the domestic court as its own and admitted to execution within its jurisdiction; or, it may be received as evidence of the creation of an obligation; or, lastly, it may be received as evidence of the original obligation, in suit brought on the primary cause of action. The first of these methods, according to Westlake, is that generally followed on the continent; . . . the second is the mode adopted in England or America; while in some few states, e.g., Sweden, Spain, Norway, the plaintiff is relegated to his original cause of action."

Direct execution seems once at least to have been awarded in England long ago. Wier's Case (1607) cited by Thayer, International Usages—A Step Forward, reprinted (1908) in Thayer's Legal Essays 181, 188. Apparently this case and its procedure were afterwards lost sight of.

30With a caveat regarding Louisiana; and to a lesser extent, California and the other states carved out of the Mexican Cession, in which Spanish Law has had considerable influence.
the analogy of domestic judgments; primarily the procedure was a clumsy and expensive way of prolonging the effective "life" of the common law judgment. The constitutional competence of Congress to make the judgments of our state courts directly executive throughout the country would seem hardly open to question; and the rest of the common law world is rapidly adopting that position. A judgment taken in any foreign country or any dominion or dependency of the Crown which accords reciprocal treatment to English judgments may now be "registered" in England on ex parte application and thereby becomes enforceable by direct execution there. In the British Commonwealth of Nations there are now three federal dominion constitutions. The South African constitution unifies the country's judiciary and provides that all judgments shall be directly executive throughout the Union. The Australian constitution repeats our "full faith and credit" clause virtually verbatim, but it adds the further provision, that the Commonwealth (Dominion) Parliament shall have power to provide for "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states; and thereunder the Australian Par-

---

31 See ante, note 12, and the text thereto. Is there possibly discernible here a "trade-union" interest of the English lawyers in multiplying the intricacies (and expense) of legal proceedings,—"else, the law were no mystery?" The writer is not aware that Jeremy Bentham ever turned his scalding pen to this particular point. Although a modern (domestic) judgment is directly executive usually for ten or fifteen years, or longer, still the old alternative of bringing a new "action of debt" upon it is commonly still available for doubling that time. See Mason's 1927 Minn. Stat., secs. 9400, 9476.


33 The pertinent legislation comprises the Administration of Justice Act (1920), 10 & 11 Geo. V., ch. 81; and the Foreign Judgments (Reciprocal Enforcement) Act (1933) 23 Geo. V., ch. 13. The earlier act authorized registration in England only of judgments taken in the British Empire outside Great Britain. The later act extends the procedure to judgments taken in foreign countries and provides that by orders in council it may be made gradually to supersede the earlier act within the Empire. Both acts embody the principle of reciprocality stated in the text; and cf. the Connecticut Code of 1650 (ante, notes 10, 13). The weight of scholarly opinion both in England and America undoubtedly condemns this theory of reciprocity; but it may be remarked the idea persists, both in legislation and in decision. See Hilton v. Guyot, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; Union Securities Co. v. Adams, (1925) 33 Wyo. 45, 236 Pac. 513.

34 Union of South Africa Act 1909, 9 Edw. VII., ch. 9, secs. 111, 112.

35 Commonwealth of Australia Constitution Act 1900 (63 Vict., ch. 12), sec. 118: "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." And cf. sec. 51 (25).

36 Ibid., sec. 51 (24).
liament has provided for the summary registration in any state of judgments taken in any other state, thereupon to be directly executive in the registering state.

Both the British and the Australian acts follow the old statute of the Massachusetts Bay colony in providing that a foreign judgment registered in England (or Australia) shall thereupon have the same effect as though originally rendered there; not, as by the terms of our own Act of Congress, the same effect that it has in the foreign jurisdiction that did originally render it. The difference is substantial, and the British practice is probably preferable. The contrary provision of our American statute has not been consistently interpreted and enforced. By the law of South Carolina judgments were enforceable for twenty years; by the law of Georgia its own domestic judgments were enforceable for twenty years, but foreign judgments were to be enforceable (suable) in Georgia only for five years. And held, by the United States Supreme Court, that the Georgia statute was constitutionally applicable to a South Carolina judgment whose enforcement was sought in Georgia, contrary as that seems to the terms of the Act of Congress. On the other hand, it has been held that a state need not give to foreign judgments the same priority, e.g., in distribution of a decedent’s estate, that it accords to the judgments of its own courts.

The Canadian constitution unifies criminal law and procedure throughout the Dominion but leaves civil procedure to provincial regulation, and without obliging the provinces to give any effect to

---

37 Service and Execution of Process Act (1901), Part IV. The act has been several times amended, to 1931; but no amendment has been found material to any topics of this paper. As amended to 1912, the act is reprinted as an appendix to Professor Cook’s article already cited (ante, note 32); cf. (1919) 28 Yale L. J. 441 ff.

38 The word “foreign” is used in this paper to include other constituent states of the same federal country, as well as foreign countries. The word “state” will usually refer to one of the constituent members of a federal country (the United States, or Australia); for a “state” fully independent internationally the word “country” will commonly be used herein.

39 23 Geo. V., ch. 13 (1933), part I, 2-(2) (a): “A registered judgment shall for the purposes of execution be of the same force and effect . . . as if the judgment had been originally given in the registering court . . . on the date of registration . . .”

40 Australia Serv. and Exec. Proc. Act (1901), part IV., 21.(2): “From the date of registration the certificate shall be a record of the court in which it is registered, and shall have the same force and effect in all respects as a judgment of that court.”

Cf. ante, note 11; and the text, to notes 14 & 25.


Cf. Brengle v. McClellan, (1836) 7 Gill. & J. (Md.) 434.
the civil judgments or proceedings of the other provinces. The Canadian provinces in this respect seem fully as independent of each other as were the several United States before the adoption of the constitution. Commissioners for uniform laws in Canada have drafted a proposed "Uniform Foreign Judgments Act, 1933." This draft act would make judgments not directly executive in another province but only a "cause of action," following the common law system. But it provides that the holder of a foreign judgment, if he prefers, may sue on his original cause of action instead of on the judgment, following thus the common law doctrine of the non-merger of foreign judgments. Apart from this proposed uniform act, several of the Canadian provinces have enacted legislation regulating the standing of foreign judgments. Under these statutes in general a foreign judgment is not conclusive; a defendant sued on a judgment obtained against him outside the province may defend again on the merits, raising either new defenses or defenses that he unsuccessfully interposed to the earlier (foreign) action. But some of the acts confine this principle to actions brought on foreign default judgments or judgments not founded on personal service of the original process; or, to defendants domiciled in the present forum. Obviously the Canadian laws and constitution integrate that country less thoroughly in this respect than is the case with either the United States or the other British nations, which is remarkable, for, in general, national (dominion) authority is wider and state (provincial) authority is narrower.

42I.e., the British North America Act of 1867, as amended; see secs. 91 (27), 92 (14).
43The Honorable Mr. Justice Riddell of the Supreme Court of Ontario is authority for the statement (in personal correspondence with the writer) that "We have no constitutional limitations.... Each of the provinces is in its judgments a foreign state. International Law governs the rules concerning them, unless there is provincial legislation in the matter." (Italics, mine.)
44The draft act is included as an appendix to the valuable monograph by Professor Read, of the Law School of the University of Minnesota, on the Recognition of Foreign Judgments in the British Commonwealth of Nations at Common Law. (Conflict of Laws thesis: Harvard Law School.) But it may be noted that the recent English statutes already cited seem to have abrogated the common law principle of non-merger of foreign money judgments. 23 Geo. V., ch. 13, part I, 6:

"No proceedings for the recovery of a sum payable under a foreign judgment... to which this... Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom."

45Professor Read (op. cit., pp. 146-149) cites the following provincial statutes: Prince Edward Island, Statutes 1869, ch. 15, sec. 5; New Brunswick, General Statutes 1903, ch. 137; Manitoba, Acts 1913, ch. 46, sec. 25 (1); Order 35 of Rule 38, sub. Nova-Scotia Acts 1919, ch. 32.
cial) competence narrower in Canada that in this country or Australia.46

The Act of Congress sounds very sweeping: “The records and judicial proceedings of the courts of any state or territory,” duly authenticated, are to have the same effect in every other state “as they have . . . in the courts of the state from which they are taken.”47 That would seem to mean that any and every sort of judicial proceeding to which the state in which it takes place gives conclusive or any other definite effectiveness must be given the same effect in every other state. But such a broad construction has not proved tolerable. The practice of suing a non-resident defendant and attaching his property within the jurisdiction dates back into colonial times, and had been pushed to extreme lengths. In one such Massachusetts case the property attached comprised one handkerchief; in another, one blanket.48 Meantime some states permitted action against absent and non-resident defendants without any attachment; on plaintiff’s affidavit merely that defendant had property in the state the court would summon him from abroad to defend the action.49 The constitutional standing of such judgments was not settled until 1877. The Act of Congress purports to draw no line of discrimination between different sorts of procedure on this or any other basis;50 but in the famous

---

46In Australia, as in the United States, the national (federal) government is the government of delegated, enumerated powers and the reserved or residual powers belong to the states; in Canada and South Africa the dominion (national) government is competent in all fields except those assigned exclusively to the provinces. British North America Act 1867, secs. 91, 92; Australia, Constitution Act 1900, secs. 51, 107; cf. Bryce, Studies in History & Jurisprudence 409-414. See cf. (1932) 48 L. Quart. Rev. 142-145.


48Kibbe v. Kibbe, (1786) Kirby (Conn.) 119; Phelps v. Holker, (1788) 1 Dall. (Pa.) 261, 1 L. Ed. 128; cf. ante, note 16. Evidently such attachments were not made with a view to securing a fund out of which to collect the anticipated judgment; they were conceived merely as a mode of founding personal jurisdiction, upon which a (probably default) judgment might be obtained which in turn would ground an “action of debt” in the defendant’s home state.

49See, e.g., Mason’s 1927 Minn. Stat. sec. 9235(3); so formulated in the Minnesota statutes as early as 1866 (Minn. Gen. Stat. 1866, ch. 66, sec. 49, Third), and retained ever since without verbal change, though nugatory since the decision of Pennoyer v. Neff, (1877) 95 U. S. 714, 24 L. Ed. 565.

50And so, Kent, J., in Hitchcock v. Aicken, (1803) 1 Gaines (N.Y.) 460: “When we reflect in what manner judgments may in some instances be obtained, as . . . by attachment of a handkerchief or blanket, it is more favorable to . . . harmony and . . . justice that the judgments of the several states should be put on the footing of foreign judgments, than that they should be held absolutely binding and conclusive, or as much so as they may be by the laws of the State which authorized the proceeding; and if we may
case of *Pennoyer v. Neff* default judgments taken on "foreign attachment" were held to bind only the specific property attached and not to be given effect in other states (nor indeed in the state where rendered) as a general adjudication of the merits.\(^2\) The decision for some time also was deemed to have stigmatized the practice of suing an absent and non-resident defendant without attachment as wholly unconstitutional except where the action is brought directly for the purpose of adjudicating the parties' rights respecting some certain property (or "status," as, e.g., a marriage) specified in the pleadings, such as an action to foreclose a mortgage or to quiet title.\(^5\) In such cases, as in the attachment cases, default judgment is effective only with relation to the specified property or status, but is entitled to no generally conclusive effect on the merits.

