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Full Faith and Credit--The Lawyer's Clause

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The necessity for revising federal legislation under the full faith and credit clause was enacted in 1804—143 years ago. This lack of attention was commented upon recently by Mr. Justice Jackson.

"This clause is relatively neglected in legal literature. It did not have the advantage of early and luminous exposition by Marshall. No scholar has thought it worthy of a book. Text writers have usually noticed it only as a subsidiary consideration in the law of conflicts or as a phase of constitutional law too obvious to require much exploration. Changing conditions of a century and a half have brought forth no new legislative implementation. The practicing lawyers often neglect to raise questions under it, and judges not infrequently decide cases to which it would apply without mention of it."

This lament is fully justified, when we review the recorded history of this clause, the few opinions written under its analogous predecessor in the Articles of the Confederation, and the scant discussion of full faith and credit problems in our federal Congress. The purpose of this, the first in a series of papers to be published concerning the full faith and credit clause, is to show how the scant deliberation given this ques-

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1 U. S. Const. Art. IV Sec. 1.

2 Jackson, Full Faith and Credit: The Lawyer’s Clause of the Constitution (1945) 45 Col. L. Rev. 1.

3 The series has these tentative chapter titles:

II. State Legislation Concerning Full Faith and Credit.

III. The Checks and Balances Imposed Upon the Lawyers’ Clause By Other Constitutional Provisions.

IV Due Process In Particular and Full Faith and Credit: Herem of Jurisdiction, Service of Process, The Doctrine
tion by our statesmen has created some very apparent problems, has required supplementary state legislation, and that the time is ripe for a thorough federal and state overhauling of our statutes on this topic. Our courts need more decisive standards than are now in force. While the historical approach here presented may seem at times to be too detailed and laborious, it is here that we find the foundation for many of the present-day puzzling and inconsistent decisions.

This is not a recent problem, it existed before we became a nation. It was considered by the colonists prior to the adoption of the Articles of Confederation, when the American Colonies owed allegiance to the Crown of England. Until that time there existed no specific legal rights or duties among the

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The writer wishes to acknowledge his great indebtedness to Hessel E. Yntema, Professor of Law, University of Michigan Law School, and to Lewis M. Simes, Floyd R. Mechem University Professor of Law, University of Michigan Law School, for their cooperation and aid in undertaking and continuing this study, which is made as a partial fulfillment of the requirements for the LL.M. and S.J.D. degrees at the University of Michigan Law School. Errors and omissions are solely my liability.

It is not proper to conclude that legislation alone will solve all the full faith and credit problems. Certainly it can remedy some of the more apparent defects which are pointed out in this paper.

Previous discussions of the historical development of the full faith and credit clause, listed in chronological order, and which from necessity, the writer has to duplicate to a certain extent, are: Costigan, The History of the Adoption of Section I of Article IV of the United States Constitution and A Consideration of the Effect on Judgments of that Section and of Federal Legislation (1904) 4 Col. L. Rev. 470; Cook, The Powers of Congress Under the Full Faith and Credit Clause (1918) 28 Yale L. J. 421; Yntema, The Enforcement of Foreign Judgments in Anglo-American Law (1933) 33 Mich. L. Rev. 1120; Ross, Full Faith and Credit in a Federal System (1938) 20 Minn. L. Rev. 140; Radin, The Authenticated Full Faith and Credit Clause: Its History (1944) 39 Ill. L. Rev. 1.
American colonies aside from those imposed as a part of the colonial policy of the motherland and by International Law. Because of this independence, each from the other, a colony could consider the acts of another colony as the acts of a foreign government. Nevertheless each had similar economic and political interests. One such interest was the protection of their own creditors. To aid their respective residents to collect from absconding debtors, most of them passed foreign attachment acts. And that despite their hatred for the English, foreign attachment acts which prevented a goodly number of these same colonists from leaving England with unpaid for goods and unreturned borrowed funds. Also the Colonists were not averse to opening their courts to non-resident creditors who were seeking judicial aid in collecting their just dues from a resident debtor. A citizen of South Carolina could bring suit against a Delaware resident in the courts of the latter. The only requirement was that the non-resident plaintiff “give Security for the Costs and Charges that may accrue by such Writ or Action, which said security shall be by a substantial inhabitant of that County where such action is commenced.” This requirement has a modern counterpart in our present-day codes, familiarly known as “posting a non-resident cost bond.”

English creditors could use the colonial courts. If D, a

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6From “An Act obliging all non-residenters within this Government to give Security to the Prothonotaries of these Counties, before any Writ can issue from their said Offices for the Payment of the Costs.” Laws of the Government of New Castle, Kent and Sussex Upon Delaware. Published by order of the Assembly. Printed and Sold by B. Franklin at the New Printing-Office, in Market Street, MDCCXLI.

The second paragraph of the act of the Province of Maryland, op. cit. fn. 14, makes a similar requirement of non-resident plaintiffs.

7Mich. Stat. Ann., sec. 27.738, Vol. 20, p. 663: “On motion of the defendant, all plaintiffs who are non-residents of the State of Michigan may be required to furnish sufficient surety or sureties, to be approved by the clerk of the court, and who shall justify in double the amount of security ordered, for all such costs as may be awarded to the defendant, and such sureties shall be liable for all costs awarded either in the court of original jurisdiction, or in any appellate court.”

Kentucky makes no distinction between non-resident and resident plaintiffs: “Each circuit clerk shall, when each original action commencing with original process in his respective court is filed, collect five dollars and apply it as a credit on the clerk’s fees accruing in the action.” Kentucky Rev Stats., 1946, sec. 64.030, p. 428.
resident of Massachusetts, was indebted to P, a resident of England, P could file suit in the courts of Massachusetts. However, had P found D in England so that personal service of summons could have been had on D, and P received a judgment in an English court of record, that judgment would not necessarily be the basis of P’s action in Massachusetts against D, assuming D had left England without satisfying the judgment. I have found no English statutes requiring the colonial courts to enforce judgments obtained in English courts against American Colonists. In fact, P would probably find that his valid English judgment of record would be treated in the colonial courts as though it were the judgment of a court of a totally foreign government, and not that of a court of the mother country.

A similar situation existed if P had originally obtained a judgment in South Carolina against D, a resident of South Carolina. Assume D left for Massachusetts without paying the South Carolina judgment. P would have his judgment treated by the courts of Massachusetts as though it were the judgment of a court of a foreign country and not the judgment of a

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8 None is listed in the “Chronological Table and Index of the Statutes, Thirty-Third Edition. To the End of the Session 7 & 8 Geo. 5 (1917-8).” The Chronological table was checked from 1500 to 1790.

