

Michigan Law Review

Volume 56 | Issue 1

1957

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Recommended Citation

Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957).

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FULL FAITH AND CREDIT TO JUDGMENTS AND PUBLIC ACTS

A HISTORICAL-ANALYTICAL REAPPRAISAL*

Kurt H. Nadelmann†

IN our federal system, functions of extreme practical importance appertain to the Full Faith and Credit clause under which comity can become a constitutional command for certain aspects of interstate relations. Recent action by Congress under the part of the clause which relates to "public acts," as well as the Supreme Court's vacillations in the same area since early in this century have emphasized the uncertainties which surround the full faith command for public acts. The Supreme Court has come to assume that the clause is self-executing as to public acts. But is that so? Is it so without any limitation? Although much has been written on the subject, historically¹ and generally, we do not seem to have any definite answer to these questions.

At an early stage of the Republic the same kind of problems were argued back and forth with regard to full faith and credit for judgments. These questions have come to a rest. Why do they continue to be with us for public acts? What, if any, conclusions may have to be drawn from the judgments field for public acts? All this remains to be fully explored. Yet certain definite ideas (for example, that the command of full faith in the Constitution is self-executing for public acts) have come to establish themselves in many minds as if they were proven facts. If only because of the little if anything achieved by the Supreme Court in this direction, circumspection would seem to be in place. Conflicts resulting from differing public acts have not come any closer to solution.

*This article is a product of the author's research in Early History of American Conflict of Laws under a John Simon Guggenheim Memorial Fellowship.—Ed.

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¹See, notably, Costigan, "The History of the Adoption of Section I of Article IV of the United States Constitution," 4 COL. L. REV. 470 (1904); Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 (1933); Ross, "Full Faith and Credit' in a Federal System," 20 MINN. L. REV. 140 (1935); Radin, "The Authenticated Full Faith and Credit Clause: Its History," 39 ILL. L. REV. 1 (1944); Childs, "Full Faith and Credit: The Lawyers Clause," 36 KY. L. J. 30 (1947); Page, "Full Faith and Credit: The Discarded Constitutional Provision," 1948 WIS. L. REV. 265; Sumner, "The Full Faith and Credit Clause—Its History and Purpose," 34 ORE. L. REV. 224 (1955).

Consequently, continued search with an open mind for the most adequate reading of the clause would seem to commend itself.

There may be some question of the extent to which knowledge about the origin of the clause and thoughts of the members of the Constitutional Convention who were connected with the drafting can help in making the best use of the clause under present-day conditions, but the thoughts of the originators, if known, should be given close attention. Recently, historical materials have been used extensively in connection with a plea for a new "true" reading of the Constitution.² The Full Faith and Credit clause has been included in the treatment.³ The present writer has found it opportune to make his own historical investigation for independent evaluation. Wide room has been found for closer analysis of the known facts, and such analysis has been undertaken with today's problems in mind. A fair amount of materials hitherto not used have been found providing here and there welcome clarifications. All facts considered have been set out so as to enable the reader to draw his own conclusions.

Interest here is concentrated on full faith and credit for public acts. But what led to insertion of the command respecting public acts cannot be divorced historically from the study of the command of full faith for judgments. The whole field, therefore, has been included in the reexamination. Clarifications obtainable on the "judgments" side, it will be seen, help also on the "public acts" side. On both sides there are historical facts which deserve greater attention than has been hitherto given, and if, as a result, some of the myths surrounding the Lawyers Clause are exploded, the rethinking may have consequences fully compensating for a seeming loss. The analysis has been carried through to the events of our own days.

I

Precursor of the Full Faith and Credit clause in the Constitution is the Full Faith and Credit clause in the Articles of Confederation. This clause, the last paragraph of Article IV, read: "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."⁴ Opening with the famous, "The better to

² CROSKEY, *POLITICS AND THE CONSTITUTION* (1953).

³ *Id.* at 542.

⁴ 19 *JOURNALS OF THE CONTINENTAL CONGRESS*, Ford ed., 214, 215 (1912).

secure and perpetuate mutual friendship and intercourse among⁵ the people of the different States of the Union," Article IV had also a clause on Extradition of Fugitives from Justice and, furthermore, a Privileges and Immunities clause.

None of these clauses were in the draft of Articles of Confederation upon which the Continental Congress agreed on August 20, 1776.⁶ They were added a year later when the Congress took up proposals for additional Articles. A committee of three—Richard Law of Connecticut, Richard Henry Lee of Virginia, James Duane of New York—was appointed on November 10, 1777 to take these proposals into consideration and report such as they should judge proper.⁷ The committee, the following day, reported seven new articles, among them an Extradition, a Full Faith and Credit, and a Privileges and Immunities clause.⁸

The Full Faith and Credit clause was reported as follows:

"That 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 that an Action of Debt may lie in the Court of Law in any State for the Recovery of a Debt due on Judgment of any Court in any other State; provided the Judgment Creditor gives sufficient Bond with Sureties before Said Court before whom Action is brought to respond in Damages to the Adverse Party in Case the original Judgment should be afterwards reversed and Set aside."⁹

The vote was one day later, on November 12, 1777. The first part of the clause, "That full faith and credit shall be given in each of these States to the Records, Acts and Judicial Proceedings of the Court and Magistrates of every other State," was adopted without any change and, it would seem, without debate.¹⁰ But an

⁵ It read "between" until the final editing, Nov. 15, 1777. 9 JOURNALS OF THE CONTINENTAL CONGRESS, Ford ed., 906, 908 (1907). Cf. BROWN, Book Review, 67 HARV. L. REV. 1439, 1449 (1954).

⁶ 5 JOURNALS OF THE CONTINENTAL CONGRESS, Ford ed., 674 (1907).

⁷ 9 id. at 885: "Sundry propositions being laid before Congress in addition to the articles of confederation: *Resolved*, That a committee of three be appointed to take the same into consideration, and report such as they shall judge proper to be added to the articles of confederation, not changing or altering any of the articles already agreed on."

⁸ Id. at 887. The other clauses were: freedom of speech in Congress; power to censure and fine members of Congress; bills of credit to be charged against the United States; jurisdiction for controversies concerning private rights of soil claimed under different grants of two or more states.

⁹ Id. at 887. In the handwriting of Richard Law, as the three preceding articles, with some verbal changes introduced by Duane. Id., note 5.

¹⁰ Id. at 895.

amendment was proposed—the Journal does not say by whom—stating the second part of the clause—on bonding—as reported¹¹ and adding a third part: “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. . . .”

The amendment with its two distinctly separate proposals—bonding and requirement of notice—was defeated in one voting.¹² Among those voting against were all three committee members. For the amendment voted Henry Marchant of Rhode Island, Eliphanet Dyer and William Williams, the two colleagues of Richard Law from Connecticut, Benjamin Rumsay of Maryland, and Daniel Roberdeau of Pennsylvania.

Any basis for assuming that the clause as first reported originated with the committee of three is lacking.¹³ The committee had only one day to pass over the (probably) numerous proposals submitted for additional Articles. Max Radin's suggestion¹⁴ that, perhaps, Richard Law, of the committee, was the author of the clause, is unsupported by information furnished by the Journal of Congress or any other source referred to by him. Assuming the whole of the original proposal came from one side, the author would, normally, have voted at least for the first part of the amendment. Of those who voted for the amendment, one probably was the author¹⁵ of the second part—the notice requirement—but, again, whether he or any other of those voting for the amendment had been responsible for the original proposal, we do not know. None of the few facts which we have suggest it.

The question dealt with by the clause was not novel and it certainly was familiar to the lawyers among the delegates. But nothing suggests that the proposal originated with one of the delegates attending the congress at the time of the voting. The proposal could have come directly from one of the states—which substantially widens the possibilities of authorship.

¹¹ Ibid. As edited by Duane, note 9 *supra*.

¹² Id. at 896. No: Folsom, N.H.; Gerry, Mass.; Law, Conn.; Duane, N.Y.; Elmer, N.J.; Clingan, Pa.; Smith, Md.; Jones, R. H. Lee, F. L. Lee, Harvie, Va.; Penn, Harnett, N.C.; Laurens, S.C.

¹³ Duane did some minor editing on the second—the bonding—part. Id. at 887, note 5.

¹⁴ Radin, “The Authenticated Full Faith and Credit Clause: Its History,” 39 *ILL. L. REV.* 1 at 4 (1944).

¹⁵ Henri Marchant, Attorney General of Rhode Island, and Eliphanet Dyer, a member of the Superior Court of Connecticut, were the lawyers among them.

The Continental Congress had been in session since September 5, 1774. Earlier in the year the subject of enforcement of foreign judgments had been dealt with in the legislature of the Province of Massachusetts Bay. According to the *Journal of the Massachusetts House of Representatives*,¹⁶ on January 31, 1774 upon a motion (it is not said by whom) Mr. Hopkins¹⁷ was ordered to bring in a bill "to enable persons to bring and maintain actions of debt upon judgments obtained in the courts of law in other governments." The bill was read on February 14 the first time,¹⁸ read and passed to be engrossed on February 23¹⁹ and passed to be enacted on March 4, 1774.²⁰ On March 8, 1774, according to the *Journal*, Samuel Dexter came down from the Council Board and proposed an amendment to the bill. The House concurred in the amendment²¹ (the contents of which we do not know) and instructed Samuel Adams²² to acquaint the Board with the concurrence. The following day, the Governor informed the House²³ that he had given his consent to this and a number of other bills.

The Act now carried the title: "An Act to enable persons to bring forward and maintain actions of debt in the executive courts within the Province, upon judgments recovered in the neighboring governments, and upon judgments recovered before Justices of the Peace in this Province." The amendment may have brought about the limitation to judgments from "neighboring" governments, or it may be the source of the unrelated second part of the Act dealing with Massachusetts judgments from Justices of the Peace.

Governor Hutchinson, on April 5, 1774, reported the Act to the Lords of Trade with this comment: "To make the record of a judgment in the neighboring Colonies evidence equal to the judgment itself. As the Superior Court have been in doubt whether such record could be admitted, the provision by the Act becomes necessary."²⁴

¹⁶ *JOURNAL*, volume beginning May 26, 1773, at p. 112, 5 Acts and Resolves of the Province of Massachusetts Bay 369 (1886).

¹⁷ Mark Hopkins, of the County of Berkshire.

¹⁸ *JOURNAL*, p. 153.

¹⁹ *Id.* at 185.

²⁰ *Id.* at 227.

²¹ *Id.* at 239, 5 Acts and Resolves of the Province of Massachusetts Bay 369 (1886).

²² Samuel Adams was clerk of the House at the time.

²³ *JOURNAL*, p. 241.

²⁴ "Mass. Bay," Board of Trade, vol. 82, p. 58, according to 5 Acts and Resolves of the Province of Massachusetts Bay 369. Before the Board of Trade on June 16, Oct. 25, and

Before proceeding further, it is proper to recall that the Colony of Massachusetts Bay did not for the first time concern itself with neighbor problems in this field. About a hundred and thirty years earlier the Confederation of New England Colonies had dealt with the subject. The Articles of Confederation of 1643 did not cover enforcement of judgments, although they made provision for extradition of fugitives from justice,²⁵ but when the Commissioners of the United Colonies met at Hartford the next year, the question was raised "of what esteem and force a verdict or sentence of any one court within the colonies ought to be of in the court of another jurisdiction."²⁶ And the Commissioners, on September 9, 1644, recommended to the general courts

"that every such verdict or sentence may have a due respect in any other court through the Colonies where occasion may be to make use of it, and that it may be accounted good evidence for the plaintiff until either better evidence or some other just cause appear to alter or make the same void, and that in such case, the issuing or the cause be respited for some convenient time, that the court may be advised which were the verdict or sentence first passed."²⁷

Shortly afterward, the Province of Connecticut enacted a law implementing the recommendation, with a reciprocity requirement.

"... Ordered that any verdict or sentence of any court within the colonies, presented under authentic 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

Nov. 5, 1774. JOURNAL OF THE COMMISSIONERS FOR TRADE AND PLANTATIONS FROM 1768 TO 1775, pp. 397, 399, 400 (1937). No objections raised in the report to the Privy Council. 6 ACTS OF THE PRIVY COUNCIL OF ENGLAND (Colonial Series) 548 [918] (12) (1913).

²⁵ Art. 8 of the Articles of Confederation, 2 HAZARD, HISTORICAL COLLECTIONS 1, 5 (1794); 9 PLYMOUTH COLONY RECORDS 3 (1859). Extended to the Province of New Netherlands by Articles of Agreement of Sept. 19, 1650, with delegates of Peter Stuyvesant. 10 PLYMOUTH COLONY RECORDS 18, 20 (1859). See Riesenfeld, "The Formative Era of American Public Assistance Law," 43 CALIF. L. REV. 175 at 219 (1955). Cf. Act of the Colony of New Plymouth of June 1670, 11 PLYMOUTH COLONY RECORDS—LAWS 1623 to 1682, p. 229 (1861). See Treaty of New Plymouth With Massachusetts of March 1621, THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH, Brigham ed., 306 (1836).

²⁶ 2 HAZARD, HISTORICAL COLLECTIONS 21 (1794), 9 PLYMOUTH COLONY RECORDS 241 (1859).

²⁷ Decision of Sept. 9, 1644, *ibid.*

void. And that in such case the issuing of the cause in question be respited 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 live within some of the confederate colonies; and where the verdict in the courts of this colony may receive reciprocal respect by a like order established by the general court of that colony."²⁸

Evidence that any of the other colonies at the time passed corresponding legislation seems to be lacking.²⁹

Foreign judgments had created problems also in the colonies farther south. Thus Maryland passed in 1715 an act "providing what shall be good evidence to prove foreign and other debts . . ." ³⁰ which prescribed "that all debts and records, whether by judgment, recognizance, deed inrolled, and upon record, the exemplification thereof, under the deed of the courts where the said judgment was given or was recorded, shall be sufficient evidence to prove the same."

Similarly South Carolina dealt with proof of foreign judgments in 1731. An Act of Assembly of that year provided:

"All exemplifications of records, and all deeds, and bonds, or other specialties, all letters of attorney, procuration or other powers in writing, and all testimonials which shall at any time hereafter be produced in any of the courts of judicature in this province, and shall be attested to have been proved upon oath under the corporation seal of the Lord Mayor of London, or of any other mayor or chief officer of any city, borough or town corporate, in any of his majesty's dominions, or under the hand of the governor and public seal of any of his majesty's plantations in America, or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law, in any of the courts of judicature in this province, as if the witnesses to such deeds were produced and proved the same *viva voce*."³¹

²⁸ The law appears in the codification of 1659, Connecticut Acts and Laws, 1650, under the heading, "Verdict."

²⁹ There was also an agreement on recognition of probated wills: 2 HAZARD, HISTORICAL COLLECTIONS 124, 135 (1794), 9 PLYMOUTH COLONY RECORDS 137, 149 (1859).

³⁰ Act of June 3, 1715, Acts of Assembly Passed in the Province of Maryland from 1612 to 1715, No. 85 (London, 1723).

³¹ Act of Assembly, 1731, COLLECTION OF PUBLIC LAWS, Grimké ed., No. 552, §40, pp. 123, 129 (1790); 1 BREVARD, ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH CAROLINA 313, 316 (1814). See 5 Geo. 2, c. 7. (1732): "Act for the more easy recovery of debts in his Majesty's plantations and colonies in America." RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 131 (1915).