Under *Pennoyer v. Neff* the constitutional effect of a state court's judgment has seemed to depend primarily on two facts or questions: (1) Whether the defendant at the time the original action was begun was actually (physically) within the state in whose courts that action was brought, or lived in that state; or, (2) whether the defendant then had property in that state which either was the direct subject of the litigation or else was seized at the beginning of the action and held in custody of the court. But while the Supreme Court thus read a'1 this into the constitution and the Act of Congress, none of it is to be found there; and it is no more inevitable than is the rule that a foreign judgment can be enforced only by means of a complete new action of debt. The courts of England during the Nineteenth Century and since have summoned a defendant from abroad regardless of whether or not

\[\text{question the binding force of the \ldots judgment in one case, we may in another; for the Act of Congress has no exceptions and must receive a uniform construction.}\] (Italics, mine.)


\(^{(1877)}\) 95 U. S. 714, 24 L. Ed. 565. The decision disabled even the state that rendered it from giving it such general effect, counting on the "due process" clause of the fourteenth amendment. A fortiori it could be entitled to no such effect in any other state.

they have seized (actually or "constructively") specific property of his in England; yet when asked to enforce foreign judgments in England, they have commonly responded very much in the terms of our own case of *Pennoyer v. Neff*. When pressed with the discrepancy, they have replied that they summon defendants from abroad in obedience to Act of Parliament imposing that duty upon them, but that it by no means follows that the judgments they render on such procedure would be or ought to be given effect in foreign lands. In other words, while summoning defendants from abroad is authorized by England's "municipal law," the English judges do not think the practice conforms to "international law." This seems a parochial version of international law, however; for the fact seems to be that the Roman countries,—i.e., pretty much the civilized world outside the "English-speaking" countries, take a quite different view of the canonical doctrine of international law on this point. The practice of the English judges in summoning foreign defendants seems sounder than their notion of international law. The Australian constitution empowers the commonwealth parliament to confer federal (nationwide) jurisdiction on the state courts; and pursuant thereto the Service and Execution of Process Act regulates the authority of an Australian state court to summon a defendant from elsewhere in the commonwealth. The upshot of it seems to be that the procedure is authorized whenever the litigation concerns (1) property in the state, or (2) transactions that took place in the state, or, (3) the omission to do something that ought to have been done in the state. Jurisdiction, that is, depends on the character of the

---


54 Australia, Constitution Act 1900, sec. 71; and cf. Id., sec. 51(24) (ante, note 36).

55 Part II., 11-(1): If "(a) the subject matter of the suit . . . is . . . (1) Land or other property situate . . . within the state . . . in which
litigation, regardless of whether the defendant lives or does business or owns any property in the summoning state. The English acts authorize registration of a foreign judgment in England if the defendant had either a residence or a business address in the original (foreign) jurisdiction; provided, in the latter case, that the litigation was "in respect of" business so done there.57 The proposed Canadian draft act does not lay down this last limitation; but under its terms a business address will suffice only if the summoning jurisdiction "is a province or territory of Canada."58

the writ was issued; or
"(2) . . . stock of a corporation . . . having its principal place of business within that state . . . or
"(3) Any deed, will, document or thing affecting any such land, stock or property; or
"(b) . . . any contract in respect of which relief is sought . . . was made . . . within that state . . . or
"(c) the relief sought is in respect of a breach, within that state . . . of a contract wherever made; or
"(d) any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was done or is to be done or is situate within that state . . . or
"(e) at the time when the liability sought to be enforced arose . . . Defendant . . . was within that State . . . or
"(f) the domicil of the person against whom any relief is sought in a matrimonial cause is within that state . . ."

12. When a judgment is given . . . under this act, such judgment shall have the same force and effect as if the writ had been served on the defendant in the state . . . in which the writ was issued.

57By the Administration of Justice Act 1920 sec. 9-(2), a foreign judgment shall not be registered in England if
"(a) The original court acted without jurisdiction; or
"(b) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or else submit or agree to submit to the jurisdiction of that court."

The Foreign Judgments Act 1933 provides that the original court shall be deemed to have had jurisdiction in personam (Part I., 4. (2) (a) :
"(iv.) If the judgment debtor . . . was . . . resident in, or being a body corporate, had its principal place of business in the country of that court; or
"(v.) If the judgment debtor . . . had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;" or, in rem
"(b) In . . . an action of which the subject matter was immovable property, or . . . movable property if the property . . . was . . . situate in the country of that court;

Provided, however, that the registration "shall be set aside" if 4., (1) (a) (iii.) "the judgment debtor . . . did not (withstanding that process may have been duly served on him) receive notice . . . in sufficient time to enable him to defend. . . ."

58"In . . . personam, a court of a foreign country has jurisdiction in the following cases only:

(a) "Where the defendant is at the time of the commencement of the action ordinarily resident in that country;

(b) "Where the defendant when the judgment is obtained is carrying on business in that country and that country is a Province or territory of
The United States Supreme Court seems to be moving—haltingly—toward the English or Proposed Canadian position. Under *Pennoyer v. Neff* mere ownership of property in a state does not subject a defendant personally to the jurisdiction of its courts. Carrying on business in the state was early made the criterion of jurisdiction over foreign corporations; but for some time it was widely thought that an absent and non-resident individual could not be summoned personally into the state simply because he carried on business there, even though the litigation concerned that business. The advent of the automobile brought about the first distinct departure from that point of view, but the matter is still shrouded in some obscurity. In its latest pronouncement the United States Supreme Court holds that where a state (constitutionally) treats a definite line of business as "exceptional" and subjects it to "special regulation," an absent and non-resident individual who carries on that line of business in the state may be summoned personally into it for litigation growing out of that business. But "all business is subject to some kinds of public regulation." What amount or sort of legislative regulation constitutes "special" regulation? In the case of *Adkins v. Childrens Hospital* Mr. Justice

Canada;

(c) "Where the defendant has submitted to the jurisdiction of that court." (Italics, mine.)


64Quoted with approval in *State v. Johannes*, (Minn. 1935) 259 N. W. 537.
Sutherland declared that legislative regulation of the terms of private contracts must rest upon "the existence of exceptional circumstances." It stands admitted that money-lending is a business the terms of whose contracts may be legislatively restricted, by usury laws. May a non-resident money-lender then be summoned personally into the state to defend litigation arising from his money-lending there?

It may be suggested that for summoning a defendant from another state of the same federal country, different tests may well be appropriate than for summoning defendants from countries entirely foreign. The Australian act, which disregards both residence and place of business, applies only within that commonwealth, while the English acts (and the proposed Canadian uniform act) apply also to proceedings in countries wholly foreign. Within a single federal country possessed of a fairly homogeneous legal system it is submitted the terms of the Australian statute are not too broad. In this country a criminal defendant may be taken for trial into any state where it is alleged he committed the crime. Why should not a defendant be obliged civilly to litigate his transactions in any state where they took place or by the terms of his own undertakings ought to have taken place? Yet Congress has not seen fit to give the civil process even of the federal district courts a nation-wide reach except in certain "exceptional" classes of cases.

Suppose Congress now passed an act in general terms: That any default judgment produced by summoning a foreign defendant into the state to defend litigation concerning any business or transaction negotiated by him in the state should be entitled to full faith and credit in other states,—would such an act be constitutional? The constitution authorizes Congress to prescribe the inter-state effect of judicial proceedings. Since Congress has laid out no lines of discrimination, the Supreme Court might have held that there are none and that the obligation of "full faith and credit" extends to every sort of judicial proceeding that its original state holds effective; or, that until Congress sets up standards of discrimination each state remains free to make its own. Instead, the court has treated the constitutional section in connection with the fourteenth amendment as self-executing and has worked out

---

64(1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785.
its rules as assumed logical (?) corollaries of the constitutional obligation. If that is what they are, how much play of legislative discretion is left to Congress? Undoubtedly, here as elsewhere, any congressional discretion must be exercised within the limits of what the Court will regard as "reasonable," the undefinable standard of which rests in the bosom of the Court itself. But, no doubt, too, to be "reasonable" any such legislation will have to follow the general distinctions already established by the Court. It may be questioned whether an act of Congress would be sustained which, like the Australian Service & Execution of Process Act, disregarded both the residence and the business address of the defendant and made jurisdiction turn entirely on the character of the litigation.

In this country a non-resident defendant who has never done any business in the state may nevertheless be summoned personally before its courts if he can be found physically within the state, no matter how temporarily. Yet the United States Supreme Court refused effect to a French judgment taken against an American defendant doing business in France, and not on default, but after appearance and trial of the case. But then the French courts do not exclude hearsay evidence! And they do not give con-

---

66Although "personal" jurisdiction over foreign corporations is grounded on their engaging in business in the state, it is also held that this jurisdiction must not be so exercised as to impose an "unreasonable" burden on interstate commerce. Davis v. Farm. Coop. Eq. Co., (1923) 262 U. S. 312, 43 Sup. Ct. 956, 67 L. Ed. 996; L. & N. Ry. v. Chatters, (1929) 279 U. S. 320, 49 Sup. Ct. 329, 73 L. Ed. 711; D. & R. G. Ry. v. Terte (1932) 284 U. S. 284, 52 Sup. Ct. 76, 76 L. Ed. 295. And, for the distinction between jurisdiction over foreign corporations generally, for all transitory causes, and as confined to litigation over business done in the state, see Penn. Fire Ins. Co. v. Gold Issue Co., (1917) 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610; Dragon Co. v. Storrow, (1925) 165 Minn. 95, 205 N. W. 694. In the case of Henry L. Doherty Co. v. Goodman, (1935) 294 U. S. 623, 55 Sup. Ct. 553, the Iowa statute pursuant to which defendant was summoned from New York was inclusive in terms. Any non-resident defendant maintaining a business office or agency in Iowa might be summoned from abroad to defend litigation "growing out of or connected with the business of that office or agency." But in sustaining the jurisdiction the United States Supreme Court stressed the fact that the kind of business involved in the case was one which Iowa "treats as exceptional and subjects to special regulation. . . Only rights claimed on the present record are determined. The limitation of [the statute] under different circumstances we do not consider." Cf. ante, note 32.


68Hilton v. Guyot, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.
clusive effect to American judgments. And, of course, to the judgment of a foreign country the "full faith and credit" section does not apply; nor, if this case is good law at all, does the "due process" clause. Under both the English Acts it is clear a foreign judgment is not registrable in England, even though defendant was personally served with process in the foreign jurisdiction, unless at the time he was either "ordinarily a resident" or else engaged in business there. The Canadian uniform draft act takes the same position.

At least as between different countries certainly a good deal can be said for the sound policy of such a rule. In Australia (and in South Africa) the problem largely disappears in its inter-state aspect; since, if the nature of the cause of action permits, a defendant can be summoned into any Australian state from any other state regardless of his residence or place of business (so long as he lives within the commonwealth), there is not much occasion to "snapshot" a defendant by catching him with process in some state where he just happens to be at the moment.