9 With one exception—a relaxed method of proving plaintiff’s case-in-chief, as provided for by Stat. 5 Geo. II (1731-3), C. 7. “An Act for the more easy recovery of debts in his Majesty’s plantations and colonies in America:” “in any action or suit to be brought in any court of law or equity in any of the said plantations, for or relating to any debt or account, wherein any person residing in Great Britain shall be a party, it shall and may be lawful to and for the plaintiff or defendant, and also to and for any witness to be examined or made use of in such action or suit, to verify or prove any matter or thing by affidavit or affidavits in writing upon oath made before any mayor or other chief magistrate of the city, borough or town corporate in Great Britain, and every affidavit or affirmation so made, certified, and transmitted, shall in all such actions and suits be allowed to be of the same force and effect, as if the person or persons making the same upon oath or solemn affirmation as aforesaid, had appeared and sworn or affirmed the matters contained in such affidavit or affirmation viva voce in open court, or upon a commission issued for the examination of witnesses, or of any party in such action or suit respectively;”

It appears that cross-examination is not necessary; thus differs from the usual form of interrogatories propounded to an adverse party and to be answered in writing under oath. Nor is it a deposition as we now know it. The third section of the act provides the one safeguard: false swearing amounts to willful and corrupt perjury.
court of a sister colony. Likewise there were no English statutes requiring that the courts of the colonies of England in the Americas enforce the judgments of another colonial court.\textsuperscript{10}

Of the thirteen colonies, at least three\textsuperscript{11} felt that they should not serve as sanctuaries for fleeing colonial judgment debtors. Connecticut, Maryland and Massachusetts Bay expanded their common law action of debt on a domestic judgment to include the judgments of courts of certain other jurisdictions.

Connecticut was the first colony so to legislate. Prior to 1650, it enacted

"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 party, until better evidence or other just cause appear to alter or make the same void: And that in such case the issuing of the cause in question be resipted 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 sue within some of the confederated colonies; and where the verdicts in the courts of this colony may receive reciprocal respect by a like order established by the general course of that colonye."\textsuperscript{12}

\textsuperscript{10} The provincial courts were bound by the findings of a provincial admiralty court. See, 9 Pickering Stat. at L., pp. 428-9, setting forth 8 Wm. III, C. XXII, "An act for preventing frauds, and regulating abuses in the plantation trade." Sec. II of that act provided that all bottoms used for import-export trade in the colonies be of English or Irish construction; if not, there may be "condemnation thereof in one of the courts of admiralty in England, Ireland, or the said colonies or plantations." However, except for the specific cause of action created by the use of other than English or Irish built ships, that this effect ordinarily was given to the decisions of admiralty courts was well known to the colonial lawyers, even without this statute. See Jenkins v Putnam, op. cit., note 21.

\textsuperscript{11} Professor Max Radin, 39 Ill. L. Rev 1, p. 18, states: "Story says that there were several such statutes (citing 2 Story, Commentaries on the Constitution of the United States, 5th ed., 1891, M. M. Bigelow, edit. sec. 1307, p. 188) I have been able to find only that of Massachusetts."

Story simply cited the case of Bissel v Briggs, 9 Mass. 461, 6 Am. Dec. 88 (1813) which referred to the Massachusetts Bay Act of 14 Geo. III, Ch. II, hereinafter discussed in this paper. Costigan, supra, note 1 and Mr. Justice Gray in Hilton v Guyot, 159 U. S. 113, 181 (1895), likewise make the same statement as did Story.

\textsuperscript{12} Connecticut, Acts and Laws, 1650. This appears to be a codification of the Acts. The effective date of this particular statute is not stated.
An examination of this Connecticut statute presents many requirements which are reiterated in decisions under the wording of the full faith and credit clause of our present Constitution. The statute limited the enforcement of judgments to those of "any court within the colonies"—the full faith and credit clause is limited to the enforcement of the "public acts, records and judicial proceedings of every other state", those of foreign countries are clearly excluded. Modern day decisions, attempting to distinguish between "prima facie" and "conclusive" effect of judgments are modern restatements of the Connecticut statute's "a verdict is good evidence until better evidence or other just cause appear to alter or make the same void." Moreover, Connecticut demanded reciprocity it permitted the verdict of the courts of the other colonies to be good evidence provided that the colony whose verdict was presented would consider the verdict of a Connecticut court to be good evidence. Such reciprocity is still required by some state statutes. Note also the requirement that the verdict be "presented under authentique testimony", in later federal and state statutes, much is made of the "authentication" of the records of other states.

June 3rd, 1715, the Province of Maryland passed the following:

PA. STAT. ANN., (PURDON) Title 42, Sec. 311, p. 66; "Justices of the Peace of this state have jurisdiction in actions of debt, on demands not exceeding $100., founded on judgment or judgments of any justice of the peace of any adjoining state, where a similar jurisdiction is given to justices by the laws of such state:"

Code of Laws of South Carolina, 1942, sec. 726, p. 540: "No testimonial, probate, certificate, or other instrument under the seal of any foreign court of law, notary public, or other magistrate or person qualified and empowered to give the same, shall be received in the courts of the State as evidence of any debt or demand owing by any person or persons resident within the limits of this State: provided, nevertheless, that if it shall appear to the court that the testimonials, probates, certificates, or other instruments of writing for the purposes aforesaid, which have been, or shall be hereafter, issued from any of the courts of this State, or by any of the officers thereof authorized and empowered to give the same, are received and allowed as evidence in the courts of such foreign country, then such instruments of writing shall be received in evidence in the courts of this State."

Acts of Assembly Passed in the Province of Maryland From 1692 to 1715. Printed by J. Baskett, Printer to the King's Most Excellent Majesty MDCCXXIII, London.
"No. 85. An Act, Providing What Shall be Good Evidence to prove Foreign and other Debts; and to Prevent Vexation and unnecessary suits at Law, and Pleading Discounts in Bar.

That all debts or records, whether by judgment, recognizance, deed inrolled, and upon record, the exemplification thereof, under the seal of the courts where the said judgment was given, or was recorded, shall be sufficient evidence to prove the same."

Here is an expanded action of debt—its scope broadened from the familiar common law action of debt on a judgment of a Maryland court to include debt on a judgment of a foreign court. Inherent is the idea that to enforce the foreign judgment an action first must be brought on the judgment itself, that the foreign judgment is not executed. The mode of proving the judgment is given in greater detail than the Connecticut act; it must be "exemplified under the seal of the court where the judgment was given." Eliminated is Connecticut's requirement of reciprocity, no effect is prescribed, and nothing is stated as to what types of foreign judgments can be sufficient evidence. It does not appear to be limited to the judgments of colonial courts and is unique in that respect.

The best known of the three Colonial Acts was passed by the Province of Massachusetts Bay on March 4, 1774, which in part, reads.

"An Act to Enable Persons to Bring Forward and Maintain Actions of Debt in the Executive Courts Within This Province, Upon Judgments Recovered in the Neighbouring Governments, and Upon Judgments Recovered Before Justices of the Peace in This Province.