Reverting to the Massachusetts statute enacted in 1774,³² shortly before the opening of the Continental Congress in Philadelphia, it read:

"Whereas it frequently happens that persons against whom judgments of court are recovered in the neighboring governments remove with their effects into this province without having paid or satisfied such judgment, and, upon actions of debt upon such judgments brought in the executive courts in this Province, the record of such judgments cannot be removed into the said courts in this Province, and it has been made a doubt whether, by law, such judgment can be admitted as sufficient evidence of such judgments, whereby honest creditors are often defrauded of their just demands by negligent and evil-minded debtors; FOR the prevention whereof:

". . . [I]t shall and may be lawful for such 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 a judgment or judgments so recovered, or that shall be recovered in the neighboring colonies as aforesaid, in any executive court within this province, proper to try the same in such way and manner as they might have done if such judgment or judgments had been originally recovered in the executive court in this province where said action of debt shall be brought.

". . . [U]pon a plea of *nul tiel* record or any other plea or pleas which may and shall be made in such action or actions of debt so to be brought upon such judgment, as aforesaid a true copy of the record and proceedings of the said court or courts in the said neighboring colony or colonies, according to the custom and usage of the colony where the said judgment or judgments were or shall be recovered, . . . shall be to all intents and purposes as good and sufficient evidence of such judgment, and have the same effect and operation, as if the original judgment and proceedings had been rendered and had in the court where such action of debt shall be brought and depending."³³

As indicated by the preamble and confirmed by Governor Hutchinson's report to the Board of Trade, this legislation was

³² 5 Acts and Resolves of the Province of Massachusetts Bay 323 (1886); CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, Dane, Prescott, and Story ed., 684 (1814).

³³ The domestic law part dealing with judgments recovered before justices of the peace in Massachusetts is omitted.

prompted by doubts on the part of the Superior Court whether records of judgments from courts of other colonies could be admitted in evidence. What were these doubts? A consultation of Gilbert's *Law of Evidence* gives the answer. But a few preliminary words on the author and his work are in order.

Sir Geoffrey (or Jeffray) Gilbert, Lord Chief Baron of the Court of Exchequer at the time of his death, at the age of 52, in 1726,³⁴ left a series of treatises on law in manuscript which were published after his death. His *Law of Evidence*, first systematic presentation of the subject, became a classic. Originally printed in Dublin in 1754, it had London prints in 1756, 1760, 1769, 1777, 1788, 1791, and 1801, and, furthermore, Philadelphia reprints in 1788 and 1805. The work, praised by Blackstone in his *Commentaries*,³⁵ furnished the basis for the books on evidence and the evidence chapters in the books on *Trials at Nisi Prius* subsequently appearing.³⁶ James Wilson recognized it as the leading text in his Lectures on Law at the University of Pennsylvania,³⁷ though attacking it for its reliance on the theories of Locke.³⁸

In the American Colonies, the *Law of Evidence* was in constant use in the courts soon after appearance. For Massachusetts, *Quincy's Reports*³⁹ shows that the work was referred to in nearly all cases where a question of evidence was the issue.⁴⁰ The same appears for Maryland from *Harris & McHenry's Reports*,⁴¹ and

³⁴ Previously he had held the same office in Ireland for a decade. The best account of Gilbert is by Capel Lofft in Lofft's edition of GILBERT'S LAW OF EVIDENCE in four volumes (London, 1791-6, Dublin, 1795-7). Cf. 8 FOSS, JUDGES OF ENGLAND 31 (1864).

³⁵ 3 BLACKST. COMM. *376, note (n).

³⁶ [BATHURST] AN INSTITUTE OF THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 1st ed., Part VI (1767); [BATHURST] THEORY OF EVIDENCE (1761); BULLER, INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, (1st ed. 1772) (based on Bathurst).

³⁷ "My Lord Chief Baron Gilbert, the most approved, and deservedly the most approved writer on this part of the law. . . ." 1 WORKS OF JAMES WILSON, Bird Wilson ed., 272 (1804); 1 WORKS OF JAMES WILSON, Andrews ed., 245 (1896) (Lectures on Law 1790-1).

³⁸ Criticisms in chapter XIII: "Of the Nature and Philosophy of Evidence," of Wilson's Lectures. Gilbert had abstracted Locke's "Essay on Human Understanding" (printed in the Lofft edition of GILBERT'S LAW OF EVIDENCE).

³⁹ Josiah Quincy, Jr., Reports of Cases Argued and Adjudged in the Superior Court of Massachusetts Bay Between 1761 and 1772 (Samuel M. Quincy, ed., 1865).

⁴⁰ Rex v. Pourksdorff, Quincy 104 (1764) (cited by Kent, either from the 1756 or 1760 edition); Whitney v. Whitney, Quincy 117 at 118 (1765) (cited by John Adams, either from the 1756 or the 1760 edition); Tyler v. Richards, Quincy 195 at 196 (1765) (cited by Auchmuty, from either the 1756 or 1760 edition); Hall v. Miller, Quincy 252 at 253 (1767): "And the Court Relied on Gilbert's Law of Evid. 191, where . . ." (quoting from the 2d, 1760, edition).

⁴¹ Johnson v. Howard, 1 H. & McH. (Md.) 281 at 296 (1768) (cited by S. Chase); Hutchins' Lessee v. Erickson, id. at 342 (1769) (S. Chase); Chamberlaine's Lessee v. Crawford, id. at 358-359 (1770) (Hollyday, Jenings); Hath's Lessee v. Polk, id. at 366

we have proof for Connecticut in William Samuel Johnson's *Diary*.⁴²

Gilbert begins his *Law of Evidence* with a statement that the first thing to be treated of is the evidence which ought to be offered to the jury and by what rules of probability it ought to be weighted and considered. He recalls that, according to Locke, there are several degrees from perfect certainty and demonstration quite down to improbability and unlikeliness, and he concludes by saying that what is to be done in all trials of right is to range all matters in the scale of probability. In continuation he remarks:

"Now this, in the first place, is very plain, that when we cannot see or hear anything ourselves, and yet are obliged to make a judgment of it, we must see and hear by report from others; which is one step further from demonstration, which is founded upon the view of our own senses; and yet there is that faith and credit to be given to the honesty and integrity of credible and disinterested witnesses, attesting any fact under the solemnities and obligation of religion, and the dangers and penalties of perjury, that the mind equally acquiesces therein as on a knowledge by demonstration. . . ."⁴³

After these opening remarks on the faith and credit to be given to means of evidence, Gilbert takes up, successively, written and unwritten evidence. Dividing written evidence in public and private, he begins with records. Records, he explains,⁴⁴ cannot be removed from place to place and must have a common repository. Consequently, copies of records must be allowed in evidence, "for since you cannot have the original, the best evidence that can be had of them is a true copy."⁴⁵ He discusses copies of statutes and then turns to copies of other records. Drawing a distinction between copies under seal and copies not under seal, he explains that copies under seal—exemplifications—may be under the Broad Seal or under the seal of the court.⁴⁶ He proceeds: "Under the Broad Seal such exemplifications are of themselves records of the

(1770) (Goldsborough); *Smith's Lessee v. Steele*, id. at 421, 425 (1771) (Goldsborough, Jennings).

⁴² "Infancy admitted to be given in evidence under non assumpsit on the authority of Gilbert's *Law of Evidence*." *Foster v. Anderson*, S.C.R. Hartford, Dec. 1772, *THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON 1772-1773*, Farrell ed., 10 (1942).

⁴³ P. 4 of the 1756 and 1760 editions.

⁴⁴ P. 7 of the 1756 and 1760 editions.

⁴⁵ At p. 8. The whole part is quoted in 4 WIGMORE, *EVIDENCE*, 3d ed., §1215 (1940).

⁴⁶ P. 14. Partly quoted in 5 WIGMORE, *EVIDENCE*, 3d ed., §1681 (1940).

greatest validity, and to which the jury ought to *give credit*, under the penalty of an attain; for there is *more faith* due to the most solemn attestations of public authority *than* any other transactions whatever. . . ."⁴⁷

Gilbert notes that, because the Chancery holds the Great Seal, a record exemplified under the Great Seal is either a record of the Court of Chancery or a record sent for attestation into Chancery. Copies under the seal of the court, and not under the Great Seal, he continues, are of higher credit than a sworn copy and shall be delivered to the Jury⁴⁸ to be "carried away by the Jury, to be seen and considered, that things of greater credit may be equally understood with other matters that carry less authority."⁴⁹

For the statement on the faith and credit due to exemplifications, *Olive v. Guin*,⁵⁰ a decision of 1658 of the Court of Exchequer, is cited. The question there was whether an exemplification with the seal of the court of a record from the court of Great Sessions in Wales should be admitted in evidence, the defendant having pleaded *nul tiel record*. At the time, Wales was an independent jurisdiction with its own court system.⁵¹ Speaking through Chief Baron Witherington, the Court of Exchequer held that the exemplification was admissible in evidence but that the jury did not have to give credit to it under the penalty of attain.

"... Et jury n'est lye a doner credit al chescun evidence desouth paine de attain. . . . Mon corolary de tout cas est que le recovery desouth le seal de Breckneck est evidence, mes jeo ne affirme que le jury fuer tenus a doner credence al ce desouth paine de attain."⁵²

In the American colonies, under *Olive v. Guin* reliance on a record from a foreign jurisdiction could be made difficult, and

⁴⁷ Beginning on p. 14 in both editions. Emphasis added. Not quoted in Wigmore.

⁴⁸ P. 17.

⁴⁹ P. 18.

⁵⁰ 2 Sid. 145, 82 Eng. Rep. 1303 (1658) (first published in 1684). The arguments are in Hard. 118, 145 Eng. Rep. 409 (first published in 1693), and reproduced, with the decision, in *THE LAW OF EVIDENCE* [ascribed to W. Nelson] 66, No. 12 (1717), 89, No. 16 (1739, 1744 editions). The case is referred to in WIGMORE, *EVIDENCE*, 3d ed., §§1681 and 2164 (1940).

⁵¹ Act for certain Ordinances in the King's Dominion and Principality of Wales, 34 & 35 Hen. 8, c. 26 (1542-43). Conflicts of jurisdiction were frequent. See, e.g., Act to Discourage the Practice of commencing frivolous and vexatious Suits in his Majesty's courts at Westminster, in causes of action arising within the dominion of Wales, 13 Geo. 3, c. 51 (1773). See OWEN, *THE ADMINISTRATION OF ENGLISH LAW IN WALES AND THE MARCHES* (1900).

⁵² 2 Sid. 145 at 146, 82 Eng. Rep. 1303 (1658). The judge referred to Anonymous, 7 Eliz., 2 Dyer 236a, 73 Eng. Rep. 522 (1564) (involving a record from Chester, but left undecided).

Gilbert's treatise had publicized the possibility. The preamble to the Massachusetts statute of 1774 shows that debtors moving to Massachusetts from other provinces had taken advantage of it and pleaded *nul tiel record*. In view of doubts entertained by the Superior Court legislation had become necessary.

When it came to the drafting by the Continental Congress of Articles for the new Confederation, it is reasonable to assume that the promoters of the legislation in Massachusetts also looked to it that the problem was solved for the Confederation. Did the proposal to the Congress for an Article on recognition of foreign judicial records come from that corner? Was the proposal submitted in the language reported to the Congress by the Committee of Three? These questions remain to be answered. The language of the Massachusetts statute of 1774 is particularly clumsy, the Article on Full Faith a model of draftsmanship for a constitutional provision. Whoever drafted the clause as reported and adopted might have been guided by the text in Gilbert. From the passage that the Jury ought to "give credit" to exemplifications of records under the Broad Seal because there is "more faith due to the most solemn attestations of public authority than any other transactions whatever," there is only a short step to the famous formula.

"Giving faith and credit to a record," on the other hand, is a term of art which had been used in English legal parlance long before Gilbert, and the formula may have been taken from the same source or sources from which it had come to Gilbert. The expression "giving faith and credit" was regularly recurred to in discussion of the effect to which decisions of the ecclesiastical courts were entitled in the common law courts. In 1585, it had been held in *Bunting v. Lepingwel*,⁵³ "et entant q' le conusans de droit de mariages appent al Ecclesiasticall court, & mesme le court a doné sentence en cest case, les judges de nostre ley doivent (comme que soit encounter le reason de nostre ley) doner foy & credit a lour proceedings & sentences, & a penser que lour proceedings sont consonant a ley de saint Eglise; Car *cui libet in sua arte perito est credendu* . . ." which was later translated into English as:⁵⁴ "forasmuch as the conusance of the right of marriage belongs to the Ecclesiastical Court, and the same Court has given sentence in this case, the Judges of our Law ought (although it be against

⁵³ As reported by Coke. COKE, LES REPORTS 29a (1585) (published in French in 1604).

⁵⁴ 4 Co. Rep. 29a, 76 Eng. Rep. 950 at 952 (1585) (first published in 1658), quoted by Kent, J., in *Vandenheuev v. The United Ins. Co.*, 2 Johns. Cas. (N.Y.) 127 at 141-143 (1801).

the reason of our Law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the Law of Holy Church, for cuilibet in sua arte perito credendum."⁵⁵

The formula appeared in the English text of Coke's report of *Caudrey's Case*,⁵⁶ decided ten years later and likewise involving an ecclesiastical court determination: ". . . the Judges of the Common Law ought to give faith and credit to their sentences, and to allow it to be done according to the ecclesiastical law. . . . And this is the common received opinion of our books, as appeareth 11 H. 7. 9. 34 H. 6. 14. & c. And in *Bunting and Leppingwel's case*, in the Fourth Part of my Reports." It reappears whenever the effect of an ecclesiastical court decision was the issue, as, for example, in *Grove v. Elliott*,⁵⁷ decided in the late 17th century: "We must give faith and credit to their proceedings, and presume they are according to their law, 4 Co. 29." Sometimes it was shortened to "we ought to give credit,"⁵⁸ "ought to give credence,"⁵⁹ "we must give credit,"⁶⁰ or to "nous doyoumus doner credence al eux."⁶¹ And in the shortened version it is found, on occasion, also in decisions involving recognition of an adjudication by a foreign court of admiralty, as, for example, in *Hughs v. Cornelius*,⁶² decided by the King's Bench in 1682.

The holding in the *Bunting* case was quoted in the English courts about eighteen months before the Continental Congress added to the Articles the Full Faith and Credit clause. It happened in a cause celebre, the *Trial of Elizabeth Duchess-Dowager of*

⁵⁵ "Experts should be trusted in their art." (trans. ours).

⁵⁶ 5 Co. 1, 77 Eng. Rep. 1 at 8 (1595) (first published in 1605). The Latin text merely said: "communi legis Judices ipsorum sententiae fidem adhibere et eandem approbare, juxta legem ecclesiasticam latam fuisse debent." Ibid. For these jurisdictional conflicts, see Lord Coke on Jurisdiction of Courts, 4 Co. Inst. 321 (1644).

⁵⁷ 2 Ventr. 41, 86 Eng. Rep. 296 at 298 (1670) (Archer, J.).

⁵⁸ Kenn's Case, 7 Co. Rep. 42b, 77 Eng. Rep. 474 at 476 (1606).

⁵⁹ Baker v. Rogers, Cro. Eliz. 788, 78 Eng. Rep. 1018 at 1019 (1601). See WATSON, THE CLERGY-MAN'S LAW, 4th ed., 43 (1747).