Another procedural vice that affects the problem of "full faith and credit" is "fraud" in obtaining the foreign judgment. Early in the Seventeenth Century the English chancellor with the personal help of King James I established his authority to forbid the holder of a common law judgment from ever taking any steps to enforce it, on proof (made to the chancellor) that it was obtained by fraud. This is a principle capable of wide extension. Every

69See ante, note 33.
70See ante, notes 57, 58. Cf. the Foreign Judgments Act 1933, part I., 4.(2): That the original (foreign) court shall be deemed to have had jurisdiction in personam if

(i) the judgment debtor... defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing... otherwise than for the purpose of protecting... property seized... in the proceeding or of contesting the jurisdiction of that court; or

(ii) if the judgment debtor was plaintiff... or counterclaimed in the... original court; or

(iii) if the judgment debtor... had... agreed... to submit to the jurisdiction of... that court; or

(iv) " and "(v)" as in note 57, ante. Cf. Guiard v. deClermont & Domer, [1914] 3 K. B. 145, 83 L. J. K. B. 1407; Harris v. Taylor, [1915] 2 K. B. 580, 84 L. J. K. B. 1839; Barber v. Lamb, (1860) 8 C. B. N. S. 95, 29 L. J. C. P. 234. Cf. York v. Texas, (1890) 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; West. Ind. Co. v. Rupp, (1914) 235 U. S. 261, 35 Sup. Ct. 37, 59 L. Ed. 220; Baldwin v. Trav. Mens Ass'n, (1931) 283 U. S. 522, 51 Sup. Ct. 517, 75 L. Ed. 1244. For the Continental (civil law) point of view, see Lorenzen, Cases on the Conflict of Laws, 2nd ed., p. 126, n.: "The Anglo-American point of view, according to which a defendant may be sued on a personal cause of action in any state in which service of process can be made upon him, without reference to his domicile or to the place where the cause of action arose or the property to which it may relate is situated, is rejected by all other countries." (Italics, mine.)
defeated litigant is prone to think his adversary won by fraud and perjury; hence a voluminous (and conflicting) lore of intricate distinctions as to the precise sorts of fraud that respectively can or cannot be made the basis of such an equity action. Modern statutes that broaden the grounds for direct appeal to include newly discovered evidence, surprise, accident, excusable neglect, and so forth, would seem to leave little reason for perpetuating this item of chancery jurisdiction; and some states seem to have abolished it. Minnesota clings to it. Under the act of Congress a judgment is to have the same effect in other states that it has in the state that rendered it. Enforcement is sought in State X of a judgment given in State Y. If and to whatever extent a court of equity in State Y under its laws could restrain enforcement of the judgment for fraud, to that same extent it has been held a court of equity in State X may do so, but no further. If and to whatever extent the judgment would be invulnerable to such attack in its home state, it must be impregnable likewise in State X. Under the English Acts and the Canadian uniform draft act a foreign judgment is not to be enforced if it appears to have been "obtained by fraud;" apparently this is regardless of whether it could be attacked that way in its original habitat or not. The American rule is a literal application of the terms of the act of Congress. It requires the Minnesota court, e.g., before which enforcement of a foreign judgment is contested for fraud, to explore the law of the foreign jurisdiction and determine whether that law would sustain such a contest. The English and Canadian acts proceed on the reverse principle of giving to the foreign judgment the effect it would have if it had been obtained in England, or in

---

1 Mason's 1927 Minn. Stat., secs. 9283, 9325, 9405.
2 But N. B., that the judgment debtor need not bring the equity action in State Y; he may bring it initially in State X; but semble, he can maintain it there only if a similar action would have lain in State Y, and only for the same sort of "fraud" that would sustain it there. See Maitland and Montague, A Sketch of English Legal History 124; Christmas v. Russell, (1866) 5 Wall. (U.S.) 290, 18 L. Ed. 475; Levin v. Gladstein, (1906) 142 N. C. 482, 55 S. E. 371; Schendel v. Chicago & Ry., (1926) 168 Minn. 152, 210 N. W. 70; Embry v. Palmer, (1882) 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; Goodrich, Conflict of Laws, (1927), pp. 461-64; (1927) Minnesota Law Review 150, 567-68.
3 (1920) 10 & 11 Geo. V., ch. 81, part II., sec. 9-2(d); (1933) 23 Geo. V., ch. 13, part I., 4.(1)(iv.); Canadian (uniform draft) Foreign Judgments Act 1933 6.(c), and cf. Id., 6.(i):

That to an action brought on a foreign judgment it shall be a "sufficient defence, . . . that the proceedings in which the judgment was obtained were contrary to natural justice." The Australian act contains no such provisions; see ante, notes 37, 56.
the Canadian province in which its enforcement is now sought. This is simpler, and as already intimated, probably preferable.  

The recognition of foreign judgments raises questions not only about the procedure by which they were arrived at, but also regarding the nature of the relief they award or the causes of action upon which they may have been based. The common law system of enforcing foreign judgments only by bringing “action of debt” upon them is suited to only one type of judgment, to-wit: judgments for the payment of money. By applying the doctrine res judicata a common law court could give a certain indirect effect to other foreign judgments. Whenever litigation in England turned upon questions that had already been litigated between the parties and embodied in a judgment abroad, even though not a money judgment, the English court could hold the parties concluded by the foreign determination of those questions; and that might control the result of the English litigation. But only a foreign judgment for money could be directly enforced in England. This position was fortified by the unwillingness of the common law judges to give effect to the decrees of the English chancery. A common law judgment always calls for “recovery” of a stated sum of money or of some specified article or articles of property; an equity decree is the chancellor’s personal command to the defendant to do something: to pay money, to sign and deliver a deed, to tear down a wall,—what-not. When chancery commanded a defendant, e.g., to sign and deliver a deed of Blackacre, the common law courts did not recognize the decree itself as giving the (chancery) plaintiff any rights in the land. They would continue to protect the defendant in his possession and enjoyment of the land until he did actually sign and deliver the deed; though when he had done that, they accommodatingly shut their eyes to the fact that he had done it only under coercion and treated it as his free and voluntary act.  

The chancellor’s decrees were not accorded high “faith and credit” in the common law courts of their own country.  

So the English Act of 1933 makes a foreign judgment registrable and executive in England only if “there is payable thereunder a sum of money.” But the Act applies to other foreign judgments
the doctrine res judicata, as suggested above. Under the Canadian uniform draft act action on a foreign judgment could be defended on the ground that the judgment "is not for a sum certain in money;" but regardless of that, "a foreign judgment is conclusive as to any matter adjudicated upon and shall not be impeached for any error of fact or law."

The common law courts would not sustain an action of debt on a chancery decree for the payment of money. The professed reason was that chancery decrees were not "final;" the chancellor retained a discretionary authority to revise or discharge his decrees at any time on showing of a change in circumstances. Some modern statutes limit this discretion. So in this country on a money decree—e.g., for alimony—action can be brought in another state only for instalments past-due; and for them only if by the law of the original state they are beyond reach of discretionary revision. Otherwise our states have often regarded themselves as free from constitutional obligation to enforce chancery decrees from other states. But it has been said by the United States Supreme Court that a chancery decree is entitled to "full faith and credit" by application of the doctrine res judicata. Apparently that leads to the conclusion that if the chancellor in State Y has commanded defendant, e.g., to give a deed of Blackacre, on action brought in State X its chancellor must treat the decree in State Y as a conclusive adjudication of the merits and so will issue a decree in the same terms (barring any change of circumstances shown since the decree was rendered in State Y). Yet the traditionally dis-

77Part II., 8.—(1):

"A judgment to which part I. of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered . . . and whether . . . it is registered or not, shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim." (Italics, mine.)

Cf. Id., (3): "Nothing in this section shall . . . prevent any court in the United Kingdom recognizing any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognized before . . . this Act."

78Sec. 6. (e).

79Sec. 5.


cretionary character of equity jurisprudence stands in the way of thorough-going acceptance of this doctrine. Undoubtedly defendant will not be committed for contempt in State X directly for disobedience of the decree issued against him in State Y. In general, to be enforceable in State X the judgment given in State Y must award relief of a kind that the remedial system of State X makes available to litigants in its courts. State X stands under no constitutional obligation to adapt its procedural system to any par-

Equity, (1915) 15 Col. L. Rev. 106; Barbour, Extra-Territorial Effect of the Equitable Decree, (1919) 17 Mich. L. Rev. 527; Lorenzen, Application of Full Faith & Credit Clause to Equitable Decrees, (1925) 34 Yale L. J. 591; Goodrich, Conflict of Laws 477 ff. Cf. Sill v. Worsick, (1791) 1 Hy. Bl. 665; Phillips v. Hunter, (1795) 2 Hy. Bl. 402; Minna Craig SS Co. v. Chartered M. Bank, [1887] 1 Q. B. 55, 66 L. J. Q. B. D. 162; MacFarlane v. Macartney, [1921] 1 ch. 522, 90 L. J. Ch. 314. Nouvion v. Freeman, (1897) is an amusing case (in chancery) 37 Ch. D. 244, (in the house of lords) (1898) 15 App. Cas. 1, 59 L. J. Ch. 337. Action was brought in England on a Portuguese "remate" judgment,—judgment entered on summary process, somewhat analogous to our judgment by confession, but liable to be superseded by a so-called "plenary" action (no such plenary action to supersede this judgment had been brought in Portugal, however). The action was resisted on the ground that the remate judgment was not "final." In reply, the analogy was pressed upon the court, of an English common law judgment, liable to annulment by chancery for "fraud." The English court refused to enforce the Portuguese judgment and found substantial distinction between it and an English common law judgment. But, said Lord Herschel:

"Even if the analogy were complete . . . it would afford very little assistance to your Lordships unless we could know what had been the course adopted with regard to [English common law judgments] in countries in whose system of law the same force and effect are given to foreign judgments as are given in the courts of this country."

Lord Bramwell said:

"I do not think any argument can be founded upon . . . the preposterous condition of things that existed in England before the judicature acts" [fusing "law" and "equity"]. . . . "I think that some twenty or thirty years hence . . . it will scarcely be believed that such a state of things did exist in a civilized country."

Of course no common law judgment is really final (until the statute of limitations has run) where the chancellor has power to annul it for fraud; nor, while still subject to appeal whereby it may possibly be reversed. Yet common law courts hold common law judgments entitled to the benefit of the principle of res judicata as well as suable by action of debt before time for appeal has expired, and even though appeal has been taken, unless by supersedeas. Paine v. Schenectady Ins. Co., (1877) 11 R. I. 411; Ebner v. Steffanson, (1919) 42 N. D. 229, 172 N. W. 857, 5 A. L. R. 1261, and note. Cf. the English Foreign Judgments Act 1933, part I., 1.—(3):

"A judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal."

But the earlier act of 1920 (10 & 11 Geo. V., ch. 81) denied English registration to an overseas judgment on showing that an appeal was pending "or intended," part II., sec. 9.—(2) (e). And the Canadian uniform draft act provides that action on a foreign judgment shall be stayed if it is shown that appeal has been or is "about to be" taken, sec. 7. The Australian act is silent in this regard.
ticular sorts of relief that might be required for enforcement of any foreign judgments.62

One country commonly does not enforce the criminal or revenue laws or sentences of another, and this rule is applied between the several United States notwithstanding the constitutional provision. If a convict in State Y escapes into State X, he is to be extradited back into State Y; but he is not subject to imprisonment in State X for the unexpired term of his State Y sentence. So a judgment given in State Y against a taxpayer for delinquent taxes presumably will not found an action of debt in another state. This doctrine is extended to “quasi-criminal” or “penal” obligations, and it is held that a judgment rendered in State Y on a “penal” obligation is not constitutionally entitled to enforcement in State X. For this purpose a judgment apparently is penal when it awards relief, not to a private plaintiff because of damage done him by the defendant, but to the State or to some one such as a “common informer” who sues under statutory authority not to redress injury sustained peculiarly by himself but as a “public representative” to “vindicate public justice.”63 This exemption of “penal” judgments from the operation of “full faith and credit” cannot be spelled out of the words of either the constitution or the Act of Congress. Like the rest of our constitutional law on “full faith and credit,” it has been developed wholly judicially, giving constitutional force (and thereby constitutional sacrosanctity) to a common law tradition.64


63 Huntington v. Attrill, (1892) 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. The authority of these cases has been questioned, largely on the basis of some remarks by Holmes, J., in Fauntleroy v. Lmn, (1908) 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039. Goodrich, Conflict of Laws, sec. 204; Hazelwood, Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments, (1934) 19 Marquette L. Rev. 10. So “infamy” produced by a sentence (judgment) of State Y ordinarily will not be given effect in State X, e.g., to make a witness incompetent, Commonwealth v. Green, (1822) 17 Mass. 515, and a prohibition against re-marriage incorporated in an absolute divorce decree pursuant to the law of the divorcing state has been held not to avoid the party's re-marriage after acquisition of domicile in another state. Webster v. Modern Woodmen, (1922) 192 Iowa 1376, 186 N. W. 659. Cf. State v. Yoder, (1911) 113 Minn. 503, 130 N. W. 10. It seems on this basis, in part, that enforcement of foreign chancery decrees has been refused; the coercive processes of chancery smack of a criminal or “penal” quality. Cf. ante, note 81; especially Union Pacific Ry. v. Rule, (1923) 155 Minn. 302, 193 N. W. 161; Bossung v. District Court, (1918) 140 Minn. 494, 168 N. W. 589. Cf. post, notes 87, 88, 89.