"Sec. 1. it shall and may be lawful for such creditor or creditors who have so recovered or shall hereafter recover a judgment or judgments as aforesaid, to bring forward, support and maintain an action or actions of debt upon such judgment or judgments so recovered, or that shall be recovered in the neighbouring colonies as aforesaid, in any executive court within this province, proper to try the same, in such way and manner as he or they might have done if such judgment or judgments had been originally recovered in
This act has many important features which are mirrored in later decisions under the Constitution's full faith and credit clause. It is limited to a final judgment. No interlocutory decree could be a basis for an action of debt. The type of judgment is not stated. It applies to judgments recovered prior to the passage of this act as well as after. Like the Maryland act, it expands the old action of debt on judgments recovered in the Massachusetts courts to include judgments recovered in the courts of other jurisdictions. While this act would exclude the judgments of courts not within the continental limits of the present United States, an unanswered question is whether it excluded judgments of those colonies within the present United States which were not "neighboring," i.e., immediately adjacent to Massachusetts Bay. It is interesting to note that the procedure to be followed is that followed in the Massachusetts Bay courts, but the evidentiary requirements, i.e., authentication, are not those of Massachusetts Bay but of the court wherein the original judgment was recovered. Not only must the judgment be set forth but also the entire proceedings or "judgment roll." The act of Massachusetts Bay not only paraphrased the Connecticut act that the judgment roll will be "good and sufficient evidence" but goes beyond that it shall "have the same effect and operation, as if the original judgment had been recovered in Massachusetts."#17

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17 Cf. U. S. Revised Statutes, sec. 905, ff., fn. 34: "such faith and credit given to them as they have by law or usage in the courts of the State from which they are taken." (Underlining mine). The Massachusetts statute thus provides available enforcement machinery which might be otherwise lacking if it would have to give the judgment the treatment accorded it in the forum rendering the judgment.
Even though the colonies had courts functioning prior to the adoption of the Articles of Confederation, I have found no reported decisions bearing upon the interpretation of the Connecticut, Maryland or Massachusetts Bay Acts, or upon the enforcement in the colonial courts of the judgments of a foreign country or a sister colony.

June 11, 1776, the Continental Congress passed a resolution for the purpose of organizing two committees—one to prepare a declaration of independence, and the other to frame a constitutional government. The Declaration of Independence was adopted within a month, the Articles of the Confederation were reported on the twelfth of July, 1776, but were not adopted by the Congress until November 15, 1777. They were not ratified by the legislatures of all the states until March, 1781.

It was in the last and sixteenth month of the committee’s work that a full faith and credit provision was even considered. It does not appear at all in the original drafts. Neither Dickinson’s draft nor the second draft had a full faith and credit clause.

The scriveners had little analogous clauses to refer to in order to guide them in their efforts. The proposed article was unique among the constitutions of federal types of government. No similar clause is found in the various constitutions that must have been known to the committee men, such as the original league of the Swiss Cantons of 1291, the Union of Utrecht, or the act of Union between England and Scotland under Queen Anne. Perhaps some of the drafters of these documents thought it unnecessary to place a provision of this type in the articles which form a nation’s government. The delegates

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13 Suggested by Ross, op. cit. supra, note 5 at 140.

19 In the minds of some modern statesmen it must still lack the necessity of such a preeminent location as in a constitution, as evidenced by the omission of a full faith and credit clause from the Constitution of the Philippines, written in 1934. Aruego, Jose M., The Framing of the Philippine Constitution, University Publishing Co., Inc., Manila, 1937: Philippines (Commonwealth) Constitution—1945. Manila Bureau of Printing, 1945. It will be interesting to learn whether or not the new Constitution of China, which apparently is creating a federal system, will contain such a clause. Dean Pound does not discuss this, though he is the legal adviser. Pound, Roscoe, The Chinese Constitution (1947) 22 N. Y. U. L. Q. 194. But the Australian Constitution is similar to ours. See sec. 118.
found no help in the various proposals to unify the American Colonies which were advanced prior to the Articles of Confederation, such as The New England Confederation of 1643, the Proposed Union for the Colonies of 1697 and the Albany Plan of 1754, inasmuch as each omitted such a clause. However, the lawyer-delegates must have been familiar with the English decisions in this field, as well as the colonial acts of Connecticut, Maryland and Massachusetts Bay.

A committee of three, James Duane of New York, Richard H. Lee of Virginia, and Richard Law of Connecticut, had been appointed to report on any additional articles. Their report made November 11, 1777, only four days before the Articles were completed, contained this article which became the full faith and credit clause of the Articles of the Confederation.

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively provided, that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

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."

When that article was presented for the consideration of the convention, an unnamed individual made the motion that the last paragraph of this proposed article read.

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29 As summarized by Professor Radin in 39 Ill. L. Rev. 1, 11-15; Professor Yntema, 33 Mich. L. Rev 1129, 1143-44.
"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 a court of law of any State for the recovery of a debt due on a judgment of any court in any other state; provided the judgment creditor shall give bond with sufficient sureties before the said court, in which action shall be brought, to answer on damages to the adverse party in case the original judgment should be afterwards revised and set aside, and provided the party against whom such judgment may have been obtained, had notice in fact of the service of the original writ upon which such judgment shall be founded."

This motion had some important features. It expanded the "judgments" or "verdicts and sentences" of the Connecticut, Maryland and Massachusetts acts to read "judicial proceedings." It included the "records, acts" of a court. It gave an action of debt due on a judgment but said nothing about an action of debt lying for facts stated in an act of a court that would not yet be considered a final judgment. Moreover, it gave the court rendering the original judgment full control over the judgment by permitting it to revise and set it aside, the judgment creditor thus having the risk if he proceeded before the time for setting aside the judgment had elapsed, and the debtor being amply protected by the surety requirement. Finally, it emphasized that the judgment debtor must "have had notice in fact" of the original writ.

Unfortunately this motion was defeated. No recorded reason has been found for it being overruled. Perhaps they deemed unnecessary the "notice in fact" requirement and were not interested in requiring the judgment creditor to furnish sureties. Also, their original idea may have been to limit full faith and credit to the matters mentioned in the immediately preceding paragraph, namely, the extradition of felons. This theory is reinforced by the three committee members having voted against the proposed amendment.

From the time the Articles were adopted to the approval of the Constitution by the States, I have found only four reported cases concerning the full faith and credit clause. Only the first case interprets the clause or sheds any light thereon for future reference.
That case was an action of trover.\textsuperscript{21} During the Revolution, a privateer had been fitted out in North Carolina, and while on a cruise against the enemy, landed on Edisto Island, then under the jurisdiction of England. The privateers took away a number of negroes, the purported property of the plaintiff in this action, and carried them to Washington, North Carolina, where they were condemned in a court of admiralty and sold as the property of the enemies of the United States. The plaintiff brought this action in the courts of South Carolina and defendant pleaded the North Carolina judgment as a defense.