⁶⁰ Sir J. Nedham's Case, 8 Co. Rep. 135a, 77 Eng. Rep. 678 at 679 (1610); Jones v. Bow, Carth. 226, 90 Eng. Rep. 735 (1692). Cf. Lord Nottingham in Cottington's Case, 1678, cited, 2 Swan. 326n, 36 Eng. Rep. 640n. (1818).

⁶¹ Hitcham and Glovers Case, 2 Rolle 6, 81 Eng. Rep. 623 (1618). Cf. 2 Rolle, Abr. 219 (1668). See Prisot's argument in a case involving quare impedit, 34 Hen. 6, fol. 38, 40, quoted by Jefferson in his Tract, "Whether Christianity is a Part of the Common Law," 1 Jefferson's Reports 137 (1829), discussed by Story, "Christianity a Part of the Common Law," 9 AM. JURIST 346 (1833). Cf. HOWE, READINGS IN AMERICAN LEGAL HISTORY 24 (1949).

⁶² Ld. Raym. 473, 83 Eng. Rep. 247 (1682): (" . . . we ought to give credit to it, or else they will not give credit to the sentences of our Courts of Admiralty").

Kingston for bigamy,⁶³ which took place before the House of Lords, sitting at Westminster Hall, from April 15 to 22, 1776. James Wallace, one of the defense counsel, argued in the trial that the alleged first marriage of the duchess had been considered by an ecclesiastical court and held non-existent and that the Lords were bound by that decision. He began his discussion of cases with the *Bunting* case and recited the passage above quoted that "the judges of our law ought to give faith and credit to their proceedings."⁶⁴

"Because the curiosity of Europe would be excited," Lord Mansfield had not favored holding the trial.⁶⁵ The sensational affair was closely followed in Scotland⁶⁶ and probably everywhere else. Like other law books, the complete report of the trial, printed in 1776,⁶⁷ must have reached the colonies in due course.⁶⁸ Thus, at least in theory a link between the language of our Full Faith and Credit clause and the trial of the Duchess cannot be excluded.

Those who prefer to think of other possible links can point out that, apparently, use of this language was not uncommon. They may refer to a passage in a letter by Lord Hardwicke to Lord Kames, written in 1754 in answer to a proposal for assimilation of Scotch and English law:

"Might it not be right to begin with the law relating to Crimes which concern the public policy and government of the United Kingdom. . . . If to this were added the establishing of a *comitas jurisdictionum*, or the giving mutual faith and credence to the judgments and decrees of the sovereign courts in each country, as *res judicatae*, it would be a good step."⁶⁹

⁶³ *Rex v. Duchess of Kingston, The Trial of Elizabeth Duchess of Kingston for Bigamy* (London: Printed for Charles Bathurst, in Fleet Street, 1776), 34 H.L.J. 655, 11 STATE TRIALS 198 (1781); 20 HOWELL, STATE TRIALS 355 (1814). Opinion of the Law Lords in 2 SMITH'S LEADING CASES 424 (1841).

⁶⁴ At pp. 20, 21 of the 1776 print; pp. 261, 262 of the 1781 ed.; pp. 391, 392 of the 1814 ed. The duchess was found guilty of bigamy. The legal issues were (1) whether a sentence in the spiritual court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy; (2) whether the effect of such a sentence may be avoided by proof of fraud or collusion. See Hargrave's consultation for the Crown in HARGRAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 449, 453, (1787).

⁶⁵ In the House of Lords, Dec. 20, 1775, 18 PARLIAMENTARY HISTORY OF ENGLAND 1107, 1110 (1813).

⁶⁶ See the reference to the trial by Lord President Campbell in *Watson v. Renton*, 1 BELL'S COURT OF SESSION CASES 92, 108 (1792).

⁶⁷ By order of the House of Lords of April 22, 1776.

⁶⁸ Jefferson had a copy of the original, 1776, edition. 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, Sowerby ed., 298 (1953).

⁶⁹ 1 WOODHOUSELEE, MEMOIRS OF LIFE AND WRITINGS OF HENRY HOME OF KAMES 211

They may also recall that a full faith and credit formula had been used in the diplomatic practice in Letters of Credence since the Middle Ages;⁷⁰ that a "full faith" command was encountered also

(1807); 1 YORKE, *LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE* 623 (1913). Scotch courts denied *res judicata* effect. See 1 BANKTON, *INSTITUTES OF THE LAWS OF SCOTLAND* 33 (1751) (second volume, 1752, dedicated to Lord Hardwicke). For Lord Hardwicke's views on the effect of foreign judgments, see *Otway v. Ramsay*, 4 B. & C. 414n, 107 Eng. Rep. 1113n (1737); *Gage v. Bulkeley*, *Ridg. L.H.* 263, 27 Eng. Rep. 824 (1744). Cf. *Gage v. Stafford*, 2 Ves. Sr. 556, 28 Eng. Rep. 354 (1754). In *Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1 at 4-5 (1778), Lord Mansfield said: "... he recollected a case of a decree of the Chancery side in one of the Courts of Great Sessions in Wales, from which there was an appeal to the House of Lords, and the decree affirmed there; afterwards, a bill was filed in the Court of Chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the House of Lords because the original decree was in the Court of Wales whose decisions were clearly liable to be examined." On this, see Lord Kenyon's comment in *Galbraith v. Neville*, 1 Doug. 1, 99 Eng. Rep. 1 at 5n. (1789).

⁷⁰ "Litterae de credentia, apud Matth. Paris ann. 1252. Litterae credentiae et favoris, apud eundem ann. 1259. Litterae, scilicet, per quas quis petit, ut legato aut misso suo plene credatur, ac fides habeatur in negotiis pro quibus mittitur." DU CANGE, *GLOSSARIUM AD SCRIPTORES MEDIAE ET INFIMAE LATINITATIS*, v. *Credentia*, *Fides data* (1681). "Vulgo sunt litterae fidei et credentiae, quae iis redduntur qui adeuntur." PASCHAL, *LEGATUS*, c. XXI, p. 107 (Paris 1612). "... vulgo ... litterae fidei, seu credentiales nuncupatae, quae iis dantur, ad quos Legatus mittitur, et cum quibus agendum est." GERMONIO, *DE LEGATIS PRINCIPUM ET POPULORUM LIBRI TRES*, lib. II, c. VII, §4 (Rome 1627). English examples: "Paternitatem vestram humiliter imploramus, quatenus praefatos Nuncios nostros solita benigntate recipere et eisdem ... indubitabilem fidem et firmam credentiam adhibere velit." Letter of credence of May 8, 1289, by Edward I to Pope Nicholas IV, 1 RYMER, *FOEDERA*, 3d ed., part III, 47 (1739). "Trusty and welbeloved, forasmuch as we have committed to our right trusty and welbeloved Lord Clifford certain matiers greatly concernyng the worship and welfare of oure lande and of alle oure subgetts to be upened unto you, we wil that in that he or any other in his name shal shewe and declare unto you on oure behalve in this partie ye yeve full feith and credence like as ye herd us speak it in oure owne persone." Letter of credence of March 14, 1452 by Henry VI for Lord Clifford. 6 PROCEEDINGS AND ORDINANCES OF THE PRIVY COUNCIL OF ENGLAND 122 (1837). "We humbly crave ... that they will vouchsafe our commissioner ... a favorable hearing with such credit to such writings as he shall present in our names under the hands of our said secretary, as if we had presented the same in person, upon the faith and credit which we would not willingly violate for all worldly advantage." Commission to Edward Winslow by the Governor and Company of Massachusetts Nov. 4, 1646, to answer charges before the Governor in chief and commissioners for foreign plantations as members of the High Court of Parliament, 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, Shurtleff ed., 93 (1854). Professor Mark DeWolfe Howe called the Winslow commission to our attention.

At the time of the Continental Congress, the French version of letters of credence had been shortened to "donner créance entière." The letter of credence made out for Benjamin Franklin by the Continental Congress, modelled after that for the Ambassador from France, Gérard, merely said: "We beseech you to give entire credit to everything which he shall deliver on our part." In Congress, Oct. 21, 1778, 12 JOURNAL OF THE CONTINENTAL CONGRESS 1035, 1036 (1908); 2 WHARTON, *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE* 802 (1889). The drafting committee had asked for Gérard's letter of credence (JOURNAL at 908, Wharton at 709) which read: "Nous vous prions d'ajouter foi entière." 11 JOURNAL at 752, 753, 754.

As to current practice, for use of "D'ajouter foi et créance entière" by de Gaulle in 1945 and Bidault in 1946, see 2 DE MELLO, *TRATADO DE DIREITO DIPLOMATICO*, 2d ed., 174, 175 (1949). The full form, "entera fé y crédito," is still used in the Spanish language. See 1 ERICE Y O'SHEA, *NORMAS DE DIPLOMACIA Y DE DERECHO DIPLOMÁTICO* 305 (Madrid, 1945);

in the matter of notarial acts. Professor Ross has found⁷¹ that in Pope Alexander VI's Bull of May 4, 1493 delimiting the New World between Spain and Portugal it was said that copies of the Bull subscribed by a notary ought to be given, in court and out of court, that much credit as would be given to the original if produced.⁷² Thus notarial acts were given the status of public acts entitled to full faith: *instrumenta publica plenam faciunt fidem*;⁷³ and it is not without interest that, in the instrument of appointment of notaries, also the Archbishop of Canterbury decreed "that full faith be given, as well in as out of judgment, to the instrument by him [the notary] to be made."⁷⁴

In the light of the Massachusetts statute of 1774, Gilbert's *Law of Evidence*, and the other likely and unlikely sources, was the Full Faith and Credit clause in the Articles of Confederation meant merely to solve a problem of evidence, that is, admission of exemplifications of foreign records, or was it designed to secure at the same time conclusive effect to judgments from courts of sister states? If Gilbert's text was the only source, the argument would find support that the drafter or drafters merely thought of removing evidentiary difficulties which had arisen. The language used, on the other hand, originated, as far as can be seen, with the problem of what substantive effect to give to decisions from special jurisdictions. And the Massachusetts statute itself seems to have gone beyond mere securing the proof of foreign records by providing that the copy of the foreign judgment "shall have the

1 ANTOKOLETZ, *TRATADO TEÓRICO Y PRÁCTICO DE DERECHO DIPLOMÁTICO Y CONSULAR* 215 (Buenos Aires, 1948). Current United States practice: "to give full credence." See 2 DE MELLO, *supra*, at 171 (letter by President Truman); 2 GENET, *TRAITÉ DE DIPLOMATIE ET DE DROIT DIPLOMATIQUE* 205, No. 740 (1931) (letter by President Hoover).

⁷¹ Ross, "Full Faith and Credit' in a Federal System," 20 MINN. L. REV. 140 (1935).

⁷² 1 MAGNUM BULLARIUM ROMANUM, Cherubini ed., 466 (Lyons, 1655), reprinted with Richard Eden's translation from his *HISTORY OF TRAVAYLE IN THE WEST AND EAST INDIES* (1577) in 2 FISKE, *DISCOVERY OF AMERICA*, Appendix B (1892).

⁷³ See French Civil Code, Art. 1319 (1804): l'acte authentique fait pleine foi de la convention qu'il renferme (same: La. Civil Code of 1870, art. 2236). Derived from POTHIER, *TRAITÉ DES OBLIGATIONS*, c. IV: de la preuve des obligations, art. 734 (1761) (§700 in the Evans, 1806, trans.). Cf. JOH. VOET, *COMPENDIUM JURIS JUXTA SERIEM PANDECTARUM, ADJECTIS DIFFERENTIS JURIS CIVILIS ET CANONICI*, lib. XXII, Pand. Tit. III: De Probationibus et Praesumptionibus, 5th ed., 267, 268 (Leyden 1720); MASCARDUS, *DE PROBATIONIBUS, Quaestio VI De Secunda Probationum Specie: Quae Fit Per Instrumentum et Scripturam* (1615).

⁷⁴ 1 OUGHTON, *ORDO JUDICIORUM IN FORO ECCLESIASTICO-CIVILI BRITANNICO ET HIBERNICO* 486 (1738); 3 BURN, *ECCLESIASTICAL LAW*, 2d ed., 2 (1767); 2 PHILLIMORE, *ECCLESIASTICAL LAW OF THE CHURCH OF ENGLAND*, 2d ed., 945, 950 (1895). Cf. AYLIFFE, *PARERON JURIS CANONICI ANGLICANI* 386 (1726).

same effect and operation as if the original judgment and proceedings had been rendered in the court where such action of debt shall be brought and depending."

It has to be kept in mind, however, that non-recognition of the conclusive effect of foreign judgments had not become an issue, as far as we know, either in the English, or in the Colonial courts, at the time of the drafting of the Articles of Confederation. In sum, for the construction of the clause in the Articles one may perhaps have to say what Madison wrote to Edmund Randolph on March 10, 1784⁷⁵ in connection with an inquiry about the interpretation of the Extradition clause of the Articles: "The truth, perhaps, in this as in many other instances, is, that if the compilers of the text had severally declared their meanings, these would have been as diverse as the comments which will be made upon it."

There are only a few preserved reports of cases in which the Full Faith and Credit clause of the Articles was considered. In a Connecticut case, in which Ellsworth had been counsel,⁷⁶ *Kibbe v. Kibbe*,⁷⁷ decided during the September term 1786, the Superior Court refused judgment in personam against a Connecticut resident on the basis of a judgment obtained against the latter in Massachusetts by way of attachment of a handkerchief "shown to the sheriff by the plaintiff's attorney to be the estate of the defendant." The Supreme Court of Pennsylvania came to a similar result in *Phelps v. Holker*,⁷⁸ decided during the April term 1788, that is, after the Constitutional Convention. Jurisdiction had been obtained in Massachusetts by attachment of one blanket shown to the sheriff as the reputed property of the nonresident defendant. The court held that the Massachusetts judgment was not conclusive evidence of the debt claimed, Chief Justice M'Kean remarking that the proceedings in Massachusetts had been in rem and ought not to be extended further than the property attached.⁷⁹ Jared Ingersoll, a delegate to the Constitutional Convention, had represented the creditor. He thought that, as had been said by Lord Mansfield in *Walker v. Witter*,⁸⁰ foreign judgments were

⁷⁵ 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 66, 67 (1865).

⁷⁶ He excused himself from giving an opinion in the case. Kirby 126n. He had become a member of the court in 1785.

⁷⁷ Kirby (Conn.) 119 (1786). Kirby's Reports appeared in 1789.

⁷⁸ 1 Dall. (Pa.) 261 (1788). The first volume of Dallas' Reports was published in 1790.

⁷⁹ Id. at 264.

⁸⁰ 1 Doug. 1, 99 Eng. Rep. 1 (1778). The first volume of Douglas appeared in 1782. "... judgments [of certain courts of record in England] cannot be controverted. Foreign courts and courts in England not of record, have not that privilege, nor the courts in

only prima facie evidence of the debt and may be enquired into, but that the Massachusetts judgment could not be considered a foreign judgment "for, it is the record of a Court of one of the States of the Union, and, as such, it is entitled to full faith and credit in each of them. Art. of Confed. art. 4." *Walker v. Witter* had been decided in 1778, that is, after the draft of the Articles. It was probably the first English decision denying conclusive effect to a foreign judgment rendered by a court of competent jurisdiction.⁸¹ But whatever the English rule before *Walker v. Witter*, the Full Faith and Credit clause of the Articles cannot have been aimed at removing the principle of that decision.