64 Yet it would seem Congress could extend the obligation of full faith and credit to penal judgments (cf. ante, notes 32, 66), if it were thought desirable. Cf. post, notes 85, 86-88, and the text thereto.
"FULL FAITH AND CREDIT"

does not speak of "penal" judgments; but the 1933 act provides for registration of foreign judgments only for "a sum of money, not in respect of taxes or . . . a fine or other penalty;" and under the Canadian uniform draft act action could not be maintained on a foreign judgment for "a penalty or a sum . . . due under the revenue laws of the foreign" jurisdiction.

Judgments founded on "penal" obligations are the only exception thus far recognized by the United States Supreme Court to a general principle, that the judgment of any state court is constitutionally entitled to full faith and credit in every other state regardless of the nature of the cause of action upon which it was based. In wider (and vaguer) terms the English Administration of Justice Act 1920 denies registration to a foreign judgment based on "a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court." And the act of 1933 provides that registration of a foreign judgment "shall be set aside" if "the enforcement of the judgment would be contrary to public policy in the country of the registering court;" while under the Canadian uniform draft act action on a foreign judgment could be defended if it is "in respect of a cause of action which for reasons of public policy or for some similar reason would not have been entertained by the courts of this Province."

The Australian Service and Execution of Process Act does not except penal judgments nor any other class of judgments from the scope of the "full faith and credit" obligation. Judgments and decrees are registrable and executive throughout the commonwealth whether they are money judgments or not. It is submitted this is as it should be, between states of the same federal country. Between wholly independent countries different considerations may well control.

In the early Massachusetts case of Bissell v. Briggs, Sewall J., dissenting, posed several situations in which he held it unfair to require Massachusetts to enforce foreign judgments. The people

---

85 Part I., 1.—(2) (b).
86 Sec. 6(f).
87 Part II., sec. 9.—(2) (f).
88 Part I., 4.(1) (a) (v).
89 Sec. 6(h); and cf. sec. 6(i) (ante, note 73). In the case of Boyle v. Victoria Trading Co., (1902) 9 B. C. R. 213, British Columbia refused to enforce a default judgment entered abroad against a corporation on a complaint that the British Columbia court deemed patently demurrable, counting on an ultra vires transaction.
90 (1813) 9 Mass. 462. A Massachusetts sheriff under legal proceed-
of State X, let us say, deem high interest rates oppressive and have a stringent usury law. Judgment has been duly obtained in State Y upon a note including interest, e.g., at 3% per month. Now action is brought in State X upon this judgment procured in State Y. Must State X allow this judgment as a valid debt, interest and all? The question will become more acute if it be assumed further that the defendant is a citizen of State X and borrowed the money there, to be there repaid, so that if the original action on the note had been brought in State X recovery would unhappily and properly have been refused. Although State X would not have given judgment on the note, must it now award judgment on the judgment that has been entered on the note in State Y? In this country apparently it must. Mississippi has been required to enforce a judgment rendered in Missouri on a gambling transaction that had taken place in Mississippi and was illegal under the laws of Mississippi; and generally where state Y has given judgment for the plaintiff, it seems that State X must allow that judgment conclusive effect as a cause of action in its own courts although it would not have given judgment on the original ("primary") cause of action, excepting only "penal" judgments, as already noted.

Yet "the essential nature and real foundation of a cause of

ings in Massachusetts had seized personal property belonging to the (subsequent) plaintiff. Later, the sheriff being found temporarily in New Hampshire court in trespass de bonis asportatis; and although the sheriff appeared and defended, the New Hampshire court gave judgment against him. Then the plaintiff sued the sheriff again, in Massachusetts now, on his New Hampshire judgment. Defendant offered to convince the Massachusetts court that the New Hampshire judgment was erroneous and that he had really acted properly under the laws of Massachusetts, whose official he was and to whose courts of course he was officially responsible. But the Massachusetts court refused to examine that question and held the New Hampshire judgment conclusive against him. Mr. Justice Sewall dissented vigorously that to enforce this New Hampshire judgment

"is to administer our own laws by the intervention of a court in New Hampshire, who have no official cognizance of our laws or officers. . . . Other suggestions might be made, of cases arising under laws esteemed . . . against public faith, or against good morals, or judgments recovered against positive regulations within the state to which they are brought to be enforced . . . for instance, judgments upon usurious or gaming contracts, illegal and void where made, but which may happen to be recovered where no such restraints are recognized."

Mr. Justice Sewall's prescience will be appreciated in the sequel.

action, indeed, are not changed by recovering judgment upon it."92 Those words were uttered by the United States Supreme Court to excuse State X from enforcing the "penal" judgments of State Y; but why are they not equally appropriate to any judgment? Just why should a foreign judgment entered on an immoral transaction be constitutionally sacrosanct above one founded on a "penal" obligation? It is submitted ethical justification of the rule must rest upon the answer to an anterior question: Was Missouri constitutionally free to give the judgment that it did, on the Mississippi gambling transaction? Suppose the original Missouri decision had been appealed to the United States Supreme Court: Could it have been reversed for the failure to apply the law of Mississippi to the situation? If so, then the defendant not having taken such appeal but having permitted the unconstitutionally erroneous Missouri judgment to become final, it may well enough be treated as conclusive against him in the later Mississippi litigation. Defendant has made his own bed and should lie in it. But if Missouri was constitutionally free to give judgment for the plaintiff on the Mississippi gambling transaction in the teeth of the laws of Mississippi, then it is outrageous to say now to Mississippi: You must nevertheless give full effect to that Missouri judgment.

To this point of view two answers have been made. It is urged that when a court decides erroneously it is the fault of the defeated party (his counsel): If the case had been competently presented presumably the court would have decided properly. That is a large assumption. In Fauntleroy v. Lum the defendant did his best in the Missouri court to procure proper application of the law of Mississippi, without success. True, in all litigation one is at risk of erroneous decision; yet there must be an end to litigation. Nevertheless, when a citizen of State X shows to its court that his rights under its laws have been flouted by decision in State Y, the argument appeals with great force to the home court that it ought to give its own citizen his rights under his own laws and the law properly applicable to his transaction, notwithstanding the erroneous foreign decision. The very fact that he tried to make the court of State Y see the light, but it would not, seems an addition-

al reason why his own state's court now should do him justice."

Again, it is urged that the several United States should not assume a "holier than thou" attitude toward each other. It is not to be assumed that the law of any one of the United States, applied to any state of facts whatever, will produce a result that ought to seem to any other American state too shocking to be tolerated.

This contention has plausibility. Yet certain states are beginning or proposing to legalize gambling, which is widely regarded as a major social and moral evil. Certainly the ideas current in the several states as to what constitutes gambling differ materially, as the case of Fauntleroy v. Lum shows. The views prevailing in the several United States as to the moral and social bearings of the liquor traffic have varied and still vary widely. It seems all a bootlegger in the "bone driest" state need do is to manage somehow to reduce his bill to judgment in some other state, and then he can enforce it in the state where he made his sale in defiance of its law and policy. Unless the "wet" states can constitutionally be inhibited from giving judgment to the bootlegger in such a case, the "dry" state where he made his illegal sale cannot in any fairness be required to enforce the judgment.

So it is submitted the whole matter comes back to the question of State Y's constitutional obligation to apply the law of State X

93So in the case of The Helena, (1801) 4 Ch. Rob. 3, the British Admiralty, giving effect to a piratical act of the Dey of Algiers, remarked:

"Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaint, there might perhaps have been something like a reasonable ground to induce the court to look into the transaction."

And in the case of Wolf v. Oxholm, (1817) 6 M. & S. 92, 106, Lord Ellenborough, refusing to recognize proceedings that had been had in the Danish court, declared:

"The parties went into that court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit in consequence of a subsequent ordinance not conformable to the usage of nations; which therefore they could not expect, nor are they or we bound to regard:"

Cf. Fitzherbert, Natura Brevium, 8th ed., 259:

"If an English merchant's goods be spoiled [i.e., stolen] and . . . taken beyond the seas by merchants strangers, and the English merchant was beyond Sea to have justice & restitution made thereof, and could not obtain the same . . . now . . . if the merchants strangers shall come into . . . England . . . the English merchant shall have a writ . . . to arrest them . . ."

In Novelli v. Rossi, (1831) 2 B. & Ad. 757, 9 L. J. O. S. K. B. 307, and Simpson v. Fogo, (1863) 1 Hem. & M. 195, 32 L. J. Ch. 249, the English courts refused to honor foreign judgments though the defeated parties had appeared and contested the cases in the foreign courts; the United States Supreme Court did likewise in Hilton v. Guyot, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. Cf. ante, notes 68, 69 and the text thereto.

94See Beach, Inter-State Enforcement of Vested Rights, (1918) 27 Yale L. J. 656.
in litigation whose result that law ought to control. It has been noted that the framers of the constitution significantly changed the "full faith and credit" provision of the articles of confederation, with this very point in mind. Just what is—what ought to be—the scope of this obligation?

A court of State Y considering a transaction that took place elsewhere can take any one of three positions: (1) it can dismiss the case "without prejudice," because the facts are foreign; (2) retaining jurisdiction, it can brush aside the foreign law as immaterial (or, as unascertainable by it) and decide the case as though the facts had happened in State Y; (3) it can undertake to decide the case according to the foreign law of the place where the facts occurred. Historically these three positions have been taken, in about that chronologic order. Originally the common law courts would entertain only litigation arising out of facts transpired in England. This rule was compelled by the fact that the earliest jurors were witnesses rather than impartial hearers of evidence; hence a case could practically be tried only by a jury drawn from the neighborhood where the facts had occurred. As the function of the jury gradually shifted, the reason for the rule, and finally the rule itself, largely disappeared, and, indeed, under modern conditions it would be wholly impracticable. But obviously the whole difficulty under discussion is an outgrowth of the development of the "transitory" cause of action, which our courts have carried to an extreme. By and large the evidence of what took place is likely to be most cheaply and readily available where it took place, and the courts of that country are in the best position to interpret and apply its law to the case. These considerations influence "civil law" doctrine. Our courts will try a case between an Italian and a Japanese concerning occurrences in Germany. The French courts would decline to entertain such litigation; and it can cogently be urged that our courts might well do likewise.