The court, in a \textit{per curiam} opinion, said

\begin{quote}
"We are bound by the sentence of the court of admiralty in North Carolina, until reversed by some competent authority, and are obliged to give due faith and credit to all its proceedings. The act of confederation is conclusive as to this point, and the law of nations, is equally strong upon it."
\end{quote}

Had the court entirely disregarded the full faith and credit clause of the Confederation, it had ample precedent to justify its decision. If the usual rule were followed, it was bound by the \textit{in rem} decrees of admiralty courts of foreign jurisdictions. In addition, plaintiff was not bringing an action of debt on a judgment of a foreign court, but the defendant was pleading the admiralty judgment as a defense. Under the English decisions, while a transcript of a foreign judgment was merely \textit{prima facie} evidence as a cause of action, it was conclusive if pleaded as a defense.

Another case decided was that of \textit{James v Allen}.\textsuperscript{22} Plaintiff had obtained judgment in November, 1782, in a New Jersey court, after having had personal service on the defendant. April 27, 1783, plaintiff had defendant arrested in Pennsylvania for the same debt, defendant gave bail and returned to New Jersey where he was taken on a capias satisfaciendum. Under the New Jersey insolvency act, he was discharged in October, 1783. Defendant had been ruled to plead in Pennsylvania, and failing to do so, judgment was entered against him. Defendant

\begin{itemize}
\item \textsuperscript{21}Jenkins v. Putnam, 1 Bay (S. C. Law) 8 (1784)
\item \textsuperscript{22}1 Dallas 188 (Ct. of Common Pleas of Philadelphia County, 1786)
\end{itemize}
then moved the Pennsylvania court to set aside the default judgment and to permit him to plead the New Jersey discharge. The court overruled this motion, because the New Jersey order was local in nature, that "by the very terms of the order as well as under the New Jersey statute" it "goes no further than to discharge him from his imprisonment in the Goal of Essex County in the State of New Jersey, which, if fullest obedience were paid to it, it could not authorize a subsequent discharge from imprisonment in another Gaol in another State." The court also said, and quite unnecessarily for the disposition of this case, that "The Articles of Confederation seem chiefly intended to oblige each State to receive the records of another as full evidence of such Acts and Judicial Proceedings." Apparently the court had in mind the evidentiary requirements of the full faith and credit clause, and that it was limited only to evidence and prescribed no effect to the evidence, once introduced.

The third case is that of *Kibbe v. Kibbe*,23 which was an action of debt on a judgment rendered by the Massachusetts Common Pleas. The original action in Massachusetts was covenant. The defendant was served by having his handkerchief attached in Massachusetts, and a copy of the writ of attachment left at his home in Connecticut. He failed to appear in the Massachusetts court and judgment by default was entered against him. The defendant filed a demurrer to plaintiff's surrejoinder in the Connecticut action, which set forth the mode of service by a Massachusetts deputy sheriff who left a copy of the writ at the defendant's Connecticut home. The *per curiam* opinion of the Connecticut court, which found for the defendant, said that for the plaintiff to recover on the Massachusetts judgment, the Massachusetts court had to have jurisdiction, "and so no action ought to be admitted on said judgment;' it likewise stated that the plaintiff's declaration did not show that both parties were within the jurisdiction of the Massachusetts court, nor that the defendant had duly served with process, nor that he had "or might have had a fair trial of the cause."

Had there been personal service of process on the defendant

23 Kirby, 119 (Conn., 1786).
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within Massachusetts, that would have appeared on the transcript. If a "fair trial" consisted of observing all the procedural requirements of Massachusetts, that could also be shown, but how could the other elements of "fairness" be shown on a transcript?

Judge Dyer added the following remarks to the per curiam opinion.

"the original action was upon a covenant real, and locally annexed where the lands lye, and the judgment being by default, this court never could take cognizance of or examine into the justice of the cause."

Did he thereby mean that they would not give credence to judgments based on "local" actions? Did he mean also that the Connecticut court never would take cognizance of a judgment obtained by default? Undoubtedly he meant default of service and not a default judgment obtained by failure of a party defendant, properly served, to plead or defend.

The fourth case decided under the Articles of Confederation's full faith and credit clause is Phelps v Holker. In that case an attachment had been filed in Massachusetts against one blanket. A judgment was entered and then debt on the judgment was brought in the Pennsylvania courts. The court held for the defendant, the reason therefor being stated by Justice Bryan "By the very words of the Massachusetts act, the judgment and execution in a foreign attachment, shall go only against the goods attached." Actually this case was limited to an interpretation of the Massachusetts foreign attachment act and no interpretation was given or needed of the Fourth Article of the Articles of the Confederation.

From these cases we derive the following principles.

1. The courts would not give full faith and credit to a judgment of a sister state court unless that judgment had been procured after due opportunity for the defendant to present his side of the case. While this whittled down the plenary phrase of "judicial proceedings" to mean "judicial proceedings in which defendant had an opportunity to present his

1 Dallas 261 (Penn. Supreme, 1788)
side of the case," certainly it is consistent with our notions of due process.

2. The full faith and credit clause of the Articles of Confederation was concerned with evidence and not with the effect of such evidence.

This latter principle is particularly interesting because it was stated in *Moulin v Insurance Company*, that "Congress could not provide the method of authentication" under this clause of the Articles of the Confederation. The net effect, assuming that conclusion is sound, is that each state of the Confederation could thereby prescribe its own requirements as to authentication—just what Massachusetts Bay permitted under its colonial act. But the requirement is mandatory full faith and credit shall be given. Therefore is not the power to legislate implied? Yet there was no court created to decide the meaning of the phrase "full faith and credit."

In addition, "Congress could not legislate upon what should be the effect of a judgment obtained in one state in the other states." Again it seems that the power to legislate as to the effect to be given an authenticated judgment should be implied. Thus each of the colonies could decide what effect it would give to such a judgment. In other words, it was possible for each state court to lay down its own requirements as to authentication and to prescribe the effect thereof—a relapse to the status that existed prior to the adoption of these Articles.

The literal wording of the clause itself indicates an important limitation. It is concerned only with the records, acts and judicial proceedings of the courts, and did not include the records and acts of any other branch of the respective state's government.

Confronted with these defects of the full faith and credit clause of the Articles of Confederation, the delegates to the Constitutional Convention attempted to revise it. The sug-

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24 N.J.L. 222 (1853)
25 The same question arose under the problem of whether or not the first sentence of Art. IV, sec. 1 of the Constitution is self-executing or not.
gested revisions made by the delegates appear in the records of the Federal Convention, reproduced in Max Farrand's "The Records of the Federal Convention of 1787." An able analysis of these records insofar as it affects the full faith and credit clause has been made. The proceedings indicate that the delegates considered it important that Congress be given legislative powers in order to carry out the concept of "full faith and credit," that since the word "shall" and not "may" was adopted, the extending of full faith and credit was mandatory, while there were no instances known of one government "executing" judgments of the courts of another, yet it was possible to give Congress the power to provide legislation for the execution of judgments. Whether or not it was given never has been settled. Also, it was decided that full faith and credit should be given to the acts and records of all the departments of a sister state government as well as to the proceedings of the sister state's judiciary.