A third case in which the Full Faith and Credit clause of the Articles was invoked is *James v. Allen*.⁸² This case was decided by the Common Pleas Court of Philadelphia County during the September term 1786, only a few months before the Constitutional Convention convened in Philadelphia.⁸³ The question was whether a discharge from imprisonment for debt (not from the debt itself) granted by a New Jersey court on the basis of powers given the courts under the New Jersey Insolvency Law⁸⁴ protected the

Wales, &c. but the doctrine in the case of *Sinclair v. Fraser* was unquestionable. Foreign judgments are a ground of action everywhere, but they are examinable." 99 Eng. Rep. 4. In *Sinclair v. Fraser*, also cited in the Trial of the Duchess of Kingston, the House of Lords had held on March 4, 1771, on an appeal from the Court of Session, "that the judgment of the Supreme Court of Jamaica ought to be received as evidence prima facie, of the debt, and that it lies upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained. . . ." Quoted in 1 Doug. 4a, 99 Eng. Rep. 3n. MORISON, *DICTIONARY OF DECISIONS* 4542 (1801). This was in line with Scotch precedents: *Edwards v. Prescott*, Dec. 29, 1720, KAMES, *REMARKABLE DECISIONS* 1716-1728, No. 21, p. 59 (1729). Cf. KAMES, *PRINCIPLES OF EQUITY*, 2d ed., 370 (1767) (dedicated to Lord Mansfield); Nadelmann, "Non-Recognition of American Money Judgments Abroad and What To Do About It," 42 *IOWA L. REV.* 236 at 239 (1957).

⁸¹ See *Burroughs v. Jamineau*, Mos. 1, 25 Eng. Rep. 235 (1744), 2 Str. 733, 93 Eng. Rep. 815 (1726). Sack, "Conflict of Laws in the History of the English Law," in 3 *LAW: A CENTURY OF PROGRESS* 342 at 384 (1937); Yntema, "Enforcement of Foreign Judgments in Anglo-American Law," in 2 *MÉMOIRES DE L'ACADEMIE INTERNATIONALE DE DROIT COMPARÉ* 348 (1932). Outside Admiralty and Ecclesiastical law, the question was doubtful. See 2 TAYLOR, *EVIDENCE* 1145 (1848).

⁸² 1 Dall. (Phila. Co.) 188 (1786).

⁸³ The Convention opened on May 14, 1787.

⁸⁴ Act of June 18, 1783 [Wilson's N. J. Laws 338 (1784)] reviving and continuing an Act of Dec. 21, 1771 [Allison's N. J. Laws 356 (1776)] entitled, An Act for the Relief of Insolvent Debtors (providing that any resident debtor may, in conjunction with two-thirds of his creditors, present a petition to the court; and on his making an assignment of his estate it was lawful for the court to discharge him from imprisonment).

It is of interest (See note 103 *infra*) that, on June 7, 1771, the Privy Council had disallowed an act of the N. J. Assembly of 1770, c. VI, for the relief of insolvent debtors because it dealt with the case of individuals and the Privy Council favored general "acts of insolvency." 5 Acts of the Privy Council (Colonial Series) 315 (1912) (with the report of Richard Jackson, K.C., counsel for the Board of Trade).

debtor from imprisonment for the same debt in Pennsylvania. The New Jersey law had one year's residence as a statutory requirement. Counsel for the debtor argued that extraterritorial effect should be given to the discharge both on the basis of general principles of the law of nations and the particular obligations arising from the Articles of Confederation. They cited *Robinson v. Bland*,⁸⁵ a decision of 1760 in which Lord Mansfield had referred to the writings of Ulrich Huber⁸⁶ in support of the application of the *lex loci*; and they suggested, with respect to Article 4, that what Lord Mansfield declared in *Walker v. Witter* to be the case with regard to certain courts of record in Westminster Hall (whose decisions were unexaminable evidence) should, under the Articles, apply to judgments of the several courts in the states of the American Union.

Counsel for the creditor, Ingersoll among them, took the position that the New Jersey law granted benefits for the territory of New Jersey only. In any event, they held the grounds for the discharge examinable and offered proof of lack of one year's residence.

The court construed the New Jersey law as exclusively local in its nature and terms. Thus it did not reach the "international law" and the constitutional law issues. But President Shippen remarked that insolvency laws subsisted in every state of the Union and that they probably were all different from each other; that they had never been considered binding outside the limits of the state. He added: "The Articles of Confederation . . . will not admit of the construction contended for, otherwise executions might issue in one State upon the judgments given in another; but seem chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings."⁸⁷

This had been a ruling on the effect of a foreign discharge from imprisonment for debt. *Millar v. Hall*⁸⁸ brought a ruling on

⁸⁵ 1 W. Bl. 234, 96 Eng. Rep. 129, 2 Burr. 1077, 97 Eng. Rep. 717 (1760).

⁸⁶ 1 W. Bl. 234 at 257, 258, 96 Eng. Rep. 129 at 141. See Davies, "The Influence of Huber's *De Conflictu Legum* on English Private International Law," 18 BRIT. Y.B. INT. L. 49 (1937); Lorenzen, "Huber's *De Conflictu Legum*," 13 ILL. L. REV. 375 (1919), reprinted in LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 136 (1947). Cf. Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws," 5 INT. & COMP. L. Q. 534 at 539 (1956).

⁸⁷ 1 Dall. (Phila. Co.) 188 at 191 (1788). Holding explained in *Gorgetat v. M'Carty*, 1 Dall. 366 at 368 (limited to discharges from imprisonment).

⁸⁸ 1 Dall. (Pa.) 229 (1788).

the effect of a foreign discharge from the debt itself. The case, which had been pending for some time,⁸⁹ was decided by the Supreme Court of Pennsylvania during the January term, 1788, shortly after the closing of the Constitutional Convention. The debtor, a Maryland resident, had obtained a discharge from debt in the courts of Maryland under the Maryland Insolvent Law.⁹⁰ The issue was whether the discharge had effect against a creditor in Pennsylvania. Ingersoll, who represented the debtor, argued that, under English authorities, a debt paid according to the law of a foreign country, though in a depreciated medium, had been decreed to be a satisfaction, and a *cessio bonorum* in Holland, "which is a discharge there," was decided to have the same effect in England. These authorities, he claimed, applied to the case at bar with additional force under the sanction of the Articles of Confederation. And he cited the Full Faith and Credit clause and the Privileges and Immunities clause.⁹¹ Relying on Lord Kames' *Principles of Equity*⁹² and *Robinson v. Bland*, his opponent, Moylan, argued that foreign statutes as such had no coercive authority extra territorium and were received only by consent as far as they were necessary to accomplish the rules of justice. He pointed at the Pennsylvania residence of the creditor and claimed that the debt was a Pennsylvania debt and that the Maryland law was passed after its creation.⁹³ The court held for the debtor, "having considered the principles of the law of nations, and the reciprocal obligations of the states under the articles of Confederation." Said the Chief Justice for the Court:

"It is true, that the laws of a particular country, have *in themselves* no extraterritorial force, no coercive operation; but by

⁸⁹ According to INGRAHAM, A VIEW OF THE INSOLVENT LAW OF PENNSYLVANIA, 2d ed., 185, n. 2 (1827), the action was originally brought in the Common Pleas Court of Philadelphia and removed by habeas corpus into the Supreme Court to April term 1785. The case came before the court on a motion for leave to enter an exoneratur on the bail piece.

⁹⁰ Act for the Relief of Insolvent Debtors of March 23, 1774 [1774 Acts, c. 28, 1 KILTY, LAWS OF MARYLAND (1799)] continued for three years by Act of Feb. 1777, c. 17, and for seven years by Act of March 1780, c. 21, KILTY, LAWS OF MARYLAND (1800).

⁹¹ 1 Dall. (Pa.) 229 at 231.

⁹² KAMES, PRINCIPLES OF EQUITY, 2d ed., 363 (1767): "Though a statute, as observed, hath no authority as such extra territorium; it becomes however necessary, upon many occasions, to lay weight upon foreign statutes, in order to fulfil the rules of justice. Many examples occur of indirect effects given thus to foreign statutes. . . ." Kames' work, dedicated (beginning with the second edition) to Lord Mansfield, in the closing chapter deals with "Jurisdiction of the Court of Session with respect to Foreign Matters." Linking "comity" with equity, Kames is the first to offer a comprehensive treatment in the English language of problems of conflicts of laws.

⁹³ 1 Dall. (Pa.) 229 at 230.

the consent of nations, they acquire an influence and obligation, and, in many instances, become conclusive throughout the world. . . . From the nature of the act then, it appears to be founded upon equitable grounds, for general and just purposes; it ought therefore to be regarded in all other countries, and should enjoy that weight, in our decisions, which it naturally derives from general conveniency, expediency, justice, and humanity. For, mutual conveniency, policy, the consent of nations, and the general principles of justice form a code which pervades all nations and must be everywhere acknowledged and pursued."⁹⁴

These few decisions are insufficient to support any specific construction of the Full Faith and Credit clause in the Articles.⁹⁵ They have been recalled because a connection between the issues before the courts and the debates in the Constitutional Convention cannot be ruled out—even may suggest itself.

II

We pass to the Full Faith and Credit clause in the Constitution of the United States. A clause on "full faith" was in the draft constitution reported to the Constitutional Convention on August 6, 1787⁹⁶ by the Committee of Detail, composed of John Rutledge, of South Carolina, Edmund Randolph, of Virginia,

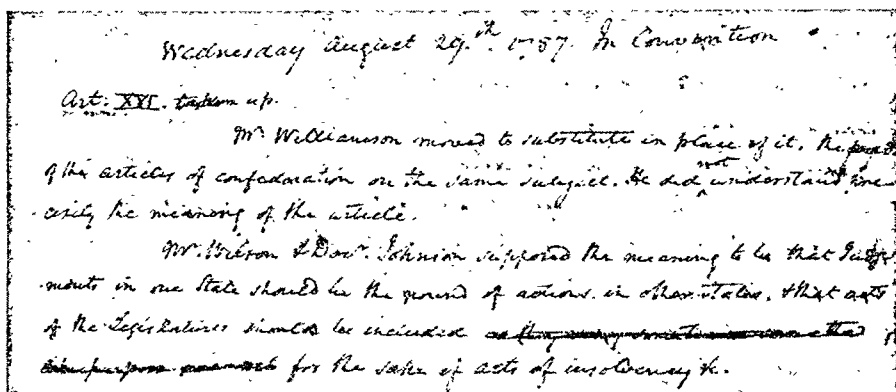
⁹⁴ *Id.* at 232. Followed in *Thompson v. Young*, 1 Dall. (Phila. Co.) 294 (1788). Cf. *Gorget v. M'Carty*, 1 Dall. (Phila. Co.) 366 (1788). The interesting status of the law on this subject before *Ogden v. Saunders*, 12 Wheat. (24 U.S.) 213 (1827), is well described in *INGRAHAM, A VIEW OF THE INSOLVENT LAW OF PENNSYLVANIA*, 2d ed., 178 (1827), and *DORSEY, AMERICAN LAW OF INSOLVENCY* 161 (1832).

⁹⁵ In this connection, a reaction within the Continental Congress in the summer 1781, that is, seven years after the draft of the article, is of interest. A committee had been appointed to prepare an Exposition of the Confederation, a plan for its complete execution and supplemental articles. This committee, composed of Messrs. Randolph, Ellsworth, and Varnum, on August 22, 1781, reported that the Confederation "requires execution in the following manner: (1) By adjusting the mode and proportions of the Militia aid to be furnished to a sister State labouring under Invasion; (2) By describing the privileges and immunities to which the citizens of one state are entitled in another; (3) By setting forth the conditions upon which a criminal is to be delivered up by one state upon the demand of the executive of another; (4) By declaring the method of exemplifying records and the operation of the Acts and judicial proceedings of the Courts of one State contravening those of the States in which they are asserted; (5) . . ." 21 *JOURNALS OF THE CONTINENTAL CONGRESS* 894 (1912). (Emphasis added.) No background information being available, it would be mere guessing on what may have been in the minds of the drafters when they thought of situations where the acts and proceedings at the forum clash with the acts and judicial proceedings of the state on which the party seeks to rely. But it is interesting that, at that stage, the drafters saw two different problems in need of clarification; one formal, the method of exemplification, and the other, substantive, the effect of a foreign judgment or proceeding.

⁹⁶ 2 *FARRAND, RECORD OF THE FEDERAL CONVENTION* 176 (Journal), 177 et seq. (Madison) (1911).

Nathaniel Gorham, of Massachusetts, Oliver Ellsworth, of Connecticut, and James Wilson, of Pennsylvania.⁹⁷ The draft provided in Article XVI: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."⁹⁸ Except for the extension to "acts of the Legislatures," it was essentially the clause of the Articles of Confederation.

The discussion of Article XVI began on August 29, 1787.⁹⁹ The Journal of the Convention merely records commitment of the article, together with various proposed amendments. Madison's *Notes of Debates* are more explicit. According to the Notes (Appendix, pp. 87-88 *infra*), Mr. Williamson, of North Carolina, said that he did not understand precisely the meaning of the article. He moved to substitute the words of the Articles. James Wilson, Pennsylvania member of the Committee of Detail, and William Samuel Johnson, of Connecticut, advanced explanations.



"They supposed the meaning to be," says the Notes, "that judgments in one state should be the ground of actions in other states, and that acts of the legislatures should be included, *as they sometimes serve the like purpose as act for the sake of Acts of insolvency etc.*" The part in italics, reproduced as identified in the State Department edition of the Notes,¹⁰⁰ is stricken out in the manuscript.¹⁰¹ The last two words stricken out are difficult to

⁹⁷ Appointed July 24, 1787. *Id.* at 106 (Madison).

⁹⁸ *Id.* at 188 (Madison).

⁹⁹ *Id.* at 445 (Journal), 447 (Madison).

¹⁰⁰ 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 635 (1900); 2 FARRAND, RECORD OF THE FEDERAL CONVENTION 447 (1911). It appeared neither in the Gilpin edition of the "Papers" (1840), reprinted in Elliott's DEBATES (1845), nor in Hunt's edition of the "Writings" of James Madison (1903).

¹⁰¹ See excerpt of the Notes reproduced in the text above.

decipher. At what time the correction was made would be difficult to know without chemical tests. As we know, many corrections were made when, between 1821 and 1836, Madison worked on editing the Notes for posthumous publication. Why this particular correction was made must be left to speculation. The part stricken out cannot have been invented; it makes perfect sense and matches with what follows.

What were the "Acts of insolvency" referred to by Wilson and Johnson? Johnson's home state, Connecticut, had no general bankruptcy or insolvency legislation at that time.¹⁰² Insolvent debtors desiring to be relieved from their debts had to petition the legislature for what was called a special "Act of insolvency." The records of the legislature, now published, show action on such petitions taken by the General Assembly at almost every session.¹⁰³ The debtor received the benefit of a special act em-

¹⁰² Connecticut had a law, though, for the release of debtors by the court but the release was conditioned upon the creditor's refusal to advance costs for the debtor's maintenance. Act for Regulating Gaols and Gaolers, Acts and Laws of the State of Connecticut in America 89, 90 (1786).