---

95Cf. ante, notes 17-22, and the text thereto. For Australia, cf. ante, note 35.
97See Bossung v. District Court, (1918) 140 Minn. 494, 168 N. W. 589; Boright v. Chicago & R. I. Ry., (1930) 180 Minn. 52, 230 N. W. 457; Peterson v. Chicago B. & Q. Ry., (1932) 187 Minn. 228, 244 N. W. 823; Pillet, Jurisdiction over Foreigners, (1905) 18 Harv. L. Rev. 325; Beale, Jurisdiction of Courts over Foreigners, (1913) 26 Harv. L. Rev. 193.
Fitzherbert (cf. ante, note 93) at the end of the Middle Ages represents a transitional position:
"If an English merchant be robbed . . . by merchants strangers and . . .
The fact that the Court can take any of these three positions shows that the problem is not to be solved by logical deduction from the political doctrine of "sovereignty." If State Y is a fully "sovereign" state, its "sovereignty" in this connection means simply that it is "king in its own courts;" it "may attach any legal consequences whatever to any state of facts whatever, including acts done in other countries even by persons not citizens or residents of" State Y. No settled principles of "international law" impose any definite constraint upon state Y in this regard. In 1927 the case of the *Steamship Lotus* came before the Permanent Court of International Justice. A French steamer and a Turkish ship had collided in the Aegean Sea, sinking the Turkish ship and killing eight Turks on board her. Her captain and others were rescued by the French steamer, which then proceeded to Istanbul. There the Turkish authorities arrested both the Turkish captain and the French sailing-master and prosecuted them jointly for manslaughter in the Turkish courts and convicted and sentenced them both. The Turkish penal code (said to be a verbatim transcript of the Italian code) provides that any damage done to a Turk by a foreigner abroad by any act which if done in Turkey would be criminal there shall be deemed a crime and punishable as such by the Turkish courts. The French Government protested the Turkish prosecution of the French master and brought the case before the World Court for a judgment whether the Turkish prosecution was "conformable to the principles of international law," and, if

---

The quotation is from Professor Cook in (1918) 28 Yale L. J. 69. Cf. Dicey, Conflict of Laws, 3rd ed., p. 9:

"The English courts might . . . decide every matter . . . whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France exactly as they would do if the transactions had taken place between Englishmen in England."

---

The quotation is from Professor Cook in (1918) 28 Yale L. J. 69. Cf. Dicey, Conflict of Laws, 3rd ed., p. 9:

"The English courts might . . . decide every matter . . . whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France exactly as they would do if the transactions had taken place between Englishmen in England."
not, praying indemnity to be paid to France by Turkey. By an equally divided bench the court decided in favor of Turkey. Under the terms of the Turkish code an act done in France by a Frenchman might be held a violation of Turkish law and so punished in the Turkish courts (if the luckless Frenchman were ever caught in Turkey), though perfectly lawful by the law of France whose citizen he was and where he acted. Whether such a broad application of Turkish law could be deemed "conformable to the principles of international law" seemed doubtful to several of the judges; and Mr. John Bassett Moore, the American member of the bench, dissented expressly on the ground that it was not and that the terms of the "compromis" submitting the case to the court required it to decide that question and not to justify the particular Turkish prosecution on any other or narrower ground. The judges also discussed the analogy—or lack thereof—between the instant collision and the hypothetical case so familiar to all law school students of a man standing in the United States close to the international boundary and shooting a man standing just over the line in Canada or Mexico. Mr. Justice Moore was prepared to concede that Turkish law might be applied to the principal case on the ground that the French master's (allegedly reckless) navigation of his ship "took effect" in and upon the Turkish vessel, which on the high seas was to be deemed a part of Turkish territory. But the president of the court (whose opinion, the bench being equally divided, became the court's decision) swept all this aside by pointing out that in the last analysis—on the basis of actual "physical power"—the "territoriality" of Turkey's "sovereignty" means no more than that she cannot execute her own process on foreign soil. She could not have sent her own police into France, there themselves to arrest the French shipmaster and without a "by your leave" to the French Government bring him to Turkey for trial; but that is not to say that Turkey cannot de-

100Crapo v. Kelly, (1872) 16 Wall. (U.S.) 610, 21 L. Ed. 430; and cf. the writer's Has the Conflict of Laws Become a Branch of Constitutional Law, (1931) 15 MINNESOTA LAW REVIEW 161, 172-175.

101Holmes, J., "the foundation of jurisdiction is physical power," in McDonald v. Mabee, (1917) 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608; and cf. the present writer's The Shifting Basis of Jurisdiction, (1932) 17 MINNESOTA LAW REVIEW 146.

102Although that very thing has been done (not between France and Turkey, but between the United States and Peru) and has been sustained by the United States Supreme Court as no denial of constitutional "due process." Ker v. Illinois, (1886) 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421. Cf. Mahon v. Justice, (1887) 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; sed cf. United States v. Rauscher, (1886) 119 U. S. 407, 7 Sup.
clare and enforce in Turkey any legal consequences she may see fit to attribute to any acts, wheresoever and by whomsoever performed.

When the "operative facts" all occurred in State (or country) X, it has the look of a straightforward application of the "territorial" theory of sovereignty and jurisprudence to say that the legal consequences of those facts, wherever litigated, should be determined according to the law of State X. In those cases also the argument sounds cogent that the facts had better be litigated in the courts of State X and that other courts ought to decline to take jurisdiction.\(^\text{103}\) The United States Supreme Court—especially when speaking through the mouth of Mr. Justice Holmes—has been wont to insist strongly on this view of the normal "territoriality" of law and its applicability, although the United States Government (and the Supreme Court for it) insists upon its own "jurisdiction" to control the legal consequences both of acts done within its boundaries, by whomsoever performed, and also of acts done by its citizens, wheresoever performed.\(^\text{104}\) But it is perfectly possible for an action to be brought in an American court against an American citizen by an Englishman, arising from events that occurred partly in the United States, partly in England, and partly in Norway—and even, partly in other places. In such a case the

\(^\text{103}\) See ante, note 97, and the text thereto.

"FULL FAITH AND CREDIT" 173

territorial" logoscope affords scant help. In any case our hypo-

theoretical court of state Y litigating transactions occurred in state
(or county) X seems perfectly free internationally; only its obli-
gations under the United States constitution can constrain it to apply
the law of State X to the case, and its constitutional obligations can-
not be worked out by adopting any rules of international law as the
rules of constitutional law, nor by Euclidean reasoning from a post-
ulated "territoriality" of the "sovereignty" of state X or state Y.
The constitutional rules (if any) can only be rules of ethics, policy,
convenience, that may be deemed suitable between states that are
members of the same federal country. So under the constitutional
section Congress may "prescribe the effect" which "the public acts" of
state X shall have in state Y. It is for Congress to set the bounds
of the "legislative jurisdiction" of the several states. But Congress
has not done so. The federal statutes provide a method of authenti-
cating copies of "the acts of the legislature of any state or territory;"
but it is only the "records and judicial proceedings of the courts" of
the states which Congress has said "shall have such faith and
credit given to them in every court within the United States as
they have by law or usage in the courts of the state from which
they are taken." The most "logical" position for the Supreme
Court would seem to be to hold that until Congress prescribes the

105See Cook, Logical & Legal Bases of the Conflict of Laws, (1924) 33 Yale L. J. 457; Lorenzen, Territoriality, Public Policy & the Conflict of
Laws, (1924) 33 Yale L. J. 736; Beale, The Jurisdiction of a Sovereign
State, (1923) 36 Harv. L Rev. 341; de Sloovere, The Local Law Theory
and Its Implications, (1928) 41 Harv. L. Rev. 421; Heilman, Judicial
Method and Economic Objectives in the Conflict of Laws, (1934) 43 Yale
L. J. 1082. It is of course this class of cases that raises the problem of
"the renvoi." If all the "operative facts" that are in litigation in State Y
occurred in State X, to say that the State Y court should decide "according
to the law of State X" is tantamount to saying that the State Y court
should decide the case just as the courts of State X presumably would decide
it if it had been litigated there. In such a case it seems the most obvious
justice to say that wherever the facts happen to be litigated the result should
be the same, which can mean only that it should be "according to the law of
State X." But suppose the facts happened partly in State X, partly in State
Y and partly in State Z. Now to say that the State Y court should de-
cide "according to the law of State X" becomes ambiguous. It may mean
either that it should decide as the State X courts would decide similar
facts all occurred in State X; or it may mean as the State X courts would
decide this very state of facts, which might perchance be "according to
the law of" State Y—or of State Z. To take as a guide the "territoriality"
theory of "sovereignty" is to follow an ignis fatuus. See Yntema, The
Hornbook Method and the Conflict of Laws, (1928) 37 Yale L. J. 468; Guar.
260.

“extra-territorial” effect of state legislation, there is none as a matter of any constitutional obligation, and in some early cases the Court expressed that point of view. But it has abandoned that attitude and now says that “it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.” The shift has come about partly unconsciously (at first), partly in response to the persuasiveness of counsel interested for the advantage of their clients to expand the scope of the “due process” clause. The statement made by the present writer in an earlier volume of this Review that “the question: ‘By the law of what jurisdiction shall the rights and liabilities of parties to given acts and events be determined?’ is a federal question generally speaking, under the due process clause, and in many cases also under the full faith and credit clause” has been fully justified since it was made, if it had not been already. But even more than in connection with judgments, the outline of the final rules on this subject is still sadly blurred.

In the case of The Halley the Judicial Committee of the Privy Council held that facts which occurred abroad are not suable in England unless the same facts, if they occurred in England, would found an action there. The several United States have been more liberal. Generally they have enforced such “foreign-created rights” even when the same facts occurring within their own borders would have created no rights there, unless to do so shocked their moral sensibilities or seemed counter to some strong

107 "The most defendant can say is, that the state court made a mistaken application of doctrines of the conflict of laws. . . . But that, being purely a question of local common law, is a matter with which this Court is not concerned." Brandeis, J., in Kryger v. Wilson, (1916) 242 U. S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229.


109 It is not intended here to censure the Court for having changed its position. Congress not having legislated, perhaps the Court had to, from sheer necessity of “some accommodation of conflicting interests” of parties claiming rights under the laws of different states, both apparently applicable to the situation (the quotation is from Mr. Justice Stone’s opinion in Alaska Packers Ass’n v. Ind. Com., (1935) 294 U. S. 532, 55 Sup. Ct. 518; cf. ante, note 108.) Yet it is not clear why the Court could not have left each state free in this regard until Congress should choose to act. Congress might thereby have been stimulated. Whether such legislation would have been advantageous in advance of any judicial development of the subject may be open to question; cf. post, notes 131-136, 144, and text.

110 Has the Conflict of Laws Become a Branch of Constitutional Law, (1931) 15 MINNESOTA LAW REVIEW 161, 178; cf. Ibid., at pp. 180, 181, and notes 90-94.

local public policy or "injurious" to their own citizens.\textsuperscript{112} Commonly they have supposed that they are the final judges of their own policy in this respect and that they enforce any "foreign rights" only by "comity" and not under constitutional obligation.\textsuperscript{113} When a court is considering foreign facts, it is one thing for it to say: "We will not award recovery, although by the foreign law of the place where the facts happened they would constitute a cause of action;" it is quite another thing to say: "We will award recovery though by the lex loci these facts do not constitute any cause of action at all." In general an American state may take the former position, but not the latter one. The distinction has been emphasized and reiterated by the United States Supreme Court, and, it is submitted, is both rational and ethical. By refusing recovery the court leaves the parties where it found them, and its judgment may be regarded in other states "as not on the merits, but rather as in the nature of a non-suit, leaving the plaintiff free to pursue the defendant again in any jurisdiction that may entertain the action and be willing to enforce the claim."\textsuperscript{114} But if the court gives judgment for the plaintiff, it has not left the antecedent situation undisturbed; it has now subjected the defendant to "irremediable liability," and "this may not be done."\textsuperscript{115} This judgment may be collected in the state that rendered it; otherwise, it constitutes in itself a new cause of action which under the "full faith


\textsuperscript{113}It has been urged that the word "comity" has no proper place in discussion of the conflict of laws. Generally speaking it is proper to say that any "comity" involved is that of the state (or country), rather than of the court. Without prejudice to the controversy, the word is used here—as the text shows—merely as an antonym for "constitutional obligation."