In its final form, Article IV, Section 1, of the United States Constitution, reads

"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."

Contrasting this with the Fourth Article of the Articles of Confederation, Congress now has the power to legislate as

28 Cook, Walter Wheeler, supra, note 5.
29 It is interesting to compare Cook's proposal in 28 Yale L. J., fn. 5, and Madison's statement as written in II Farrand, p. 445: "Madison. Wednesday, August 29th. 1787. In Convention He (Mr. Madison) wished the legislature might be authorized to provide for the execution of judgments in other States, under such regulations as might be expedient—He thought that this might be safely 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."

"The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding"
to how the acts, records and judicial proceedings of every other state shall be proved in state courts. The federal government can legislate as to a rule of evidence which the state courts are required to follow. In addition, once such act, record or judicial proceeding is proved in the prescribed manner, then Congress can tell the judiciary of a state what effect such evidence shall have in the court in which it was produced. And not only is the judicial proceeding of a court of a sister state admissible with the prescribed effect, but so also are the public acts and records of the other departments of a sister state government.

In an attempt to carry out its powers under this provision, the First Congress of the United States passed "An Act to prescribe the mode in which the public acts, records, and judicial proceedings, in each State, shall be authenticated so as to take effect in every other State."

"Be it enacted, etc., That the acts of the Legislatures of the Several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, 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, or shall be taken. Approved, May 26, 1790."

The House passed this bill on May 3rd, 1790, the Senate on May 5th, 1790. Other bills passed during the same session indicated not only the dates the respective chambers passed them, but also gave the date the President signed each bill. In this case, it merely stated the date of approval as being May 26, 1790, which I assume is the date the bill was signed by President Washington.

That little care was given to this bill is seen by the lack of discussion thereon in either house on its final reading, and by its lack of completeness

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1. Authentication requirements were laid down as to the acts of state legislatures and the "records and judicial proceedings" of state courts. No authentication standards were stated as to the records or acts of a state's executive department.

2. The legislative acts and judicial records and proceedings of territories or colonial possessions were not included in the authentication requirements, nor were they mentioned as to what effect they were to have given them, once authenticated and offered in evidence.

3. It failed to prescribe any effect to state legislative acts, once authenticated.

4. "The records and judicial proceedings of state courts shall have such faith and credit given them in every court within the United States." Nothing is said concerning the faith and credit to be given these same records and judicial proceedings in the courts of territories or colonial possessions of the United States, outside its continental limits.

5. As stated in paragraph 4, supra, it does not read "full faith and credit" but reads "such faith and credit."

Did this act set up the effect to be given to the records and judicial proceedings of a state court, once authenticated and offered in evidence in any other court within the United States? If "faith and credit" means "good evidence" or "full evidence" as it was defined under the similar clause in the Articles of the Confederacy, the Act of 1790 failed to establish any quantitative standard of effectiveness.

This problem was fully discussed by five judges of the Supreme Court of New York, who decided *Hitchcock v. Akken*. Plaintiff had filed an action of debt on a judgment that he had recovered in Vermont, personal service having been obtained upon the defendant in Vermont. All five of the judges held that the Constitution stated two objectives (1) the manner of proving judicial proceedings of the States, and (2) the effect of the judicial proceedings of another State, once proved. But three of the judges decided that when the Act of 1790 declared "such faith and credit" it meant "full faith and credit", that

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31 1 Caines 460 (New York Supreme, 1803).
faith and credit is concerned only with evidence and not with 
the effect to be given such evidence, and that Congress had not 
exercised its power to prescribe the effect to be given such admissible documents. Therefore the Act of 1790 left the question 
as to the legal effect and operation to be given an authenticated judicial proceeding precisely where it was prior to the adoption of the Constitution.

This view had been previously rejected by the United States Circuit Court for the District of Pennsylvania, in the case of Armstrong v Carson's Executors. An action of debt had been brought upon a New Jersey state court judgment. Defendant pleaded nil debet, counsel for the plaintiff argued that the plea was inadmissible, citing the full faith and credit clause and the Act of 1790. "Ingersoll, for the defendant, declined arguing the point, thinking it clearly against him." Mr. Justice Wilson stated.

"There can be no difficulty in this case. If the plea would be bad in the Courts of New Jersey, it is bad here: for, whatever doubts there might be on the words of the Constitution, the act of Congress effectually removes them; declaring in direct terms, that the record shall have the same effect in this Court, as in the Court from which it was taken. In the courts of New Jersey, no such plea would be sustained; and, therefore, it is inadmissible in any Court sitting in Pennsylvania."

Despite the passage of another federal act in 1804, this point was not settled until Mills v Duryee was decided in 1813, holding in accordance with the minority in Hitchcock v Acken, and following Armstrong v Carson's Executors. Thus the 1790 Act accomplished setting up the authentication requirements of a "record or judicial proceeding of a state court" and of "the acts of the Legislatures of the Several States," but prescribed the effect to be given only to such authenticated judicial records, and not to legislative acts, when produced in any other court of the United States.

The act passed in 1804, integrated with the Act of 1790, now appears as sections 905 and 906 of the Revised Statutes of the United States. These sections read as follows

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3. 7 Cranch 481 (U. S., 1813)
"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, 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."

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."

The Act of 1804 fills at least two important needs that had not been met by the 1790 Act. By its first section, the later act states the authentication requirements of the books and records of an executive department of a state government, thereby eliminating one gap left by the Act of 1790. By its second section, the authentication requirements are stated as to the acts, records and judicial proceedings of territorial governments and

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33 Title 28, Sec. 687, U. S. Code or USCA or FCA.
34 Title 28, Sec. 688, U. S. Code or USCA or FCA.
those of countries subject to the jurisdiction of the United States. The books of any public office, once authenticated, are to be given effect in the offices as well as in the courts of various governmental units within the United States.

In addition the 1804 Act prescribed that "such faith and credit" were to be given to the acts of legislatures, records and proceedings of courts, and to the record and exemplifications of books, of any state, territory, or of any country subject to the jurisdiction of the United States." However, again nothing is said as to the faith and credit to be given these authenticated documents when admitted in evidence in the courts of territories or countries subject to the jurisdiction of the United States, located outside the limits of the continental United States.

This objection to the Act of 1790 still remains and can be illustrated as follows assume P recovered a judgment against D in a court of County A, which is located beyond the continental limits of the United States, but is subject to its jurisdiction. D goes to New York without satisfying the judgment. P may authenticate his judgment in accordance with the acts of 1790 and 1804, file suit against D in the proper court located within New York, and the New York court must give "such faith and credit to this judgment of the court of County A as is given this judgment in County A."