¹⁰³ Numerous examples are in 6 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 1785-1789, Labaree ed. (1945). See the petition by James Church for an "Act of Insolvency" at p. 275, and the disposition of the case at the May 1787 session of the General Assembly, at p. 320: "Upon the Petition of James Church of Hartford bearing Date the 19th Day of May 1786, against his Creditors, Shewing to this Assembly that by means of many great and heavy losses and misfortunes in the course of trade in the last war he is greatly reduced and embarrassed in his circumstances and become unable to pay all his just debts, that he is advanced in Years and of a weakly infirm constitution of body and desirous that equal justice might take place amongst his creditors as far as in his power, and is willing to resign up into the hands of trustees upon oath all his estate both real and personal to be disposed of for the benefit of his creditors except his own and his wife's wearing apparel and their household furniture, and praying that thereupon he may be exonerated and discharged from all his debts contracted before the date of his petition, and it appearing to this Assembly that the facts stated in said petition are just and true, and more than four fifths of his creditors in number and value having requested the same by a writing under their hands and exhibited to this Assembly,—Whereupon it is enacted and resolved by this Assembly that upon said James Church's delivering upon oath and assigning unto Messrs. Richard Alsop, Daniel Pitkin and William Adams who are hereby appointed trustees to receive the same all his property both real and personal except his own and his wife's wearing apparel and their household furniture for the use and benefit of his creditors, and obtaining from said trustees a certificate of his having so done said James Church his person and property shall by force of this Act be exonerated and discharged from all attachments executions and suits in law or equity for and on account of any debt or debts contracted before the date of his said petition, and said trustees are hereby directed and empowered to warn a meeting of said creditors to be held at the House of Mr. David Ball in said Hartford on the 20th of July next, by advertising the same in the several newspapers in this state three weeks successively twenty days before the time of said meeting, and said creditors, or a major part of them present at said meeting, may displace any or all of said trustees and appoint others in their stead, and also agree upon and prescribe regulations for said trustees in the management and disposal of said property and also with respect to the payment of the several dividends to the creditors, and also give directions how any future meeting shall be warned and on what occasions and to do and conclude any other matter and thing relating to said estate that

bodying all the features of bankruptcy legislation, including provision for liquidation of the estate and discharge from debts. Such discharge resulting from the statute served *the like purpose as* orders of discharge elsewhere granted by the courts. In the Committee of Detail, Ellsworth may well have made this point and promoted the change in the language of the article in the Articles of Confederation. A member of the Council, Johnson was no less familiar with the practice of his state,¹⁰⁴ which can easily explain his intervention in the debate. And as for Pennsylvania, Wilson's home state, the practice of special legislation for individual debtors was not unknown there either. The courts did not receive power to release debtors owing less than 150 pounds until December 20, 1784,¹⁰⁵ and individual relief acts had been passed almost every year, some still in 1786.¹⁰⁶

It was thus proper to say, as apparently it was said, that acts of the legislatures sometimes serve the like purpose as acts of courts. "Acts of insolvency" was a perfect example; divorces would have been another, for in several states, including Connecticut,¹⁰⁷ divorces were granted by the legislature either exclusively or concurrently with the courts.

After the explanations advanced by the expert lawyers Wilson¹⁰⁸ and Johnson, according to Madison's Notes, Charles Pinck-

may be necessary for the benefit of said creditors." The application opened as follows: "Upon the memorial of James Church of Hartford preferred to the general assembly in May last showing that by various losses and misfortunes in trade in the course of the last war he is reduced in his circumstances and become unable to pay all his debts, praying for an Act of Insolvency to pass in his favor as per petition on file. . . ." The practice of individual acts of insolvency continued for some time. See the "Act of insolvency" for Josiah Huntington granted in 1794, mentioned in *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122 at 136 (1819), 8 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 1793 to 1796, 49 (1951); for debtors Barber granted in October 1799, *Barber v. Minturn*, 1 Day (Conn.) 136 (1803).

¹⁰⁴ He had attended the October 1786 session of the General Assembly which granted several stays of execution and protection from imprisonment in connection with pending applications for "acts of insolvency." See 6 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 1785-1789, Labaree ed., 226 (1945).

¹⁰⁵ 11 Pa. Stat. L. 396 (1906).

¹⁰⁶ Dec. 28, 1786 (Isaac Wynn and 12 others), 12 Pa. Stat. L. 347; April 1, 1784 (Long and others; Eberle), 11 id. 330, 334; Sept. 25, 1783 (Trumbower); Sept. 24, 1783 (Judson and others; Klein); Sept. 20, 1783 (Brown); 11 id. 195, 186, 180. See NOEL, HISTORY OF THE BANKRUPTCY LAW 59, n. 66 (1919).

¹⁰⁷ Divorces: Foot, May 1785; Dudley and Widger, May 1786; King, May 1787; Bliss, May 1788; Spalding, Jan. 1789. 6 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 87, 208, 334, 457, 530 (1945). See Labaree, note 104 *supra*, Introduction, 6 id. ix, xiii.

¹⁰⁸ See the first volume of Dallas for Wilson's frequent appearances in court. With or against the co-delegate to the Constitutional Convention, Jared Ingersoll, Wilson had appeared in *Wilcox v. Henry*, 1 Dall. (Pa.) 69 at 72 (1782); *McCarty v. Nixon*, 1 id. 77

ney, of South Carolina, moved to commit Article XVI with the following proposition: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."

It may well be—in any event the possibility cannot be ruled out¹⁰⁹—that the move for creation of a federal bankruptcy power was prompted by whatever Wilson and Johnson may have said of interstate problems of full faith in the field of insolvency. South Carolina had, at the time, adequate legislation for bankruptcy.¹¹⁰ The proposal for unification of the law on damages for unpaid foreign bills of exchange, on the other hand, may have come from conflicts problems which legislation on the subject in South Carolina had produced.¹¹¹

Gorham, of Massachusetts, who spoke next, supported Article XVI and was for committal of the Pinckney proposal. Madison moved for committal of both. But he added a proposal of his own: he desired the legislature to be authorized to provide for the *execution* of judgments in other states under such regulations as might be expedient. He thought that it could be safely done and was justified by the nature of the Union.

Randolph, fellow Virginian, disagreed with Madison. He thought that there was no instance of one nation executing judgments of the courts of another nation. He proposed an amendment:

"Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done."¹¹²

(1784); *Brown v. Scott*, 1 id. 145 (1785); *Lazarus Barnet's Case*, 1 id. 152 (1785); *Purviance v. Angus*, 1 id. 180 (Sept. 27, 1786); *Pollard v. Shaffer*, 1 id. 211 (June 27, 1786, April 15, 1787, Oct. 6, 1787); *Mifflin v. Bingham*, 1 Dall. 272 (1788); *M'Clenachan v. M'Carty*, 1 id. 375 (1788).

¹⁰⁹ See Nadelmann, "On the Origin of the Bankruptcy Clause," 1 AM. J. LEGAL HISTORY 215 (1957).

¹¹⁰ South Carolina had an Insolvency Law of 1759, 4 S.C. Stat. 86 (Cooper ed. 1838), modelled after 2 Geo. 2, c. 22 (1729), which was amended by Act of March 11, 1786, 4 S.C. Stat. 727. JAMES, DIGEST OF THE LAWS OF SOUTH CAROLINA 169 (1822).

¹¹¹ S.C. Public Laws (1786) 408, §9, 4 Stat. 727 (Cooper ed. 1838); JAMES, *supra* note 110, at 67, 70. See *Winthrop v. Pepon*, 1 Bay (S.C.) 468 (1795) (determining that the law of the place where the bill is drawn shall govern).

¹¹² FARRAND, RECORD OF THE FEDERAL CONVENTION 448 (1911) (Madison).

After committal of this motion, a further proposal was made. Following up Madison's idea of grant of implementing powers to Congress, Gouverneur Morris, of Pennsylvania, proposed the following text which was likewise committed:

"Full faith 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, determine the proof and effect of such acts, records and proceedings."¹¹³

A committee of five was appointed to consider Article XVI as drafted and the other proposals which had been committed. Rutledge, Randolph, Gorham, Wilson, and Johnson were made members.¹¹⁴

The committee, on September 1st, reported the following text:

"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 another."¹¹⁵

This followed closely the Morris draft, except that the committee had limited to judgments the right for Congress to prescribe "effects."

Morris was not satisfied, and when the committee draft was discussed on September 3rd, he moved that the end of the clause should read, "and the effect thereof [instead of: and the effect which judgments obtained in one state shall have in another]," which meant putting public acts, records, and judicial proceedings on the same level for the power of Congress to prescribe the effect.

George Mason, of Virginia, favored the motion, as reported in the Notes, "particularly if the 'effect' was to be restrained to judgments and judicial proceedings."

Wilson remarked that, if the legislature were not allowed to *declare the effect*, "the provision would amount to nothing more than what now takes place among all independent nations." The next speaker, Johnson, thought that the amendment as worded would authorize Congress to declare the effect of legislative acts of one state in another state. This Randolph considered as

¹¹³ Ibid.

¹¹⁴ Id. at 445 (Journal).

¹¹⁵ Id. at 483 (Journal), 485 (Madison).

strengthening the general objection against the plan that its definition of the powers of the government was so loose as to give it opportunities of usurping all the state powers. He was for not going farther than the committee draft enabling the Congress to provide for the effect of *judgments*.

Morris' motion to amend was brought to a vote. The motion was carried by a majority of six versus three, Maryland, Virginia, and Georgia voting against, and Massachusetts, Connecticut, New Jersey, Pennsylvania, North Carolina, and South Carolina for.¹¹⁶

But then came another motion. Madison moved to strike out the "ought to" at the start of the provision and replace it by "shall," and to replace the "shall" by "may" in the part giving Congress power to legislate. This motion shifting the emphasis was adopted without opposition,¹¹⁷ and the Convention passed to the discussion of the next—the bankruptcy—article.

Only slightly changed by the Committee of Style,¹¹⁸ the Full Faith and Credit clause came into the Constitution as follows, forming Article IV, first section:

"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."¹¹⁹

Madison thus commented on the clause in *The Federalist*:

"The power of prescribing, by general laws, the manner in which the public acts, records, and judicial proceedings of each state shall be proved, and the effect they shall have in other states, is an evident and valuable improvement on the clause relating to this subject in the articles of confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contingent States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction."¹²⁰

¹¹⁶ *Id.* at 486 (Journal), 489 (Madison).

¹¹⁷ *Ibid.*

¹¹⁸ The committee (Johnson, Hamilton, Morris, Madison, King) had replaced "Legislature" by "Congress" and broken up the clause into two sentences, the second starting with: "And the Congress. . . ." 2 FARRAND at 590, 601.

¹¹⁹ *Id.* at 651, 661.

¹²⁰ *THE FEDERALIST*, No. 42, Lodge ed., 266 (1888) (Madison). Immediately preceding is the comment on the bankruptcy clause.

Congress lost no time in making use of the powers granted it by the Full Faith and Credit clause. The subject was brought up during the second session of the First Congress, in the House. On February 1, 1790, William Smith, of South Carolina, recited the text of the clause and moved that a committee be appointed to bring in a bill, or bills, pursuant thereto.¹²¹ A committee of three—John Page, of Virginia, James Jackson, of Georgia, and George Thacher, of Massachusetts—was appointed.¹²² According to the *Annals of Congress*, John Page presented for the committee on April 28, 1790, a bill "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated."¹²³ The text of the bill is not available.¹²⁴ Again according to the *Annals* on April 30, 1790, an amendment was made by the House sitting as a committee of the whole.¹²⁵ With this amendment, of which we do not have the text, the bill was passed and became the Act of May 26, 1790, "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."¹²⁶ It read:

"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 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 attestation is in due form. And the said records and judicial proceedings shall have such faith and credit given to them in every court of 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."

¹²¹ 1 ANNALS OF CONGRESS 1105 (1834). Previously he had opposed appointment of a committee to bring in a bankruptcy bill, arguing that the insolvency acts in the several states would answer for the time being.

¹²² *Ibid.*

¹²³ 2 *id.* at 1548.

¹²⁴ According to the National Archives and Records Service, the absence from the files of these early bills "cannot be accounted for except that some records were lost or destroyed when the Capitol was burned by the British in 1814." Letter of December 6, 1955 from the Chief Archivist, Legislative, Judicial and Diplomatic Records Branch, to the present writer. The bill for the Judiciary Act of 1789 found by Charles Warren was a *Senate* bill. Warren, "New Lights on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 50, n. 5 (1923).

¹²⁵ 2 ANNALS OF CONGRESS 1550.

¹²⁶ *Id.* at 2225, 1 Stat. 122 (1790).

Congress thus settled authentication for acts of the legislatures, as well as for records and judicial proceedings. But Congress limited to records and judicial proceedings what it wished to say on the faith and credit to be given to the authenticated pieces. To what an extent the Massachusetts Act of 1774 or other models may have been consulted by the drafters is a matter of conjecture. And, unless the original bill is found, it will not be known whether the last part of the act, on the faith and credit to be given, came into the act through the amendment.

In the Eighth Congress, in the House, Joseph H. Nicholson, of Maryland, moved on November 1, 1803, to have a committee appointed to inquire "whether any additional provisions are necessary to be made to the Act of 1790."¹²⁷ A committee of three was appointed, with Nicholson, Thomas Griffin, of Virginia, and James Holland, of North Carolina, as members.¹²⁸ According to the *Annals of Congress*, when, on November 25, 1803, the House, sitting as a committee of the whole, considered the bill introduced by Nicholson on the 2d of November,¹²⁹ "there was considerable discussion, developing much diversity of opinion," and the bill was recommitted to a select committee of nine members.¹³⁰ Again we do not have the text of the original bill. An amendatory bill to the Act of 1790 was reported to the House on February 7, 1804.¹³¹ This bill was adopted, without changes,¹³² to become the Act of March 27, 1804.¹³³

The Act of 1804 accomplished two things, both of a technical nature. First, the provisions of the Act of 1790 were extended to records and exemplifications of office books kept in any public office of any state, not appertaining to a court; second, the provisions were made applicable to the public acts, records, office books, judicial proceedings, courts and offices of the Territories of the United States and countries subject to the jurisdiction of the United States. These topics should not have led to "much diversity of opinion." Might the original bill have dealt, in addition, with the controversy, which was already in full swing, over the faith and credit to which judgments were entitled under

¹²⁷ 13 ANNALS OF CONGRESS 554 (1803).

¹²⁸ *Ibid.*

¹²⁹ *Id.* at 555.

¹³⁰ *Id.* at 625.

¹³¹ *Id.* at 979.

¹³² *Id.* at 1226, 1227.

¹³³ 2 Stat. 298 (1804).

the clause and the Act of 1790? Unless the original bill can be found, we shall not know.

III

Did—and does—the Full Faith and Credit clause of the Constitution, or the Act of 1790, or both taken together, provide that, jurisdictional requirements fulfilled, conclusive effect must be given to judgments from courts of other states? The courts disagreed. In particular, they disagreed on whether the Act of 1790 actually prescribed conclusive effect for judgments by saying: "And the said [authenticated] records and judicial proceedings shall have such faith and credit given them in every court of the United States, as they have by law or usage in the court of the state from whence the said records are, or shall be taken."

In examining what the courts came to decide in this respect, the sources available to the courts at the time of their decision must be kept in mind. In particular, it must be remembered that the *Journal of the Constitutional Convention* was not published before 1819 and that Madison's *Notes of the Debates* were first published in 1840. The latter, incidentally, means—what is sometimes forgotten—that Joseph Story did not have the benefit of the Notes in preparing his *Commentaries on the Constitution*.