\textsuperscript{114}(1931) 15 MINNESOTA LAW REVIEW 161, 162, 163 and note 10.

and credit” clause every other state (including the state where the facts took place) must honor and enforce.

To speak of a case as involving either “foreign” or “domestic” facts is indeed to cast the problem in far too simple terms. As already noted, it may involve operative facts partly domestic and partly foreign, and perhaps concerning more than one foreign jurisdiction. But however mixed and miscellaneous in geographic incidence, in general it is believed one of the United States may decline to give effect to the facts as a cause of action by treating them as though they were all domestic facts and so applying to them its own domestic rules of law—for that purpose the forum may evaluate its public policy for itself; but if the state gives judgment for the plaintiff by applying its own domestic rules in derogation of the law of all or some of the other states or countries whose law might be thought relevant to the total situation, the United States Supreme Court will consider whether the forum had sufficient “governmental interest” in the situation, or sufficiently vital connection with the operative facts, to justify its “choice of law.” For this purpose the “public policy” of the state is subject to indubitable constitutional constraint. But the Court as yet has worked out no standards in terms permitting much concrete prediction. It is cautiously feeling its way. In the case of Broderick

116See ante, note 105, and text thereto.

117The phrase is Mr. Justice Stone’s in Alaska Packers Ass’n v. Ind. Com., (1935) 55 Sup. Ct. 518. The italics are the present writer’s.

118In Bradford Elect. Co. v. Clapper, (1932) 286 U. S. 145, 52 Sup Ct. 571, 76 L. Ed. 1026, New Hampshire was held incompetent to award workmen’s compensation according to its own law in conflict with the statute of Vermont, deemed by the United States Supreme Court to be the properly applicable law, and in Home Ins. Co. v. Dick, Texas was disabled from applying its own law against the law of Mexico, (1930) 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926. But in Alaska Packers Ass’n v. Ind. Com. (1935) 55 Sup. Ct. 518, California was permitted to apply its own workmen’s compensation statute, regardless of the Alaska statute also relevant to the situation, and in that case Mr. Justice Stone (pro Curia) said:

“Prima facie every state is entitled to enforce in its own courts its own statutes. . . . One who challenges that right because of the conflicting statute of another state assumes the burden of showing that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows . . . that the statute of a state may sometimes override the conflicting statute of another state both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home.” Here, California’s “interest is sufficient to justify its legislation. . . . No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts.” (The italics are mine.) In Young v. Masci, (1933) 289 U. S. 253, 53 Sup. Ct. 599, 77 L. Ed. 1158, New Jersey was allowed to apply its own law regardless of the law of New York, but in Yarborough v. Yarborough, (1933) 290 U. S. 202, 54 Sup. Ct. 181, 78 L. Ed. 269, South Carolina was declared incompetent to impose liability according to its own law in the teeth of the law of
v. Rosner the New York receiver (and "statutory successor") of an insolvent New York State bank brought action in a New Jersey court against stockholders of the bank there resident, for their double liability under the New York statutes. A New Jersey statute decreed:

"No action shall be maintained in . . . this state against any stockholder . . . of any domestic or foreign corporation . . . to enforce any statutory personal liability of such stockholder, . . . if such . . . liability . . . arise from the statutes or laws of any other State or foreign country;"

except under restrictions which the United States Supreme Court deemed prohibitive and hence arbitrary and unreasonable. Obeying their own statute the New Jersey court refused recovery; but the United States Supreme Court reversed the decision, which it held denied full faith and credit to the law of New York. This decision required New Jersey to award recovery against its own citizens on New York facts because by the New York law they constituted a cause of action, and thus appears to impeach the distinction we have been discussing. But it may be noted that the liability here was contractual—at least, "voluntarily assumed" by the defendants; New Jersey law of course recognizes the general principle of the enforcibility of contracts, and this particular and limited exception (refusing to enforce this narrow class of foreign contracts) apparently "shocked the moral sense" of the United States Supreme Court. If the insolvent bank had been a New Jersey bank, the stockholders in all probability would have been liable by New Jersey law. In other words, the same facts occurring in New Jersey would have constituted a cause of action there. But suppose the whole principle of stockholders' double liability were repugnant to New Jersey law and policy: Does the Supreme Court mean to say that New Jersey would have to enforce a foreign liability of stockholders that it would not enforce against stockholders of its own banks? Suppose one of the United States by statute should enact the rule of The Halley: that no action should be maintained in its courts on any foreign facts which if they had occurred.


See ante, note 111.
within the state would not constitute a domestic cause of action—suppose one of the United States should re-enact the medieval rule and forbid its courts to litigate foreign facts at all—would either such statute be unconstitutional? It is submitted the case of Broderick v. Rosner goes no further than to hold that a state may not deny recovery on foreign facts when its own domestic law would award recovery on parallel facts occurring within its own borders. The case does not purport to overrule the many cases that have stressed the general distinction between awarding and denying recovery on foreign facts,—explicitly recognized also in some of the court’s most recent pronouncements.121

But ought the dis-

121 Mr. Justice Brandeis’s opinion (pro curia) in Broderick v. Rosner, (1935) 294 U. S. 629, 55 Sup. Ct. 589, seems far from clear.

“The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the federal constitution.” True, the “full faith and credit” section “does not require enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes. But the room left for the play of conflicting policies is a narrow one. One state need not enforce the penal laws of another. A state may adopt such system of courts and form(s) of remedies as it sees fit. But it may not, under guise of merely affecting the remedy, deny enforcement of claims otherwise within [the full faith and credit obligation] when its courts have general jurisdiction of the subject matter and the parties. For the states of the Union, the constitutional limitations imposed by [the ‘full faith and credit’ section] abolished in large measure the general principle of international law by which local policy is permitted to dominate rules of comity. Here . . . the liability is contractual. . . . Obviously, recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape performance of a voluntarily assumed obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders.” (The italics are mine.) Mr. Justice Cardozo dissented. Cf. the orotund but hopelessly vague divagations of Chief Justice White in Bond v. Hume, (1917) 243 U. S. 15, 21-22, 37 Sup. Ct. 366, 61 L. Ed 565:

“The right to enforce a foreign contract in another foreign country could alone rest upon . . . comity. . . . An independent state . . . will not . . . enforce a contract founded upon a foreign law where to do so would . . . violate the public policy of the state where the enforcement . . . is sought . . . These principles apply with greater force to the relation of the several states to each other, since the obligations of the constitution . . . impose . . . restrictions which otherwise would not obtain and exact a greater degree of respect for each other than otherwise by . . . comity would be expected. . . . Was there any local public policy in . . . Texas which, consistently with the duty of . . . that state under the constitution to give effect to a contract validly made in another state, was sufficient to warrant a refusal by . . . that state to discharge such duty? . . . We must not be understood as expressing any opinion . . . whether, consistently with . . . constitutional obligations . . . Texas, under guise of . . . public policy . . . could rightly refuse to enforce a contract validly made in another state; or at all events, whether . . . such a contract would not in the nature of things be enforceable in the appropriate courts of the United States:” (The italics are mine.) But cf. Brandeis, J. (pro Cur.) in Bradford Elect. Co. v. Clapper, (1932)
tinction to be maintained, between the several United States? Sup-

286 U. S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026, that the constitutional obligation:

"does not require enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy; or . . . fails to provide procedure appropriate to its determination; or . . . because . . . enforcement . . . would be obnoxious to the public policy of the forum; or . . . because the liability imposed is deemed . . . penal. . . . A state may on occasion decline to enforce a foreign cause of action. In so doing it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defence under the applicable law of another state subjects the defendant to irremediable liability. This may not be done." (The italics are mine.)


"to impose a greater obligation than that agreed upon and to seize property in payment . . . violates the guarantee" [of due process]. True, a state "is not bound to provide remedies and procedure to suit . . . individual litigants. . . . But the Texas statute purports to create rights and obligations. . . . Doubtless a state may prohibit the enjoyment . . . within its borders of rights acquired elsewhere which violate its laws or public policy, and under such circumstances it may refuse to aid in the enforcement of such rights. . . . We need not consider how far a state may go . . . in refusing . . . enforcement of rights acquired beyond its borders." (The italics are mine.)


"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction." Holmes, J. (pro Cur.), in Slater v. Mex. Nat'l Ry., (1904) 194 U. S. 120, 24 Sup. Ct. 381, 48 L. Ed. 900. (The italics are mine.) Cf. ante, note 91.
pose State X to have legalized gambling, outlaw in State Y. If action is brought initially in State Y to recover losses incurred at play in State X, State Y apparently may refuse recovery as contra bonos mores; but if action were brought first in State X and judgment there given for the plaintiff (as it would be), he then has a constitutional right to demand State Y's enforcement of that judgment. Has such a distinction between the constitutional obligation of a judgment and of the primary cause of action underlying it any sound basis? The rule as to judgments will no doubt be maintained, it represents the first and plainest intent of the constitutional provision. That being true, might not State Y properly be required also to enforce the primary cause of action? But as between the United States or any of them and foreign countries, according to *Hilton v. Guyot* American courts need not honor a foreign judgment; wherefore they need not be required to enforce the foreign primary cause of action.

The "full faith and credit" section apparently goes no further than to require state Y in a proper case to give effect to the statute law of state X, as distinguished from its "common" law; but it has been discovered that the "due process" clause inhibits state Y from giving judgment for the plaintiff on facts that ought to be controlled by some foreign law unless the proper foreign law would justify recovery,—and this is regardless of whether such "proper" foreign law be that of a foreign country or of another one of the United States, and apparently irrespective of whether the particular rule came to be the law of the foreign land by definite legislative enactment or by judicial development. It is believed any dis-

---

122 Cf. ante, note 92.
124 Even internationally, where the facts all have relation only to the one foreign country, X, need State Y feel morally outraged at being asked to enforce the claim, even though it would hold the same facts occurring at home illegal or immoral? Cf. *Veytia v. Alvarez*, (1926) 30 Ariz. 316, 247 Pac. 117. In such cases the argument that one of the United States ought not to refuse enforcement to any cause of action arising in another one of them as intolerably immoral has especial cogency (cf. ante, note 94). Yet where a citizen of the forum is affected or the facts have any other distinct relevance to it, the urge is strong to deny recovery by applying the forum's own standards of policy or morals. *Shannon v. Georgia Ass'n*, (1901) 78 Miss. 955, 30 So. 51; *Ertel Bieber Co. v. Rio Tinto Co.*, [1918] A. C. 260, 87 L. J. K. B. 531, 8 Br. Rul. Cas. 734.
125 For the "due process" clause has international as well as inter-state application; and it draws no distinction between foreign laws according to their genesis. *Home Ins. Co. v. Dick*, (1930) 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926, (ante, note 118). The Australian constitution contains
tinction, based on the "full faith and credit" provision, between foreign statute law and judge-made law has in view of the fourteenth amendment no longer any substantive importance; and, niceties of verbal constitutional exegesis aside, no good reason appears why the constitutional standing of a rule of law of State (or country) X before the courts of State Y should depend on how it came to be the law of X. If it is now the law of X, it would seem it ought to be equally obligatory (or non-obligatory) upon State Y.126

It will bear repeating that in all this the Supreme Court is legislating—developing a field of law that the constitution intended Congress to occupy, and that is inherently and entirely political. The common law distinguishes broadly between rights in rem and in personam, and it is currently held that if A, of State (or country) Y, owns real or personal property situated in State (or country) X, and according to the law of X his title becomes divested, the change of ownership should be given effect everywhere, including Y, although no judicial proceeding in State X has authenticated the transfer. The Supreme Court appears disposed to enforce this rule as a constitutional obligation (and regardless of whether the old or the new owner happens to be plaintiff in the litigation that ensues in Y or elsewhere),127 at least if the property was in X with A's consent and was at rest there and not simply in transit through X at the time it is alleged X's law operated to divest A's title.128 These limitations show that the doctrine itself

no "due process" clause; but its "full faith and credit" section is broader than ours. See ante, note 35. Cf. ante, Notes 107, 108, and the text to Notes 109, 110; and cf. Has the Conflict of Laws Become a Branch of Constitutional Law, (1931) 15 MINNESOTA LAW REVIEW 161, 169-172, 176-178.