Change the initial forum. P recovered a judgment against D in a court of record of the State of New York. D goes to Country A, without satisfying the judgment. P may have his judgment authenticated in New York, and file suit against D in the proper court of Country A. That court must admit as evidence the authenticated judgment but need not give such faith and credit to the New York judgment as is given that judgment in New York. The effect of the New York judgment would depend entirely upon the views of the courts of Country A under International Law. It may be treated as a judgment of a foreign country, and entitled only to comity, and have no conclusive effect as to the merits of the judgment obtained in New York. 36

36 This is theoretically possible, as was first pointed out by Costigan, op. cit., note 5. But some of the territories subject to the jurisdiction of the United States have legislated otherwise. Prior to its
There is thereby in existence an anomalous situation which may be of great practical importance in the activities of courts of territories recently acquired by the United States in various parts of the world, as well as those heretofore acquired. Additional difficulty is seen when we consider that under these statutes it is possible for American courts established in military occupation zones to have their proceedings receive full faith and credit by courts within the United States without their being subject to the same obligation in return, unless otherwise especially provided for. The very purpose of the Act of 1804 was to expand uniformity of judicial proceedings and the application of public acts in the United States dominated courts, which cannot be achieved under the present wording. Actually this prevents an effective symmetry to the law within all jurisdictions subject to the control of the United States.

Because they cover more jurisdictions whose public acts, books, records and judicial proceedings are entitled to full faith and credit than does the constitutional provision, the statutes create another problem, as exemplified by the following situation P filed an action for divorce from D in a Court of First Instance of the Philippines. D was granted a divorce on his cross-complaint and the court held that he was the owner of certain certificates representing an interest in a "sociedad anónima", having a legal entity in the Philippines which approximates our corporate form of business organization. P, independence, Sec. 309, Code of Civil Procedure of the Philippine Islands, provided: "The effect of a judicial record of a court of the United States or of a court of one of the United States, is the same in the Philippine Islands as in the United States, or in the State or Territory where it was made." Puerto Rico, sec. 426, op cit., note 29, provides: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made." Sec. 437 provides: "The provisions of the preceding sections of this article are equally applicable to the public writings of the United States, or a territory of the United States.” Canal Zone Code, Title 4, sections 1939 and 1950 repeat verbatim the Puerto Rico provisions. I have found no legislation of a similar nature for the Territory of Hawaii. The one reported decision of the Supreme Court of Hawaii, dealing with the full faith and credit problem, failed to perceive this distinction; the court seemed to assume that the full faith and credit clause was applicable to a judgment of a California state court in the Territory of Hawaii, though denying to enforce it because of plaintiff's failure to allege and prove that the California court had jurisdiction. Peterson v. Peterson, 24 Haw. 239 (1918)
having had these certificates in New York, was made a defendant in an action filed by D in a New York state court, which court held that P was the owner of the certificates, and thereby entitled to the dividends accrued thereupon. P then attached the funds on deposit in a California bank of the "sociedad anonima" by process issuing out of a California state court. Should the California court follow the judgment of the New York or the Philippine court? The New York judgment is blessed with the Constitution commanding full faith and credit. The Philippine judgment is to be given "such faith and credit" as it would receive in the Philippines—by rule of a mere statute. The California court said:

"At the oral argument the court suggested the possibility that since recognition of judicial proceedings of the Philippine Islands is governed by federal statute, whereas the Constitution commands that full faith and credit be given to the New York judgment, we might be compelled to accept such state judgment in the event of conflict. We do not place our decision on this ground. Rather, the ground of decision herein is that the New York decision as the last in time is controlling as to the effect to be given the Philippine proceedings."

Properly this question ought not to arise, since the failure of one court to give full faith and credit to the proceedings of another jurisdiction ought properly to be passed upon by the United States Supreme Court, instead of being placed before the courts of a third state or territory.

Other problems have been created as a result of the wording of these statutes and the limited application of the full faith and credit clause. When Congress passed the Acts of 1790 and 1804, thereby stating the effect to be given a state's judicial proceedings, acts and records, not only in every other state court, but also in every court within the United States, it exceeded the constitutional objective, but not its constitutional power. The authority to prescribe authentication requirements and what effect an authenticated judgment or record or public act of a sister state may have in the federal or territorial courts is found in Congress' power to establish a federal judiciary and in its power to regulate the territory or other property of the

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United States. Admittedly, Congress can set up the authentication requirements and the effect to be given to the legislative acts, records and judicial proceedings, and the books of a public office, so authenticated, of.

1. State A in State B's courts;  
2. State A in United States Court C;  
3. State A in United States Territorial Court D;  
4. The United States in United States Court C;  
5. The United States in United States Territorial Court D;  
6. A United States territory in United States Court D, and  
7. A United States territory in United States Territorial Court D.

But does Congress have the power to set out the effect and authentication requirements as to the acts, records and judicial proceedings, and the books of a public office, of.

8. The United States in State Court A?  
9. A United States territory in State Court A?  
10. "Any country subject to the jurisdiction of the United States" in State Court A?

It certainly has the power to prescribe the effect, once admitted

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on Art. 4, sect. 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction."

But the mode of authentication in the last three examples appears to be solely a matter of the legislatures and courts of State A to decide. Otherwise the sovereignty of a state would be infringed.

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Thus we have the situation of a state being able to prescribe the evidentiary requirements of the acts, records and judicial proceedings of any other government except those of a sister state. This is, of course, the basis upon which much state legislation rests, hereinafter discussed, Part II of this series of papers.

Neither the Constitution nor the statutes covers the authentication or effect to be prescribed to the acts, records or judicial proceedings of a foreign country. Mr. Chief Justice White, in disposing of the defendant’s contention that a Canadian judgment on a life insurance contract was a bar to the plaintiff’s action on the same contract brought in a state court of Maine, and therefore conferring jurisdiction on the United States Supreme Court to review the state court’s decision on a writ of error, said:

“No such right, privilege, or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right.”

There is no quarrel with this reasoning; the difficulty arises from the inconsistency of our policy. The national government has most points of contact with foreign nations, but in dealing with the evidentiary rules concerning the laws, judgments and records of foreign governments, and the effect they are to receive in the state courts within the United States, there is no uniform standard. The lawyer’s clause has insufficient coverage.

Is a judgment rendered by the court of a country before it was admitted to statehood or before it became a territory or country under the jurisdiction of the United States entitled to full faith and credit by courts within the United States? Again this is a timely question as to the treatment to be given judicial proceedings of courts in areas which eventually will or have come under the jurisdiction of the United States during World War II. How this problem was previously handled is indicated by two cases.

In Keene v M’Donough, 8 Peters 308 (U. S., 1834), the

plaintiff claimed title to a plantation situated near Baton Rouge by virtue of his being the highest bidder at a public sale under Spanish law when Spain was the owner of the Louisiana territory. The defendant asserted his title through a judicial proceeding of a Spanish tribunal which annulled the prior sale to plaintiff who had neglected to pay the requisite amount, the decree exposing the plantation again to public sale, and the highest bidder at this sale being defendant's predecessor in title. In upholding defendant's title asserted from the decree of the Spanish tribunal, the court said at page 310

"they (the adjudications of the Spanish tribunal) must, at least be taken as *prima facie* evidence of a judicial proceeding, to pass the title of land, according to the course and practice of the Spanish law in that province. The adjudication having been made by a Spanish tribunal, after the cession of the country to the United States, does not make it void; for we know, historically, that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was, de facto, in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid."