James Wilson, now on the Supreme Court of the United States, faced the issue on Circuit in 1794. *Armstrong v. Carson*,¹³⁴ in the Circuit Court for the District of Pennsylvania, was an action of debt based on a judgment from a court in New Jersey. The defendant pleaded *nil debet*. Justice Wilson held that, since the plea would not be sustained in the courts of New Jersey, it could not be before a court in Pennsylvania either. "[W]hatever doubts," he said, "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."¹³⁵ This decision in the federal court notwithstanding, in 1801 the Common Pleas Court of Luzerne County in Pennsylvania took the opposite position in *Wright v. Tower*.¹³⁶ Jacob Rush, president of the court, in an

¹³⁴ 1 Fed. Cas. No. 543, at 1140 (C.C. Pa. 1794).

¹³⁵ *Ibid.*

¹³⁶ 1 Browne's Rep. (Pa.) App. 1 (1801).

elaborate opinion took the view that the Act of 1790 had not determined the effect of judgments of courts from other states.¹³⁷

In 1802, in South Carolina, a majority of four to one of the Constitutional Court held in *Hammon and Hattaway v. Smith*¹³⁸ that a North Carolina judgment was only prima facie evidence of the debt (*Walker v. Witter*¹³⁹ being referred to) and that the Act of Congress had not declared "the effect" of judgments from other states. Among the majority was William Johnson, soon thereafter to be appointed to the Supreme Court of the United States. He warned that, should the court go the other way, the next step would be to hold that a *scire facias* on a judgment in a sister state might be maintained in South Carolina.¹⁴⁰

While this decision did not appear in print until more than thirty years later, *Hitchcock v. Aicken*¹⁴¹ decided by the Supreme Court of New York in 1803, became available immediately. By a majority of three to two,¹⁴² a Vermont judgment was held to be only prima facie evidence of the debt and not conclusive as to the merits. All judges delivered elaborate opinions. With the majority, Kent¹⁴³ took the view that the clause in the Constitution meant nothing more than what concerned the evidence of the proceedings, and he pointed at the fact that the words of the clause applied to public acts as well as to judicial proceedings. The Act of 1790, he thought, had not declared "the effect" of judgments, and he recalled, referring to *Walker v. Witter* and Kames' *Principles of Equity*,¹⁴⁴ that judgments from Scotland, Wales or Jamaica, were held to be foreign judgments in England. Brockholst Livingston,¹⁴⁵ on the minority side, relied on the clause of the Constitution for the view that conclusive effect must be given. It was not clear, he thought, that Congress had anything to do with "the

¹³⁷ The defendant argued that, because of the separation of law and equity in New York, he had been prevented from pleading fraud against the New York judgment involved in the case.

¹³⁸ 3 S.C. L. (1 Brev.) 110 (1802). Followed by *Flourenoy v. Durke*, 4 S.C. L. (2 Brev.) 256 (1808).

¹³⁹ 1 Doug. 1, 99 Eng. Rep. 1 (1787).

¹⁴⁰ 3 S.C. L. (1 Brev.) 110 at 113 (1802).

¹⁴¹ 1 Cai. R. (N.Y.) 460 (1803).

¹⁴² *Lewis, C.J., Kent, Radcliffe, JJ., for; Thompson, Livingston, JJ., against.* The question of the effect of a condemnation sentence of a foreign court of admiralty had been before the court before. See *Ludlow and Ludlow v. Dale*, 1 Johns Cas. (N.Y.) 16 (1799); *Goix v. Low*, 1 Johns. Cas. (N.Y.) 341 (1800); *Vandenneuvel v. The United Ins. Co.*, 2 Johns. Cas. (N.Y.) 127 (1801), reversed 2 Johns. Cas. (N.Y.) 451 (1802).

¹⁴³ 1 Cai. R. (N.Y.) 478, 481.

¹⁴⁴ The reference is to the 3d ed., 1778, in two volumes.

¹⁴⁵ 1 Cai. R. (N.Y.) 466, 471.

effect" of domestic judgments. Disagreeing with Kames, he attacked the doctrine that foreign judgments are enforced not *ex necessitate* but only *ex comitate*¹⁴⁶—which, he felt, rendered them little better than a dead letter.¹⁴⁷ The rule of *Hitchcock v. Aicken* was reaffirmed in a series of later decisions.¹⁴⁸

In Massachusetts, the same happened as in New York. *Bartlett v. Knight*,¹⁴⁹ decided by the Supreme Judicial Court in 1805, involved an action of debt on a judgment recovered in New Hampshire. The defendant argued that he was a minor—14 years—when he signed the note on which the New Hampshire judgment was based. The court, composed of George Thacher, Theodore Sedgwick, and Samuel Sewall, held that full faith and credit did not have to be given to the New Hampshire judgment. Thacher, who had been on the committee in the First Congress, which reported the bill to become the Act of 1790, held the facts pleaded in defense pleadable. For him the Article of the Constitution and the Act of Congress did not admit of the construction contended for by the plaintiff.¹⁵⁰ Sedgwick, who had been a member of the House in the First Congress, took the view that the Act of 1790 stopped short of declaring the effect of authenticated judgments, this being left to the judicial department. In his opinion the Constitution did not force the courts to give full faith and credit in all circumstances, and he excepted the case before the court.¹⁵¹ Sewall believed the clause and the Act of 1790 merely to deal with evidence.¹⁵²

¹⁴⁶ Terminology going back to Voet ad Pandectas, §41, ad tit. Re judicat. [Voet's Commentaries, Book XLI (Krause trans. 1924) 6, 60], quoted in *Edwards v. Prescott*, 1720, 1 KAMES, REMARKABLE DECISIONS 1716 to 1728, No. 21, p. 59 (1729), MORISON, DICTIONARY OF DECISIONS 4535 (1801), where the question was whether, because of the Union, English judgments were entitled to conclusive effect in Scotland, as Dutch provincial judgments were in Holland after the Union of Utrecht under an Ordinance of April 1, 1580, art. 27.

¹⁴⁷ 1 Cai. R. (N.Y.) 460 at 467 (1803).

¹⁴⁸ *Hubbel v. Coudrey*, 5 Johns. R. (N.Y.) 132 (1809); *Taylor v. Bryden*, 8 Johns. R. (N.Y.) 173 (1811), per Kent, C.J. (explaining *Hitchcock v. Aicken* as meaning that it lies upon the defendant to impeach the justice of the judgment, or to show that it was irregularly and unduly obtained [*holding of Sinclair v. Fraser*, 1 Doug. 4a, 99 Eng. Rep. 4 n. (1771)]).

¹⁴⁹ 1 Mass. Rep. 401, 2 Am. Dec. 36 (1805); SWIFT, DIGEST OF THE LAW OF EVIDENCE 7 (1810). An Act of 1796, "Directing the Proceedings in Actions of Debt on a Judgment Rendered in another State," allowed the action of debt "provided that such judgment shall be certified in the form and to the effect which is, or shall be, prescribed by any general law of the Congress of the United States." 1 Mass. Gen. Laws, 491 (Stearns & Shaw ed. 1823).

¹⁵⁰ 1 Mass. Rep. 401 at 404 (1805).

¹⁵¹ *Id.* at 409.

¹⁵² *Id.* at 405. He maintained this view in *Bissell v. Briggs*, 9 Mass. Rep. 461, 6 Am. Dec. 88 (1813), where he was a minority of one against Parsons, C.J., and Parker, J. (Sedgwick and Thacher, JJ., not sitting in the case).

Joseph Story, in his first literary venture, *A Selection of Pleadings in Civil Actions*, published in 1805, commented on the issue¹⁵³ by quoting an unidentified "eminent lawyer" who had read the manuscript.¹⁵⁴ This source thought that the Act of Congress provided for the evidence only and referred to the doctrine laid down in England by *Walker v. Witter*.¹⁵⁵

Peck v. Williamson,¹⁵⁶ with the opinion written by Chief Justice Marshall, is the next case to be recalled. This is a decision of the Circuit Court for the District of North Carolina, rendered during the November Term 1812.¹⁵⁷ The question was whether a Massachusetts judgment was entitled to full faith and credit in North Carolina, and the court held that it was not. The jury was instructed that it could find for a sum short of what had been granted in Massachusetts. The Chief Justice took the view that the "effect thereof" part of the clause of the Constitution needed implementation and that the Act of 1790 did not state the effect to be given to foreign judgments. He remarked that it was very doubtful whether this opinion would receive the sanction of the Supreme Court, different opinions having been delivered by Judge Cushing in the federal court of Virginia, by Judge Washington in a recent case, and also by Judge Livingston, as it seemed from a case cited from New York.¹⁵⁸ Judge Livingston's dissenting opinion in *Hitchcock v. Aicken* was meant. Judge Cranch had held in *Bastable v. Wilson's Administration*,¹⁵⁹ decided in 1803, that *nil debet* was no plea to an action of debt on a judgment from another state. And the opinion by Justice Bushrod Washington evidently was

¹⁵³ At p. 296. Still found in the second edition, 1829, prepared by Benjamin L. Oliver, at p. 338.

¹⁵⁴ See "Advertisement," p. vii of the 1805 edition.

¹⁵⁵ "It has been questioned under this law [the Act of 1790] whether a court is bound to enforce the judgment of a court in another State as a matter of course, and without inquiry of the grounds of the judgment. The act of Congress seems to provide for the evidence only. In England the courts will not enforce judgments rendered by the Courts of their colonies, as judgments, but only as evidence, prima facie, of the debt. The grounds need not be averred by the plaintiff; but the defendant may object to the demand; and so the law is laid down in *Doug. 4, 5*."

¹⁵⁶ 1 Car. L. Repository 53, 1 Brunner, Col. Cas. 398, 19 Fed. Cas. No. 10,896 at 85 (C.C. N.C. 1812). The Repository was published in 1813.

¹⁵⁷ The decision was rendered on Nov. 13, 1812, and not during the November Term 1813, as is said erroneously in the Repository.

¹⁵⁸ 1 Car. L. Repository 53, 54, 19 Fed. Cas. No. 10,896, at 85.

¹⁵⁹ 1 Cranch, Circuit Court Cases 124, 2 Fed. Cas. No. 1,097 at 1012 (C.C. D.C., at Virginia, 1803). The Cranch volume appeared in 1852. Followed by *Short v. Wilkinson*, 2 Cranch 22, 22 Fed. Cas. No. 12,810, at 15 (C.C. D.C., at Washington, 1811); *Duryee v. Mills and Frazer*, June 21, 1811, not reported.

in the case *Green v. Sarmiento*,¹⁶⁰ decided in April 1811 in the Circuit Court for the District of Pennsylvania.

Green v. Sarmiento involved a New York judgment against the defendant who had appeared in the New York proceedings. In an elaborate opinion Justice Washington held the judgment conclusive under the Full Faith and Credit clause of the Constitution. He took the view that the Act of Congress did not go so far as to prescribe full faith and credit for judgments from other states. For him the supreme law of the land had already pronounced upon that subject, and a similar declaration by this subordinate body would have been idle, if not mischievous.¹⁶¹ He added that, if the Constitution or the Act of Congress had declared generally that the judgments in one state should be conclusive in every other, very embarrassing questions would have arisen as to the degree to which they were conclusive.¹⁶²

The Supreme Court of the United States settled the issue in *Mills v. Duryee*,¹⁶³ decided on March 11, 1813, only a few months after *Peck*. It was held that judgments from other states had to be given conclusive effect. The Chief Justice and Justices Washington, Johnson, Livingston, Duvall, and Story participated in the decision. Justice Johnson dissented.

In an action of debt upon a New York judgment in the Circuit Court for the District of Columbia, *nil debet* had been pleaded by the defendant, and his plea had been adjudged bad. Counsel for the judgment debtor referred to *Phelps v. Holker*, *James v. Allen*, *Hitchcock v. Aicken*, and *Bartlett v. Knight*. The opposing counsel cited *Armstrong v. Carson*. He "admitted" that a record authenticated pursuant to the Act of Congress was to have the effect of

¹⁶⁰ 1 Browne's Rep., App. xxx, Peters, Circuit Court Rep. 74, 3 Washington, Circuit Court Rep. 17, 10 Fed. Cas. No. 5,760, at 1117 (C.C. Pa. 1811). Browne's Reports was published in 1811. B. Tilghman and Tilghman appeared for plaintiff; J. R. Ingersoll, Dallas, and Ingersoll, for defendant.

¹⁶¹ Browne, at xxxvii, Peters, at 81, Washington, at 24, 10 Fed. Cas. No. 5,760, at 1119.

¹⁶² Ibid.

¹⁶³ 7 Cranch (11 U.S.) 481 (1813). On a writ of error to the Circuit Court for the District of Columbia, sitting in Washington County, in an action of debt upon a judgment of the Supreme Court of New York to which the defendant below pleaded *nil debet*, which plea, upon general demurrer, was adjudged bad. John T. Duryee v. Peter Mills and Eliphanet Frazer. Judgment of June 21, 1811. Trials 106, June Term 1811, No opinion, and not reported. Nicholas Fitzhugh and Buckner Thurston, Assistant Judges. Francis Scott Key argued for the plaintiff in error. Walter Jones, District Attorney, was the opponent. The same had appeared in the circuit court. Note that the question of the conclusive effect of sentences of foreign courts of admiralty had been determined five years before in *Croudson v. Leonard*, 4 Cranch (8 U.S.) 434 (1808).

evidence only, but argued that it was "evidence of the highest nature, viz., record evidence."¹⁶⁴

The opinion of the Court was delivered by Justice Story. Stating that the decision depended altogether upon the construction of the Constitution and laws of the United States, Story repeated the argument made for the judgment creditor almost verbatim.

"It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, namely, record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it."¹⁶⁵

Any doubt left whether the conclusive effect was deduced from the clause in the Constitution or from the Act of Congress is removed by the concluding paragraph of the opinion.

"Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."¹⁶⁶

Justice Johnson, in his dissenting opinion,¹⁶⁷ took the view that "faith and credit are terms strictly applicable to evidence."¹⁶⁸ He expressed apprehension that, if the plea of *nil debet* were to be excluded, it might lead to inextricable difficulty in a situation like the one they had had recently before the Court¹⁶⁹ where a

¹⁶⁴ 7 Cranch (11 U.S.) 481 at 482 (1813).

¹⁶⁵ Id. at 484.

¹⁶⁶ Id. at 485.

¹⁶⁷ Ibid.

¹⁶⁸ Id. at 486.

¹⁶⁹ *Holker v. Parker*, 7 Cranch (11 U.S.) 436 (1813), decided on March 10, 1813, one day

judgment for \$150,000 was given in Pennsylvania upon an attachment levied on a cask of wine, and action of debt was afterwards brought on that judgment in the state of Pennsylvania.

The Story opinion raises the question of how a majority could have been obtained in the Court for resting the decision on the Act of Congress rather than on the Constitution. Livingston and Washington were on record for deducing the conclusive effect from the Constitution, and the Chief Justice had held only the other day that neither the Act of Congress nor the Constitution gave the judgments conclusive effect, emphasizing that the act added nothing to what the Constitution itself said. The last sentence, "On the whole, the opinion of a majority of the court is that the judgment be affirmed,"¹⁷⁰ and the fact that Story had to write the opinion, perhaps suggest that the majority was in agreement on nothing but the result. And the Chief Justice may have disagreed. For, as he later revealed,¹⁷¹ it was his custom to acquiesce silently in the opinion of the Court when he had "the misfortune to differ from it." In 1818, when in *Hampton v. M'Connel*,¹⁷² the question came again before the Court, the Chief Justice restated the *Mills* doctrine for the Court in one sentence—"that the judgment of a state court should have the same credit, validity, and effect, in every other state of the United States, that it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, would be pleaded in any other court in the United States."¹⁷³

Compared with the preceding Livingston and Washington opinions, Story's opinion in *Mills* fares very poorly. Hardly explained by the junior member on the Court¹⁷⁴ is why acceptance of a record as full evidence of the statements in the record must mean recognition of the adjudicated issue as conclusive. On this

before *Mills v. Duryee*. In the *Holker* case, Marshall, C.J., speaking for the Court, had said: "Had the real case been brought before the referees . . . it cannot be assumed as certain that they . . . would have refused to receive it [the judgment from Pennsylvania] as *prima facie* evidence of a claim to its full amount, open to such objections as Parker might make to it." 7 Cranch, at 452. Story, who had represented Parker, did not sit in the case. U.S. Sup. Ct. Minutes (B: 1806-1817), Feb. 26, 1813. For the background of the *Holker* case, see Nadelmann, "Recognition of Foreign Money Judgments in France," 5 AM. J. COMP. L. 248 at 251 (1956).