126But the genesis of the foreign rule may still have "procedural" importance. Before the courts of State Y the question: What is the common law of State X? presents a different and often a considerably more difficult problem than the question: What is its statutory law? See (1931) 15 MINNESOTA LAW REVIEW 161, notes 43, 48, 55, 56, and pp. 176 (and note 71), 179-180. Cf. post, notes 145, 149, 150, and text thereto.

127Cf. ante, notes 111-121, and text thereto.

is no logical corollary of "sovereignty" based on "power," but is a rule of ethics and policy,—i.e., a matter of political adjustment.  On the basis of sheer "physical power," the property now being in State Y, that state is perfectly able to control the title as it chooses, by applying any sort of domestic or foreign law it may please. Any constitutional restraint is purely political, and was so envisaged by the draftsmen of the constitution.

In private law generally a good deal can be said for the proposition that it is well to develop a subject first judicially. Actual litigation presents situations and exposes difficulties that legislators framing statutes in advance would not think of nor adequately


So, Alaska Pckrs. Ass'n v. Ind. Com. (per Stone, J.) (U.S. 1935) 55 Sup. Ct. 578:

"The California statute does not purport to have any extraterritorial effect in the sense that it undertakes to impose a rule for foreign tribunals. . . . We assume that in Alaska the employee, had he chosen to do so, could have claimed the benefits of the Alaska statute, and that if any effect were there given to the California statute it would be only by comity or by virtue of [the full faith and credit section]. . . . Objections . . . founded upon the fourteenth amendment therefore must be directed, not to the existence of the power to impose liability . . . but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process. . . . [California] had a legitimate public interest in controlling and regulating this . . . relation. . . . It is unnecessary to consider what effect should be given to the California statute if the parties were domiciled in Alaska, or were their relation to California such as to give it a lesser interest in protecting the employee. . . . In the case of statutes, the extra-territorial effect of which Congress has not prescribed, where the policy of one state comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is . . . apparent. . . . The conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, . . . but by appraising the governmental interests of each jurisdiction."

(The italics are mine.)

Subject of course to the condition that its disposition might be practically effective only so long as the property remains within its physical control. During the World War, but before the United States entered it, the United States Supreme Court awarded the SS. Appam to her British owners in the teeth of an earlier German judgment condemning her as prize (1917) 243 U. S. 124, 37 Sup. Ct. 337, 61 L. Ed. 633; see Garner, Prize Law during the World War, secs. 68, 69, 173. Suppose the United States had not entered the war and the ship later had come into, e.g., a Swedish port and there the owners under the German prize sale had sued to recover her from the British owners to whom the United States Supreme Court had awarded her. Sweden then would manifestly award her to either claimant, or could confiscate her to the Swedish Government. Cf. Hughes v. Cornelius, (1682) 2 Show. 232, T. Raym. 473, 2 Smith, Leading Cases, 1st ed. 434; The Flad Oyen, (1799) 1 Ch. Rob. 135; The Helena, (1801) 4 Ch. Rob. 3; Simpson v. Fogo, (1862) 1 Hem. & M. 195; Castrique v. Imrie, (1860) 8 C. B. N. S. 405; Direction v. U. S. Steel Corp., (1925) 267 U. S. 22, 45 Sup. Ct. 207, 69 L. Ed. 495; Edgerly v. Bush, (1880) 81 N. Y. 199. See (1931) 15 MINNESOTA LAW REVIEW 161, 174.
provide for. After the courts have hammered a body of doctrine and distinctions out of a sufficient amount of case material, only then can the legislature profitably codify—and incidentally harmonize and clarify—the results. If the courts have taken an unfortunate position, subsequent legislation can overrule the cases. But here the Supreme Court is treating as self-executing a constitutional provision which its framers did not intend should be self-executing. If the rules the Court is working out are to be taken as implicit directly in the constitution itself—and otherwise, by what right does the Court enounce them at all?—then, as suggested in the preceding article, how much play can it be thought will be left for (possibly badly needed) legislative revision thereof? The fact that both the "full faith and credit" section and the fourteenth amendment expressly authorize Congress to legislate for their implementing and completion will perhaps save the judicially developed rules from being deemed entirely sacrosanct; yet it is standards of "reasonableness" that the Court is endeavoring to erect,—than which there is no other word so all-controlling and overpowering (nor more undefinable and "political") in all our constitutional law.

Assuming the authority of Congress, it may be suggested that it would better legislate only piece-meal for a time (as the Supreme Court has been doing) instead of attempting to formulate any code or comprehensive statement of the extra-territorial effect of state law. The general problem is perhaps the ultimate one—as it seems the most baffling—in the whole realm of "private international law." Some points seem ready for settlement, on which the Supreme Court as yet has not clearly spoken ex cathedra. The case of Haddock v. Haddock cries aloud for some uniform legislative determination of the inter-state effect of American divorces. Yet, legislation absente, what effect can the Supreme Court give to the constitutional provision except an assumed "automatic" effect,—i.e., an effect deemed to flow necessarily from the bare statement in the constitution, and thereby inevitably paramount to any act of Congress?


"In the case of statutes, the extra-territorial effect of which Congress has not prescribed, the necessity of some accommodation is apparent. Conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, but by appraising the governmental interests of each jurisdiction." (The italics are mine.)

Yet, legislation absente, what effect can the Supreme Court give to the constitutional provision except an assumed "automatic" effect,—i.e., an effect deemed to flow necessarily from the bare statement in the constitution, and thereby inevitably paramount to any act of Congress?

132See Corwin, (1934) The Twilight of the Supreme Court; Plessy v Ferguson, (1896) 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

133(1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867. Probably a better solution of this particular point would be by direct constitutional amendment to federalize the whole regulation of marriage and divorce; cf.
it is never all the relevant law of State X that is held applicable to litigation in State Y, but only its "substantive" law; the "procedural" law of State Y is always to control the course of litigation in its courts. But the line of discrimination runs in great confusion. The English courts have held that the whole question of what relief a plaintiff is entitled to is for the "law of the forum." The law of the foreign land where the facts occurred should determine whether plaintiff has any case at all; if it says he has, then the forum by its own law should decide what relief he should obtain. American courts on the whole have controlled the measure of recovery by the foreign law when that law was statutory (e.g., a Lord Campbell's act); but it has been held that the "common law" measure of damages for acts wrongful at common law is matter of "procedure." The general statutes of limitation are often held "procedural;" but special limitations specially annexed to statutory causes of action, and a title to property vested by adverse possession under statute of limitations, have been held "substantive." What sound basis of ethics or policy have such distinctions?

In this connection it is interesting to note that no British legislation has been found that formulates any standards for the application of foreign law by the courts of England, or requires the English courts ever to apply foreign law at all. In practice the English courts of course have applied foreign law to foreign facts, and their criteria seem as confused and obscure as ours.

The the constitution of Canada (British North America Act 1867-30 & 31 Vict., ch. 3): VI. 91 (26), 92 (12). The constitution of Australia (63 Vict., ch. 12, sec. 51) empowers the commonwealth (national) parliament to "make laws... with respect to:

"(xxix.) Marriage:

"(xxx.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

The classic case is Machado v. Fontes, [1897] 2 Q. B. 231, 66 L. J. Q. B. 542. The statement is to be understood in connection with the rule of The Halley, (1868) L. R. 2 P. C. 193, 37 L. J. Adm. 33, by which no relief will be awarded in England on foreign facts unless it is awardable by application of the domestic rules of English law.


"We may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." Holmes, J. (pro Cur.) in Slater v. Mex. Nat'l Ry., (1904) 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.

Liverpool & G. W. S. Co. v. Phenix Ins. Co., (1889) 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; In re Missouri SS. Co., (1889) 42 Ch. D. 321, 58 L. J. Ch. 721. In those cases the United States Supreme Court and
British statutes, however, taken in connection with the rule of *The Halley*, do recognize a certain distinction between "primary" foreign facts, and foreign judgments. According to *The Halley*, foreign facts not embodied in a judgment are not actionable unless they are actionable under the domestic rules of English law; but it seems a foreign judgment may be enforced in England though based on foreign facts that would not have constituted an English cause of action,—although even a foreign judgment is not registrable in England if founded on a cause of action deemed distinctly immoral or counter to English "public policy."

For the enforcement of foreign judgments these statutes thus lay down virtually the rule the several United States have habitually applied to "primary" foreign causes of action.

Confronted with foreign judgments arrived at by refusing to

the English court of appeal both professed to adopt the rule that a contract should be governed by the law which the parties intended should control it. But to the American court it seemed clear that the parties intended American law to govern their relations; while the English court on substantially parallel facts felt as sure the parties had English law in view. The joke is that the English court delayed its decision to await the opinion of the United States Supreme Court, and then congratulated itself on finding itself "in entire accordance with the law laid down in the American courts."

"It is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of America. It is very desirable . . . that the law relating to the interchange of comity between nations should be the same." Per Fry, L. J.

Cf. *The Kensington*, (1902) 183 U.S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, where the United States Supreme Court not only declared the parties intended their contract to be controlled by the law of New York although the contract stated the contrary, but also (impliedly), that they intended it to be governed by the law of New York as expounded in the federal courts, contrary to the rule applied by the courts of the state of New York! The same remarkable proposition is implicit in *Liverpool v. Phenix Ins. Co.*, (1889) 129 U.S. 397, 9 Sup. Ct. 469, 32 L. Ed. 988. In *Hannay v. Guaranty Trust Co.*, (C.C. N.Y. 1911) 187 Fed. 686 the circuit court of appeals held that the rights of the parties should be controlled by English law, reversing the United States district court. Later the English court of appeal held the legal results of the same facts (not parallel facts, but the same facts, between the same parties) depended on American law; but the United States district court had decided on a misapprehension of what the rule of American law really was—the noble Lords knew it better. *Guaranty Trust Co. v. Hannay*, (1918) L. J. 87 K. B. 1223, 9 Br. Rul. Cas. 260. Cf. *Thompson Co. v. Palmer*, (1893) 52 Minn. 174, 53 N. W. 1137 (per Mitchell, J.).

See ante, note 111.