Note the phrases "at least be taken as *prima facie* evidence" and must be "deemed valid," which is the same language employed by the courts when considering the effect to be rendered judgments of courts of foreign countries. Had the *prima facie* defense established by the defendant's allegation of the Spanish tribunal's judicial proceeding been rebutted, the plaintiff might have prevailed. That plaintiff had an opportunity to rebut the defense indicates the court considered the full faith and credit clause inapplicable to judgments rendered by courts of areas which at the time of rendition were not under the jurisdiction of the United States.

This conclusion is reinforced by the decision of the United States Supreme Court in the case of Mutual Life Insurance Company v. McGrew, 188 U. S. 291 (1902). In that case, the husband had been granted a divorce in 1894 by a Circuit Court of Hawaii, on the grounds of his wife's adultery, the decree containing a provision pursuant to a Hawaiian statute, that
when a divorce was decreed for the wife’s adultery, the husband would hold her personal estate forever. A few months later the husband died. His administrator filed suit in the Hawaiian courts against the Mutual Life Insurance Company to collect the proceeds on a policy of insurance on the husband’s life, payable to his wife. The ex-wife had not been joined as a party, by interpleader or otherwise, she had moved to California prior to the granting of the divorce. In 1895 the Hawaiian courts held that the administrator was entitled to the proceeds of the policy on the husband’s life. This judgment was paid by the insurance company.

Thereafter the wife filed suit against the same insurance company on the same insurance contract in the state courts of California. The state supreme court affirmed the trial court’s judgment on February 28th, 1901, that the wife should recover the proceeds. The California courts recognized the decree of divorce granted by the courts of the Kingdom of Hawaii which dissolved the marriage, but refused to enforce that portion of the decree which applied the Hawaiian statute which forfeited the wife’s personalty to the husband. The California courts held that the collection of the life insurance policy proceeds was governed by the California law, the domicile of the wife. The writ of error to the United States Supreme Court, one ground of which was the failure of the California courts to give full faith and credit to the decisions of the Hawaiian courts, was dismissed. Mr. Chief Justice Fuller pointed out that the California trial court’s judgment was entered in 1897, that the resolutions of annexation were passed in 1898 and that the act to provide a government for Hawaii was passed in 1900. "we cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial court, and which was not brought to the attention of the highest court of the State in any way whatever."

Must the courts of State A give full faith and credit to the acts, records and judicial proceedings enacted or entered by State B or Territory C, prior to the time State A became one of the United States? An answer can be found from the experience of Texas, which as a Republic, prior to its annexation as a state, had a unique statute.
CONSTITUTION, LAW

"That no suit, proceeding, judgment or degree, shall be brought, prosecuted or sustained in any court or judicial magistracy in this republic, on any judgment or decree of any court or tribunal of any foreign nation, state or territory; this republic not being bound by any international law or courtesy to give credence or validity to the adjudications of foreign tribunals, whose measures of justice and rules of decisions are variant and unknown here. But this provision is in no degree to affect the validity or obligations of contracts, engagements or pecuniary liabilities originating abroad, or the original evidence, testimony or proof, to establish the same; neither shall this provision extend to or embrace any foreign judgment or decree for specific property or recovery, introduced as the basis of a public sale for the transmission of title, or the record or memorial of any link or muniment of title to any specific estate, all of which shall depend upon the present laws of the republic. And this provision shall not in any manner relate to or affect the determinations of courts of admiralty and maritime jurisdiction abroad, proceeding in rem, and according to the law of nations."

June 23, 1845, Texas' Congress gave its assent to the annexation of the Republic of Texas to the United States. December 29, 1845, the annexation was officially made, so the Republic's statute of 1841 was annulled by the full faith and credit clause.

The problem can now be restated. Must the courts of Texas give full faith and credit to the judgment of a state court of Mississippi, entered in Mississippi prior to Texas' annexation? The language of Bacon v Howard4 would indicate an affirmative answer. In that case P had recovered a judgment against D on October 19th, 1840, in a state court of Mississippi. October 22nd, 1850, P's assignee filed an action against D on the judgment in the District Court of the United States for the District of Texas. While denying recovery because of the State of Texas' sixty day statute of limitations, Mr. Justice Grier said at page 25 of 20 Howard's Reports

"any legislation which denied that full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of sister States would be ipso facto annulled after the annexation on the 29th of December, 1845. Thereafter, the

4 Sec 2 of "An Act Creating a System of Bankruptcy and regulating the Collection of Foreign Debts" enacted by the Fifth Congress of Texas, Approved January 19, 1841. 2 Gammel Texas Laws 508.
5 20 Howard 22 (1857).
authenticity of a judgment in another state, and its effect, are to be tested by the Constitution of the United States and acts of Congress. But rules of prescription remain, as before, in the full power of every state.

While no mention was made either by counsel or by the court of the date of the entry of the judgment in the Mississippi courts as being prior to annexation, other than for the question of prescription, the language quoted indicates that the court would require full faith and credit to be given to the judgment. It has a “continuing” effect, at least until it becomes dormant in the state of rendition, equally as much as an act of the Mississippi state assembly has, until repealed.

With its usual independence, even after annexation, Texas refused to give full faith and credit to a complaint which had been filed in the courts of the Republic of Texas, based on a Mississippi chancery decree, the case being on appeal after the annexation of Texas. The Texas Supreme Court considered the matter to be ruled by its 1841 statute.

This problem is particularly of moment due to the impending statehood of Hawaii. It indicates that judgments recovered in American courts prior to Hawaii becoming a state, will have to be given full faith and credit by the state courts of Hawaii, when and if it attains statehood.

The full faith and credit clause states “judicial proceedings of every other State” and furnishes no light as to including magistrate or justice courts’ proceedings within the term “judicial proceedings.” The authentication requirements under the acts include the judge’s certification and the clerk’s attestation. Some courts find it impossible to have the transcript attested by the clerk simply because their organization does not include a clerk—a common situation in justice of the peace, magistrate and those courts usually designated as inferior or courts not of record. Did Congress thereby mean to exclude courts not having a clerk from the provisions of the Acts of 1790 and 1804? The Constitution, as well as the statutes, is silent as to the rank of the courts in the hierarchy of judicial proceedings entitled to admission. That silence, plus the require-

42 Wilson v Tunstall, 6 Texas 221 (1851).
ment of a clerk by the statutes, has caused extensive litigation and much state legislation.

Kentucky and Massachusetts have held that the judicial proceedings of inferior courts of other states were not provided for by the Constitution or laws of the United States pertaining to full faith and credit, thus giving them the same effect as though they were the judgments of courts of foreign countries. This is consistent with the English rule which treats the judgments of its inferior courts not of record as it treats the judgments of courts of record of foreign countries. Tennessee has held contra. If the Massachusetts rule is the correct one, then a state can prescribe even more stringent authentication requirements than do the acts of Congress, besides stating what effect these judgments may have in its courts. In any event a state can prescribe lower standards of authentication. Those states having express legislation concerning the authentication of foreign inferior courts' judgments are summarized herein.