¹⁷⁰ 7 Cranch (11 U.S.) 481 at 484 (1813).

¹⁷¹ *United States Bank v. Dandridge*, 12 Wheat. (24 U.S.) 64 at 90 (1827).

¹⁷² 3 Wheat. (16 U.S.) 234 (1818).

¹⁷³ *Ibid.*

¹⁷⁴ It was Story's second year on the Bench and one of his earliest opinions.

it is merely said that "... when Congress gave the effect of a record to the judgment it gave all the collateral consequences."¹⁷⁵ No support is offered for the theory of "collateral consequences" which was foremost in Story's mind, as is corroborated by a footnote added by Story in his personal copy of 7 Cranch at the bottom of the page. The note,¹⁷⁶ to "collateral consequences," reads: "see 5 East 473 *Collins v. Vt. Mathews*." In *Collins*,¹⁷⁷ decided at Westminster in 1804 and noted in Lawes, *Pleadings in Assumpsit*, which Story had edited in 1811,¹⁷⁸ a plea of *nul tiel record* was pleaded to an action of debt on an Irish judgment, Lawes arguing that the judgments of Irish courts being admitted to be records since the Union between Great Britain and Ireland, they "must be taken to be and pleadable as such, with all legal consequences, as the records of other courts within this part of the kingdom."¹⁷⁹ The court intimated that Irish judgments were properly pleadable as records.¹⁸⁰ Later decisions denied Irish judgments conclusive effect however.¹⁸¹

Whatever the technical quality of Story's opinion in *Mills v. Duryee*, as far as Story is concerned, the important fact is that he later changed his view on the reading of the Full Faith and Credit clause of the Constitution and read into the clause itself¹⁸² the command to give conclusive effect to judgments of courts from other states. Said he in his *Commentaries on the Constitution of the United States*, published in 1833:

"... Does it import no more than that the same faith and credit are to be given to them, which by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the

¹⁷⁵ 7 Cranch (11 U.S.) 481 at 484 (1813).

¹⁷⁶ Story's copy of 7 Cranch is in the Treasure Room of the Harvard Law Library.

¹⁷⁷ *Collins v. Viscount Mathew*, 5 East 473, 102 Eng. Rep. 1152 (1804).

¹⁷⁸ LAWES, *PLEADING IN ASSUMPSIT*, Story ed., 344 (1811).

¹⁷⁹ 5 East 473 at 475, 102 Eng. Rep. 1152 (1804).

¹⁸⁰ *Id.* at 474.

¹⁸¹ See *Harris v. Saunders*, 4 B. & C. 411, 107 Eng. Rep. 1112 (1825). Cf. *Sims v. Thomas*, 3 Ir. L. Rep. 415 (1841). And see Lord Brougham in *Houlditch v. Donegall*, 2 Cl. & Fin. 470 at 477, 6 Eng. Rep. 1232 at 1234 (1834). Legislation was considered. Lord Portarlington v. Souilly, 3 My. & K. 104, 40 Eng. Rep. 40 at 42 (1834). Settled by Judgments Extension Act, 1868, 31 & 32 Vict., c. 54.

¹⁸² Note that in *Bissell v. Briggs*, 9 Mass. 462 (1813), decided at the same time as *Mills v. Duryee*, the majority of the Mass. Supreme Judicial Court, Parsons, C.J., and Parker, J., seemingly derived the command from the Constitution itself.

true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause, both in the Confederation and in the Constitution."¹⁸³

Elaborating upon it, Story referred to "some diversity of opinion" that had been judicially expressed upon the proper interpretation of "and the effect thereof,"¹⁸⁴ stating that the opinion that the main section of the clause made judgments in one state conclusive in all others now seemed to be considered the sounder interpretation.¹⁸⁵ He remarked that, otherwise, Congress could have power to repeal or vary the full faith and credit given by the clause.¹⁸⁶

Even at the time of that writing, Story did not have the benefit of Madison's *Notes of the Debates*, and the few data in the *Journal of the Convention* could not convey a full picture of what had taken place. This applies in particular to the background for the change in language made at the very end of the debate when the command in the clause was changed from "ought to" into "shall" and the order to Congress to prescribe the effect was reduced to a power of discretion.

The key to the reading of the debates, and of the clause as it emerged, we think is the due consideration of the fact that *Walker v. Witter* was known in the states, and known to some at least of the delegates to the Constitutional Convention. It was known that, under the doctrine of *Walker v. Witter*, judgments of foreign courts were examinable; that, on the other hand, "implicit faith"

¹⁸³ STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1303 (1833). STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, abridged edition, §661 (1833): "The clause of the Constitution propounds three distinct objects; first, to declare that full faith and credit shall be given to the records, & of every other state; secondly, to prescribe the manner of authenticating them; and thirdly, to prescribe their effect, when so authenticated. The first is declared, and established by the Constitution itself, and is to receive no aid from, nor is susceptible of any qualification by, congress. The other two are expressly subjected to the legislative power." Cf. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §609 (1834).

¹⁸⁴ STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1306 (1833). Note that the New York legislature, in prescribing the authentication of records of courts of a foreign country, specially provided, and still provides, that the provision shall not be construed as declaring the effect of a record authenticated as prescribed. 2 N.Y. Rev. Stat. 396 (1829) Pt. III, c. VII, tit. III, art. III, §§26 to 28. N.Y. Civ. Prac. Act, (Clevenger, 1957) §397.

¹⁸⁵ STORY, COMMENTARIES ON THE CONSTITUTION §1307 (1833). Story adds: "But it is not, practically speaking, of much importance which interpretation prevails; since each admits the competency of congress to declare the effect of judgments when duly authenticated; so always, that full faith and credit are given to them; and congress by their legislation have already carried into operation the object of the clause." See M'Elmoyle v. Cohen, 13 Pet. (38 U.S.) 312 at 324-325 (1839).

¹⁸⁶ STORY, COMMENTARIES ON THE CONSTITUTION §1306 (1833). Cf. Hare, note, in 2 HARE AND WALLACE, SELECT DECISIONS OF AMERICAN COURTS, 5th ed., 611, 659 (1871).

was given by the courts of Westminster to the record of certain courts in England of record, with the consequence that judgments from these courts could not be controverted. What effect then was to be given by an American court to judgment from a court of a sister state?

Primarily as a result of *Walker v. Witter* the question had become a subject of controversy in the American courts for the Articles of Confederation. In the Constitutional Convention no difference of opinion existed on that score: the intention was not to subject judgments from sister states to the rule of *Walker v. Witter* for foreign judgments. Disagreement arose on whether to allow direct execution through an implementing law, as Madison suggested. When the language of the command part in the clause was a mere admonition and Congress was, on the other hand, put under a duty to "prescribe the effect," Wilson remarked, in support of the mandate for Congress, that, without that, the provision would amount to nothing more than "what now takes place among all independent nations." Then, at the very end, after the issue about public acts had been voted upon, the reshuffling took place in the assignments to the clause itself and to Congress. The "shall" went into the constitutional command, and the "shall" for congressional action was reduced to "may." This sanctioned for judgments what everybody had wanted: through the command of full faith and credit in the clause itself they were entitled to "implicit faith," to the faith that judgments of courts in England of record received from the courts of Westminster. To that extent the clause of the Constitution became self-executing.

While this question has not been adjudicated by the Supreme Court of the United States for judgments in modern times, the Court, it would seem, has embraced the theory that the command part of the Full Faith and Credit clause is self-executing. For, otherwise, the Court could not have applied, as it did, the Full Faith and Credit clause to public acts at a time when Congress had passed no legislation on the effect of public acts.

IV

What is the meaning of the Full Faith and Credit clause as far as "public acts" are concerned? Is the command that "Full faith and credit shall be given in each state to the public acts . . . of every other state" in the same way, or in some way, self-executing as the command regarding judgments?

In view of what was said at the Constitutional Convention, an assimilation to judgments of "acts of the legislatures which serve the like purpose as judgments," clearly suggests itself. What can be said for judgments applies with equal force to these acts of combined legislative and judicial character.

But "public acts" in the clause is not restricted to this today very rare type of acts of legislatures. "Public acts" was substituted for what had been "acts of the legislatures" in the Committee of Detail text drawn from the original Morris proposal. When Morris subsequently urged that Congress receive mandate to prescribe the effects of public acts, as well as of records and judicial proceedings, at least one of those participating in the debate, William Samuel Johnson, gave "public acts" a much broader meaning. For he opined that this would authorize Congress to declare the effect of legislative acts of one state in another state, and he was not contradicted. Violently objecting to the grant of such powers to Congress, Randolph likewise must have given "public acts" a broad meaning.

The mandate for Congress to prescribe the effect of public acts went into the clause by vote of six to three, Virginia voting "no." Immediately following, it will be recalled, Madison obtained substitution of "may" for "shall"; that is, the mandate was reduced to a discretionary power for Congress. According to Madison's Notes, this vote was: "nem: con." The feeling must have been that it was better to leave it to Congress, if it wished, to prescribe the effect of public acts of one state in another state. It was a compromise acceptable to all, obtained through a method many times used at the Convention.¹⁸⁷

It is true that, by the same vote, the "ought to" in the command part of the clause became "shall," and the suggestion has been made recently¹⁸⁸ that the intention was to make the clause self-executing as to public acts but to give Congress power to impose limitations. In the record we have nothing that supports this view. Madison would have made a motion against his own interest inasmuch as he was against a mandate for Congress to prescribe the effect of public acts, and the other delegates from Virginia, as

¹⁸⁷ See, e.g., the June 5, 1787 compromise on establishment of inferior federal courts. 1 FARRAND, RECORD OF THE FEDERAL CONVENTION 124, 125 (Madison) (1911).

¹⁸⁸ Sumner, "Full Faith and Credit Clause—Its History and Purpose," 34 ORE. L. REV. 224 at 237 (1955); Sumner, "The Status of Public Acts in Sister States," 3 U.C.L.A. L. REV. 1 at 2 (1955).

well as those from Maryland and Georgia, would certainly have voted against, as they did against Morris' original motion.

As far as the record goes, the view that the clause was designed to convey, without implementing law, to the courts of one state a constitutional command that they apply, whatever their own law, the legislative acts of another state, finds no support in the intentions of the drafters, including Morris. The language of the clause does not bar a reading in accord with the intentions. Such reading is indeed required when unacceptable results are reached through different reading. Several times, the Supreme Court of the United States has pointed out¹⁸⁹ that a rigid and literal enforcement of the Full Faith and Credit clause for "acts" would lead to the absurd result that, whenever a conflict arises, the statute of each state must be enforced in the courts of the other, but cannot in its own. Should what is obvious have escaped the attention of the drafters of the clause?

For about a century after the making of the Constitution, the general view was that, for "public acts," the command in the Full Faith and Credit clause was not self-executing. The First Congress, in using as it did the power to prescribe "effects" with respect to records and proceedings, but not with respect to public acts, must have had this view. And it was shared by the Marshall Court which did not use the clause for "public acts." It was the view of the foremost authority on conflict of laws, member of the Court—yet Story never missed an occasion to plead for fullest use of federal powers.

The new look at the clause which resulted in application by the Supreme Court of the clause to legislation in certain limited areas¹⁹⁰ began, it would seem, some time at the beginning of this century.¹⁹¹ Its origin, difficult to trace, may have some connection with the fact that the clause had come to be accepted as self-executing for judgments. If this was so for judgments, "it cannot but be

¹⁸⁹ *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532 at 547 (1935), per Stone, J.; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 466 at 493, 502 (1939), per Stone, J. Cf. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 at 73 (1954).

¹⁹⁰ Cases collected and discussed in Justice Frankfurter's dissent in *Carroll v. Lanza*, 349 U.S. 408 at 416 (1955).

¹⁹¹ *Finney v. Guy*, 189 U.S. 335 at 345 (1903) (broached and rejected); *Johnson v. New York Life Ins. Co.*, 187 U.S. 491 at 496 (1903) (broached); *Eastern Building and Loan Assn. v. Williamson*, 189 U.S. 122 at 125 (1903) (seemingly assumed); *Converse v. Hamilton*, 224 U.S. 243 at 261 (1912) (assumed); *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 at 546 (1915) (seemingly assumed), relied on in *Modern Woodmen of America v. Mixer*, 267 U.S. 542 at 551 (1925).

the same for public acts" is a small step to reason. And the argument can indeed be made with little hesitation for situations where the public act is not in conflict with the law of the forum. The next is not to distinguish between non-conflict and conflict situations.

In his Cardozo Lecture of 1945 on the Full Faith and Credit clause,¹⁹² Justice Jackson, protagonist of use of the clause for development of a truly national system of justice,¹⁹³ confined his comment on our question to this in a footnote:

"Whether it [the clause] is self-executing [as to state's statutes or to its common law] has been questioned in state courts. See Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 ILL. L. REV. 383, 388. But see *M'Elmoyle v. Cohen*, 13 Pet. 312, 325 (U.S. 1839); 2 STORY ON THE CONSTITUTION (5th Ed. 1891) 193. In fact, no requirement of faith and credit for statutes exists unless the clause is self-executing. See *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932)."¹⁹⁴

The passage in Story referred to,¹⁹⁵ written in 1833, suggests for judgments, and not for public acts, that the better view seemed to be to consider the command in the clause self-executing rather than relying on the Act of 1780 for the conclusiveness of judgments. In *M'Elmoyle v. Cohen*¹⁹⁶ the question was whether the statute of limitations of Georgia could be pleaded to an action in Georgia founded upon a judgment rendered in South Carolina. The Georgia court wanted to apply the Georgia law. Nothing was said about giving full faith to the public act of another state, nor could it have been said. Elaborating on the full faith and credit due to the South Carolina judgment, Justice Wayne, writer of the opinion of the Court, remarked that the faith and credit due it "is given by the constitution, independent of all legislation."¹⁹⁷ He referred to his colleague's work on the Constitu-

¹⁹² Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 (1945).

¹⁹³ "But the full faith and credit clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have." Id. at 34.

¹⁹⁴ Id. at 11.

¹⁹⁵ STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§1306, 1307 of the 1833 edition, §§1312, 1313 of the 5th, 1891, edition.

¹⁹⁶ 13 Pet. (38 U.S.) 312 (1839).

¹⁹⁷ Id. at 325. Cf. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 2d ed., §582a (1841).

tion.¹⁹⁸ This remark, not called for by the issue in the case, later was quoted out of context, leading to the thought that it applied not only to judgments.