In *MacFarlane v. Macartney*, [1921] 1 Ch. 522, 50 L. J. Ch. 314, it was doubted whether a foreign judgment was enforceable in England if based on facts not a cause of action according to English law (*The Halley*, (1868) L. R. 2 P. C. 193, 37 L. J. Adm. 33, 18 L. T. 379.) Ought a state (or country) to enforce a foreign judgment based on a cause of action that it would not enforce immediately? But ought it to refuse to enforce a purely foreign cause of action on grounds of its own local policy or moral standards? See ante, notes 92, 124, and text thereto, and post, note 143.

See ante, note 112, and text thereto.
apply—or by misapplying—the law of England to states of fact that the English judges have thought that law ought to control, the English courts have vacillated. In *Simpson v. Fogo* the English court of chancery refused to give effect to a Louisiana judgment which the chancellor deemed "perverse" and "in wilful disregard" of the law of England and of the comity of nations. Soon afterwards the House of Lords held, that "without expressing any opinion . . . as to what might be done in the case of a court wilfully determining that it will not, according to the usual comity, recognize the law of other nations when clearly and plainly put before it, [yet when] the whole of the facts appear to have been inquired into by [the foreign court] judicially, honestly, and with the intention to arrive at the right conclusion," the foreign judgment must be held conclusive in England, though it had misapprehended the pertinent English law. As between independent countries it is submitted neither type of foreign judgment ought to have conclusive effect, except, perhaps, judgments in rem, or, as against the party who was plaintiff in the foreign action. He "chose his own forum," and it may be urged he should abide the result. The recent English statutes would seem to prevent enforcement of such foreign judgments in England, whether the foreign court "wilfully disregarded" or merely "misapprehended" the applicable English law. Under the Statute of Westminster 1931 the self-governing British Dominions have "full power to make laws having extra-territorial operation;" but that is all. What that "extra-territorial operation" shall be—what effect any legislation by the United Kingdom or a Dominion shall have before the courts of any other member of the "British Commonwealth of Nations"—is not stated.

---

140(1862) 1 Hem. & M. 195. The Louisiana judgment had not been taken on default; see ante, note 93.
141Castrique v. Imrie, (1861) 8 C. B. N. S. 405; (1870) L. R. 4 H. I. 414, 39 L. J. C. P. 350. The quotation in the text is from the opinion of Lord Chancellor Hatherly, who had decided Simpson v. Fogo, (1863) 1 Hem. & M. 195, 32 L. J. Ch. 249. In Lloyd v. Matthews, (1894) 155 U. S. 222, 15 Sup. Ct. 70, 39 L. Ed. 128, the United States Supreme Court held that a state court's misconstruction of the pertinent law of another state presented no federal question; but the present authority of that case is believed questionable. See (1931) 15 MINNESOTA LAW REVIEW 161, 168, 169, 179-80. Cf. Godard v. Gray, (1870) L. R. 6 Q. B. 139, 40 L. J. Q. B. 62.
143See ante, notes 77, 78, 79, 87, 88. But between states of the same federal country it is submitted the Australian system is better. See ante, pp. 157, 158, 165, and notes 35, 37, 39, 73, 125, 138.
14422 & 23 Geo. V., ch. 4, sec. 3.
A final question remains: Granting State Y's duty (in a "proper" case) to apply the law of state or country X—how shall the State Y court ascertain what the relevant rule of X's law is? Foreign law is treated as part of the "facts" of the instant case, and traditionally all the "facts" must be duly pleaded, and then proved by viva voce testimony of witnesses in open court. That means that the Minnesota court could learn what the law of—e.g., Wisconsin—is only from the testimony of some Wisconsin lawyer qualified as an "expert." But the pleadings and any dearth of testimony may be pieced out by "presumptions;" under the Act of Congress the statutes and other records of other states may be presented directly to the court of the forum by authenticated copies; and state statutes often permit the published reports as well as statute books of other states to be put in evidence. The Minnesota case of Chubbuck v. Holloway is a delicious example of the results achievable under this system. A Wisconsin statute duly pleaded to the Minnesota court seemed to mean that the right of action survived the death of the tort-feasor; and so held ac-

146Goodrich, Conflict of Laws, sec. 83. The first presumption was that the foreign rule is the same as the domestic one. But where the rule of the forum is statutory, its court cannot "presume" that the foreign jurisdiction has the same statute; hence the presumption becomes—more precariously—that the actual foreign rule is the same as the forum's common law rule, what the forum's rule would be but for the statute. Any such presumption of similarity can fairly be entertained only between common law jurisdictions. Cuba Ry. v. Crosby, (1912) 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274; Male v. Roberts, (1790) 3 Esp. 163. Courts have held that "the common law" is the same everywhere and the judges now here presiding know what it is; if the courts of a foreign state have held differently, they are just mistaken. St. Nicholas Bank v. State Nat'l Bank, (1891) 128 N. Y. 26 27 N. E. 849; Dorr v. Des Moines, (1905) 127 Iowa 153, 98 N. W. 918, 102 N. W. 836. Sed cf. Forepaugh v. Delaware Co., (1889) 128 Pa. St. 217, 18 Atl. 503. In truth (statutes aside), if the rule has not been formulated in the foreign jurisdiction, the forum can only "presume" that if enounced it would be the same as the rule the forum's courts would lay down on parallel domestic facts. But "the common law" is "not a brooding omnipresence in the sky;" "the law" is simply "a statement of the circumstances under which the public force will be brought to bear upon men through the courts." Holmes, J. (pro Cur.) in American Banana Co. v. United Fruit Co., (1909) 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826. Cf. ante, note 126 and post, note 150.


148Mason's 1927 Minn. Stat., secs. 9855-56; and cf. secs. 9851-52.
cordingly, by the Minnesota supreme court. But on re-hearing it appeared that in a certain case the Wisconsin supreme court had held that the pleaded statute did not have that effect, though it also appeared that by another Wisconsin statute—which the plaintiff, however, had neglected formally to plead—the right of action really did survive. Whereupon the Minnesota supreme court reversed its former disposition of the case and held that since the action did not survive by virtue of the only Wisconsin statute of whose existence it could be officially aware, therefore the plaintiff had failed to present a case.\textsuperscript{146}

The federal courts "take judicial notice" of the law of all the states; and some states have authorized or required their courts to do the same.\textsuperscript{149} It is suggested that any such practice had better be optional rather than mandatory; certainly, if it be extended to the law of foreign countries. With law school training and practical experience in one's own system of law, it is no easy matter to delve hurriedly into a foreign system and be at all sure of one's ground; but it would seem an American judge might well enough determine the law of any of the United States in the same way that he determines the law of his own state—which is "judicial notice." The bottom difficulty is that his determination of the law of his own state is a very different thing from his conclusion as to the foreign law. The rule he enounces is the law of his own state (for that case at least) by his very utterance of it as such; but his statement of any foreign law is after all only his opinion.\textsuperscript{150} It seems likely that Congress could authorize our state courts to take judicial notice of the laws of other states. Under the "full faith

\textsuperscript{148}(1931) 182 Minn. 225, 234 N. W. 314, 868.  
\textsuperscript{150}On appeal from a state supreme court the United States Supreme Court " judicially knows" only the law so known to the particular state court. Hanley v. Donoghue, (1885) 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535.  
"FULL FAITH AND CREDIT"

and credit" section Congress may "prescribe the effect" which "the public acts, records and judicial proceedings" of one state shall have in another; and the word "records" might be held to include the published reports. Undoubtedly in every case the question of the purport of the foreign law should be for the judge alone and not a jury question.

A glance back at the original act of Connecticut Colony shows that it contemplated that the courts of Connecticut might properly "advise with" the court of the "neighboring Colonye" where the earlier judgment had been rendered. Chancery at discretion will submit all or some selected issues of a pending case for trial before a jury. Extending this practice modern British legislation provides that when in any case it becomes needful to know foreign law the English court may "direct a case to be prepared, setting forth the facts," and may "remit the same to any superior court in" the foreign jurisdiction "for opinion on such law." Such foreign court may consider the postulated facts "either with or without hearing the parties;" and on receiving the foreign court's conclusions the English court may either "take the opinion as law of the case" or may submit it to the (English) jury "as evidence, or as conclusive evidence, as the court may think fit," of the foreign law therein stated. The original Act of Parliament applied only where the "foreign" jurisdiction was within the British Empire; but the next session of Parliament authorized extension of the procedure to foreign countries by treaty and required the courts of England to give reciprocal opinions on reference from the courts of such foreign countries; also, that if the English court is not satisfied that the opinion it has obtained correctly represents the applicable foreign law it may resubmit the facts, with or without amendment, to another court in the foreign land, "and so from time to time as may be necessary or expedient."

See (1931) 15 MINNESOTA LAW REVIEW 161, 168-69, 179-80; and note 55.


See ante, note 10.


24 & 25 Vict., ch. 11. These statutes are optional; the traditional methods of proving foreign law seem still available in England. 14 & 15 Vict., ch. 99, sec. 7, provides for proof by authenticated copies of all "proclamations, treaties and other acts of state of any foreign state or any British
may act sua sponte; any responsibility for pleading the foreign law or making proof of it seems lifted from the shoulders of counsel. This device has at least one important advantage over "taking judicial notice" of foreign law. As already noted, any statement of the law of State X by the court of State Y can be only the opinion of the State Y judges; but a response given by the Court of State X itself on such reference from State Y could well be deemed a precedent in State X within the principle stare decisis.\textsuperscript{158} With this procedure available, or by taking judicial notice of foreign law, a court could avoid such a judicial contretemps as Chubbuck \textit{v.} Holloway.\textsuperscript{157} Highly desirable as this method of reference is, it seems doubtful whether Congress could authorize our state courts to use it. The "full faith and credit" clause does not purport to enable Congress to regulate the proof of "the law" of State X for the courts of State Y; apparently it contemplates authenticating only definite legislative, administrative or judicial acts of State X, already performed—although Congress is empowered to "prescribe the effect" which the law (statutory or judicially developed) of State X shall have in litigation in State Y.\textsuperscript{158} But each and any one of the United States could—and it is submitted should—adopt this English procedure for itself.

colony, and all judgments, decrees, orders and other judicial proceedings of any court of justice in any foreign state or . . . British colony, and all affidavits, pleadings and other legal documents;" and 7 Edw. VII., ch. 16, provides that copies of colonial and dominion statutes which purport to be officially printed may be received in evidence in Great Britain "without any proof being given that the copies were so printed." And viva voce testimony of foreign lawyers seems still to be received in the English courts. Concha \textit{v.} Murieta, (1889) 40 Ch. D. 543, 60 L. T. 798; Kaufman \textit{v.} Gerson, [1904] 1 K. B. 591, 73 L. J. K. B. 320, 4 Br. Rul. Cas. 414; Guaranty Tr. Co. \textit{v.} Hannay, [1918] 2 K. B. 623, 87 L. J. K. B. 1223, 9 Br. Rul. Cas. 260; MacFarlane \textit{v.} Macartney, [1921] 1 Ch. 522, 90 L. J. Ch. 314. This is as it should be. See ante, note 150.

\textsuperscript{156} Involving actual litigation, it would not be subject to the reproach of being a merely "advisory" opinion on a "moot" case. It could not even be deprecated as only "declaratory," unless the State Y litigation for which it was given were an action to obtain only a declaratory judgment. See ante, note 150, and text thereto.

\textsuperscript{157} See ante, note 148.

\textsuperscript{158} I.e., in connection with the fourteenth amendment. See ante, notes 109, 110, 125, 126, 151, and the text thereto.