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**Transcripts of Justice of Peace of Are to be**

- **State, Territory in evidence.**
- **District of Columbia**
- **Admissible evidence of the facts stated therein.**

If Authenticated by Means

- Certified by justice rendering judgment, or
- His successor in office, or
- Justice having custody of books, that it is a true and complete copy plus
- Certificate of clerk plus court seal of any court of record in county where justice court held that said justice duly commissioned and qualified to act.
- Certified by justice that transcript is correct and that he had jurisdiction, plus
- Certification by clerk of county in which justice resided under county seal that he was a justice and that his signature is genuine.
- Or
- Original or copy of docket and the oral testimony of the justice.

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**Jurisdiction**

- Alabama, Code, 1940
- Title 7, sec 422
- Transcripts of Justice of Peace of U. S.
- State, Territory in evidence.

**Jurisdiction**

- California, Deering's Code, secs. 1921 and 1924
- Montana, Revised Codes, 1935, Annotated, secs. 10571 and 10574
- Utah, Code Ann. 1943, secs. 104-7-16 and 104-17-17.

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42 McElfatrick v. Taft & Son, 10 Bush (Ky., 1873) 160.
43 Warren v Flagg, 2 Pick. (Mass., 1824) 449.
44 Menken v Brinkley 10 Pickle (94 Tenn., 1895) 721, 31 S.W 92.
In addition to the problem of whether or not the full faith and credit clause includes the proceedings of inferior courts, there is presented the question of the proper method of pleading the judgment of a court not of record. The manner of pleading the judgment differs, depending upon whether the proceedings and judgment.

- **Georgia**, State Code Ann., secs. 38.628-9
  - "Prima facie evidence of such proceedings and judgment."
  - Justice's official certificate plus official certificate of clerk of court of record, under court's seal, that he is the justice and his certificate is genuine,
  - Official certificate of his successor in office that he is the successor and proper custodian, plus the official certificate of the court clerk of record under court's seal that he is a justice and successor in office, and his signature is genuine.

- **Iowa**, State Code, 1939, sec. 622.54
  - "Sufficient evidence of such proceedings and judgment."
  - Official certificate of justice plus certificate of clerk of court of record of county where justice resides that he is acting as justice and his signature to certificate is genuine.

  - "Is evidence of such proceeding and judgment."
  - Justice's certificate that transcript is in all respects correct and that he had jurisdiction in correct and that he had jurisdiction, plus certificate of clerk of county wherein justice resides under county court seal that he was a justice at time of rendering judgment and that the signature is in justice's own handwriting,
  - Or
  - Docket plus oral testimony of justice that docket is true and correct and of his authority to render the judgment.

  - "Presumptive evidence of his jurisdiction in the cause and of the matters shown by the transcript."
  - Certified that original cause of action was such as by Penn. laws would have been within the jurisdiction of justices thereof; that is a true and full copy and that judgment remains in force, plus certificate of clerk of county under seal that he was the justice of such county
Massachusetts or Tennessee interpretation is followed. If the former, no presumption attaches that the sister state court rendering the initial judgment had jurisdiction, that it did have jurisdiction must be alleged and proved by the plaintiff.

The greatest difference in enforcing the judgment of a court of record of a sister state or a court not of record of a sister state results from the wording of the acts of limitations in certain states. Massachusetts, Michigan, Mississippi, Missouri, Tennessee statutes are concerned with the judgments of foreign courts of record. No specific statement is made concerning the judgments of foreign courts not of record, which apparently fall into the "all other actions not provided for" sections of the statutes. However, the following states have stated expressly that different periods of limitations are applicable.

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<td>20(^{54})</td>
<td>6(^{55})</td>
</tr>
<tr>
<td>New Mexico</td>
<td>7(^{56})</td>
<td>6(^{57})</td>
</tr>
<tr>
<td>New York</td>
<td>20(^{58})</td>
<td>6(^{59})</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>10(^{60})</td>
<td>6(^{61})</td>
</tr>
</tbody>
</table>

Thus after 143 years we have these elementary problems arising from the inadequacy of our federal legislation pertaining to full faith and credit. Omitted from this discussion are

47 ANNOTATED LAWS OF MASSACHUSETTS, Vol. 9, Ch. 260, sec. 20 (20 years).
48 MICH. STATS. ANN., Vol. 20, sec. 27.605, p. 456 (10 years).
49 MISSISSIPPI CODE ANNOTATED (1942), Vol. 1, Title 6, Ch. 2, sec. 734, p. 802 (7 years)
50 MISSOURI REVISED STATUTES ANN. Vol. 4, Art. 9, Ch. 6, sec. 1038, p. 261 (10 years).
51 WILLIAMS TENNESSEE CODE (1934), sec. 8601 (10 years).
53 Sec. 614.1(6).
54 REVISED STATUTES OF MAIN, Ch. 99, sec. 90(I).
55 Sec. 90(II).
57 Sec. 27-103, pp. 728-9.
58 Cahill-Parsons New York Civil Practice, sec. 44 PA-23.
59 Sec. 48 PA-25.
60 WISCONSIN STATUTES (1945), sec. 330.18.
61 Sec. 330.19.
several points settled by litigation that never should have taken place had the statutory problem been adequately considered.\textsuperscript{62} These are only the superficial problems that many more still must be solved can be seen from two cases in the past term of the United States Supreme Court.\textsuperscript{63} An examination of the Congressional Record for the past eleven years indicates that this problem was never touched upon.\textsuperscript{64} One of the most immediate benefits to be obtained from a revised federal statute would be the elimination of the necessity for many state statutes, which will be considered in the next paper of this series.

\textsuperscript{62} That the judgments of the courts of the District of Columbia are entitled to be enforced within the phrasing of R. S. 905 was decided by Embrey v Palmer, 107 U. S. 3 (1882) That they are to receive full faith and credit when pleaded as a defense was settled in Mills v Duryee, 7 Cranch 485 (1813). Whether or not the clause is self-executing as to public acts of the states was settled by A. T. & S. F Ry v Sowers, 213 U. S. 55 (1909) which case was followed by El Paso & Northeastern Ry Co. v Gutierrez, Adm'r., 215 U. S. 87 (1909), and Tennessee Coal, Iron and Railroad Co. v George, 233 U. S. 354 (1914)

\textsuperscript{63} Morris v Jones, 67 S. Ct. 451 (Jan. 20, 1947), a 6-3 decision, and Order of United Commercial Travelers v Wolfe, 67 S. Ct. 1355 (June 9, 1947) a 5-4 decision.

\textsuperscript{64} "Digest of Public General Bills With Index." Checked from the 74th Congress, Second Session, to the date of adjournment of the First Session of the Eightieth Congress, July 26, 1947.