As for *Bradford Electric Light Co. v. Clapper*,¹⁹⁹ also mentioned by Justice Jackson, where the Supreme Court told New Hampshire that it had to apply a Vermont Workmen's Compensation statute to an accident in New Hampshire, Justice Brandeis' opinion for the Court gives no cue to the origin of the new view on the clause.²⁰⁰ And Justice Stone, in his concurring opinion, stressed that he would hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire so that the New Hampshire courts, in fixing the liability of the employer for the tortious act committed within the state, are compelled to apply Vermont law instead of their own. "The full faith and credit clause has not hitherto been thought to do more than compel recognition, outside the state, of the operation and effect of its laws upon persons and courts within it."²⁰¹

The new reading of the clause for "public acts" has posed for the Court the difficult problems of solving conflicts of laws. It has, furthermore, produced interesting phenomena on the sidelines. If a command exists with regard to application of legislation from other states, would it not be necessary to include judicial legislation in the same doctrine to avoid discrimination by the Constitution against judge-made law. Evidently, even for the most imaginative mind, coverage of court decisions by the clause is difficult to detect in it.²⁰²

Inasmuch as a rigid and literal enforcement of the command

¹⁹⁸ 13 Pet. (38 U.S.) 312 at 326, citing, and quoting from, "Story's Com. 1833"—which is §1307 of the original, 1833, edition (§1313 of the 5th, 1891, edition).

¹⁹⁹ 286 U.S. 145 (1932).

²⁰⁰ On the subject of full faith to public acts, Brandeis merely said (at 154-155): "That a statute is a 'public act' within the meaning of that clause is settled" [references omitted]. A note reads: "Compare *Mills v. Duryee*, 7 Cranch 481; Rev. Stat. §§905, 906. See also *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72; *Cooper v. Newell*, 173 U.S. 555, 567." (at 155, n. 4). As for *Cooper v. Newell* (1898), it dealt with a judgment and not a statute. In *Minnesota v. Northern Securities Co.* (1904), the clause was invoked for a statute of the state in which the case was pending. Said the Court in a dictum: "We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a State other than that in which the court is sitting."

²⁰¹ 286 U.S. 145 at 163-164 (1932).

²⁰² But see 1 CROSSKEY, POLITICS AND THE CONSTITUTION 545 (1953), who refers to the word "records" in the clause. Yet "records" was already in the Articles of Confederation.

for public acts would have absurd results, under the new look at the clause the question arises of how to read the command to avoid such results. Supporters of the view that the clause is self-executing for public acts recently have come forward with a new historical doctrine offering an inherent limitation. According to Professors Crosskey and Rheinstein,²⁰³ it must be understood that the law of nations or law of conflict of laws was incorporated in the constitutional command that full faith and credit be given to public acts. And this incorporation, if we understand well, would follow from the fact that the law of nations became the law of the land and that conflict of laws was included in the ancient meaning of the Law of Nations.

This is an interesting suggestion. We think that the known history of the Full Faith and Credit clause furnishes no support for the theory. Certain broad principles of conflict of laws were indeed called part of the *jus gentium* or Law of Nations. When a court desired to give recognition to a foreign judgment, as in admiralty or in ecclesiastical cases, it referred, in support, to the *jus gentium*—a convenient justification especially in admiralty. Such references are found also in some cases where a court wanted to apply foreign law, e.g., the law of the place of contracting. Reference would be made to Voet, Huber, or other continental writers, and it would be said that, it seemed, according to the Law of Nations, to be the only rule of determining in these cases.²⁰⁴ Such rules would indeed not have been considered "local law" from the point of view of, for example, section 34 of the Rules of Decision Act²⁰⁵ where the section speaks of "the laws in the several states . . ."; for they were supposed to be the same everywhere—part of the *jus gentium*. But it is a quite different proposition to assume that vague choice of law rules²⁰⁶ were regarded adequate to be made the subject of a constitutional command for their ap-

²⁰³ Id. at 541, 550, 563; Rheinstein, "Das Kollisionsrecht im System des Verfassungsrechts der Vereinigten Staaten von Amerika," in Festschrift fuer Ernst Rabel 539, 555 (1954); Rheinstein, "The Constitutional Bases of Jurisdiction," 22 UNIV. CHI. L. REV. 775 (1955).

²⁰⁴ Examples in Nadelmann, "Story's 'De l'organisation et de la juridiction des Cours de Justice, aux Etats-Unis d'Amérique,'" 30 BOST. UNIV. L. REV. 382 at 392 (1950); Rheinstein, "The Constitutional Bases of Jurisdiction," 22 UNIV. CHI. L. REV. 775 at 807 (1955). The opinion in *Scrimshire v. Scrimshire*, 2 Hag. Com. 395, 161 Eng. Rep. 782 (1752), quoted by Rheinstein, at 807, n. 124, was not published until 1822.

²⁰⁵ Sept. 24, 1789, c. 20, §34, 1 Stat. 92. Now 28 U.S.C. (1952) §1652. Cf. Nadelmann, note 204 *supra*.

²⁰⁶ "When he [Chancellor d'Aguesseau], therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was

plication in interstate relations. No lawyer was unaware of the imperfect status of this "jus gentium"²⁰⁷ which would not even have secured conclusive effect to judgments, except in Admiralty and in ecclesiastical cases. The decision by the Constitutional Convention to reserve for Congress power to declare the effect of public acts was the reasonable and statesmanlike thing to do under the circumstances.

A case which was decided by the Court of Common Pleas of Philadelphia during the December Term 1788 illustrates well contemporaneous thoughts on conflicts problems, including the "Law of Nations." In *Camp v. Lockwood*,²⁰⁸ the plaintiff, an inhabitant of Connecticut, had joined the British during the Revolution and removed to Halifax. By a decision of the County Court of 1779, rendered under the Connecticut Forfeiture Act of 1778, his estate was declared forfeited for the benefit of Connecticut. The defendant, likewise an inhabitant of Connecticut, was indebted to the plaintiff. Not having paid the debt either to the State of Connecticut or the plaintiff, he was sued by the latter after the war in Pennsylvania whereto he (the defendant) had removed. Jared Ingersoll—it will be recalled that he was a delegate to the Constitutional Convention—argued for the defendant that, because of the confiscation, the plaintiff had no right to sue. William Rawle, who was on the other side, took the view that the Connecticut confiscation law and decree were not entitled to effect in Pennsylvania.

Both lawyers made full use of the few decisions and even fewer writings then available dealing with the extraterritorial effect of legislation and conflicts problems in general. Arguing the principle of territoriality, Rawle quoted Vattel for the proposition that one nation cannot intermeddle with the government of another.²⁰⁹ A *collisio legum* would arise, and the universal rule, as stated by Huber's third axiom, was that the laws and interests of the state having jurisdiction of the cause shall be preferred.²¹⁰ In reply, Ingersoll observed:

not susceptible of being settled on certain principles." Porter, J., in *Saul v. His Creditors*, 5 Martin N.S. (La.) 569 at 595-596 (1827).

²⁰⁷ Called "jus minor gentium" in Du Ponceau's review of Kent's Commentaries on American Law, 1 AM. Q. REV. 162 (1827). See Nadelmann, "Peter Stephen Du Ponceau," 24 PA. B. A. Q. 248 at 252 (1953). Cf. STORY, CONFLICT OF LAWS §24 (1834) ("practice of nations, or the *jus gentium privatum*").

²⁰⁸ 1 Dall. (Phila. Co.) 393 (1788).

²⁰⁹ Id. at 396. VATTEL, LAW OF NATIONS (1760).

²¹⁰ 1 Dall. 393 at 397. Huber's *de conflictu legum*, in HUBER, PRAELECTIONES JURIS CIVILIS pt. 2, bk. 1, tit. 3 (1689), 3 Dall. 370 n. (trans.) (1797).

"that he did not controvert the general doctrine advanced by the opposite Council [sic], that the law of nations is the law of nature applied to nations, and that one sovereign power cannot be bound by another; but he distinguished between the necessary, and the voluntary law of nations, which arises *ex comitate*. *Vatt. pref.* 12. *Ibid.* p. 6. and insisted that the laws of a Nation actually enforced, are everywhere obligatory, unless they interfere with the independency of another Legislature. 2 *Hub.* 26. for, common conveniency renders it necessary to give a certain degree of force to the statutes of foreign nations. 2 *Ld. Kaim. Prin. Eq.* 350. 360."²¹¹

He further remarked: ". . . the operation and effect of a sentence, or judgment, of a foreign Court cannot surely be more binding than the act of a foreign Legislature; and these, *ex comitate et jure gentium*, are in many cases final. 1 *Black. Rep.* 258. 262. *Vatt. lib.* 2. c. 7. sect. 84. p. 147."²¹²

And he concluded:

"It is true, that the *American* States have hitherto been held by a very slight confederacy; but what remedy is to be pursued? Shall we, if the knot is loose, make it still looser? . . . [W]hen a more perfect consolidation is essential to the national existence, shall we employ repulsion instead of attraction . . . ? Neither reason or experience would justify such a construction; and the *United States*, though individually sovereign and independent, must admit, not only the voluntary law of nations but a peculiar law resulting from their relative situation."²¹³

The Court held for the defendant on the narrow ground that the confiscation laws of a sister state had to be noticed because they were passed in consequence of a recommendation to the states by the Continental Congress. But the arguments made indicate the views held by leaders of the bar on conflicts problems. Laws of one nation are not enforced when they interfere with the independence of another legislature. But when the second nation has no adverse interest—as Pennsylvania in the case at the bar—what then? On September 17, 1787, the draft Constitution had been submitted to the Continental Congress—more than a year before the decision. There was no reference by Ingersoll to the

²¹¹ 1 Dall. (Phila. Co.) 393 at 396 (1788).

²¹² *Ibid.*

²¹³ *Id.* at 389.

Full Faith and Credit clause in the draft. An oversight being unlikely, Ingersoll must have thought that the clause did not command full faith and credit for the Connecticut act even in the absence of a conflict with the law of Pennsylvania.

Further contemporaneous material not devoid of interest comes from the debates in the Virginia Convention on the Adoption of the Federal Constitution. Attacking the proposed establishment of federal courts, Patrick Henry had asked what laws these courts would apply in diversity of citizenship cases.²¹⁴ John Marshall replied:

"... the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this Commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland, where the annual interest is at six percentum, and a suit instituted for it in Virginia; what interest would be given now, without any federal aid? The interest of Maryland most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision."²¹⁵

Apparently no thought had come to Marshall that, in the example, Virginia might have to apply the interest rate of Maryland because of a duty under the Full Faith and Credit clause of the Constitution.

The language of the Full Faith and Credit clause is, we think, broad enough, however, to support the view that non-application by the forum of a statute of a sister state, applicable under the law of that state, which does not conflict with the law of the forum, is a violation of the full faith command for public acts. The opposition voiced in the Constitutional Convention against the original draft was directed against the idea of in this way limiting the legislative jurisdiction of the second state but not of barring the possibility of frivolous non-application of an otherwise applicable statute of a sister state.

²¹⁴ June 20, 1788. 2 ELLIOT, DEBATES IN CONVENTION ON THE ADOPTION OF FEDERAL CONSTITUTION 397 (1828).

²¹⁵ *Id.* at 406.

The command applies, without implementing law, if the interest of the forum is not adversely affected. And this includes situations where a seeming conflict is removed because the conflicts rule of the forum refers to the public act of the other state which has been invoked. Justice Stone had, it would seem, the latter situation in mind when, in *Clapper*, he said, "the courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire."²¹⁶

For cases of a real conflict the command does not apply. It was left to Congress, if it felt fit, to deal with these situations. They are infrequent, limited as they are to cases where the conflicts rule of the forum differs from that of the sister state. For, from the point of view of constitutional command of full faith, any claim of extraterritorial effect for a law, which, in the reversed situation, the conflicts rule of the state involved would not admit, may be disregarded.²¹⁷

We shall not burden this study with another evaluation²¹⁸ of the results achieved by the Supreme Court in applying the command of full faith and credit to choice of law problems. We side with those who think that the new activities of the Court have not improved the functioning of the federal system.

The negative result is not surprising in the light of more than six centuries of experience with conflict of laws. Choice of law problems are not any easier to solve if they arise in a federal union. No practical help has come from the "theory of balancing the societal interests of the forum against those of a sister state" seen by some in the rulings of the Supreme Court. But the days of *Clapper* seem to be over in fact. As has been observed,²¹⁹ "further

²¹⁶ 286 U.S. 145 at 163 (1932). Cf. CHEATHAM, GOODRICH, GRISWOLD AND REESE, CASES ON CONFLICT OF LAWS, 4th ed., 584 (1957).

²¹⁷ On the dissolving of apparent conflicts, see Freund, "Chief Justice Stone and the Conflict of Laws," 59 HARV. L. REV. 1210 at 1217-1219 (1946).

²¹⁸ Statistics are in Justice Frankfurter's dissent in *Carroll v. Lanza*, 349 U.S. 408, 414 at 416 (1954). For recent discussions, see Sumner, "The Status of Public Acts in Sister States," 3 U.C.L.A. L. REV. 1 (1955); Clark, "Work-Injuries and the Constitution: *Carroll v. Lanza*," 1956 WASH. UNIV. L. Q. 320; Hogan, "Constitutional Implications of Workmen's Compensation and Choice of Law," 7 HASTINGS L. J. 268 (1956); Langschmidt, "Choice of Law in Workmen's Compensation," 24 TENN. L. REV. 322 (1956); Stone, "The Forum's Policy and the Defense of Faith and Credit to Workmen's Compensation Acts," 41 IOWA L. REV. 558 (1956); notes: 31 ST. JOHN'S L. REV. 104 (1956); 33 TEX. L. REV. 917 (1955); 23 UNIV. CHI. L. REV. 515 (1956).

²¹⁹ Reese, "Full Faith and Credit to Statutes: The Defense of Public Policy," 19 UNIV. CHI. L. REV. 339 at 342 (1952).

experience with the subject has induced the Court to withdraw almost entirely from the field of choice of law."

National conflicts rules could have great advantages, internationally and internally. Interstate conflicts would, in a large measure, have a basis of solution. The decision, under *Erie*,²²⁰ that the federal courts must apply local conflicts rules in diversity of citizenship cases,²²¹ has halted development of a national conflicts law by the federal courts. The consequence has been growing agitation for legislation under the implementing power granted to Congress by the Full Faith and Credit clause.

V

We turn to the recent change made by Congress in the legislation implementing the Full Faith and Credit clause. The Acts of 1790 and 1804 dealt with authentication both of public acts, and of records and judicial proceedings; but only for records and proceedings did they provide that, if authenticated as prescribed, they "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."

Materially unchanged, the contents of the acts reappeared in the Revised Statutes of 1875, Title: "Judiciary," Chapter: "Evidence," sections 905 and 906, the first dealing with authentication of legislative acts and proof of judicial proceedings of states etc., and the second with authentication of records which are not court records. Both had the closing sentence:

"And the said records and judicial proceedings [906: records and exemplifications,], so authenticated, shall have such faith and credit given them in every court [906: court and office] within the United States as they have by law or usage in the courts [906: courts or offices] of the State, [906: Territory, or country, as aforesaid,] from which they are taken."

The two sections became sections 687 and 688, respectively, of Title 28: "Judiciary," in Chapter: "Evidence," of the United States Code 1926.

Within the process of revising the United States Code, the title 28: "Judiciary," received a thorough overhauling, leading to the enactment, by Act of June 25, 1948,²²² of the new Federal

²²⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²²¹ *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

²²² 62 Stat. 947 (1948).

Judiciary Code, Title 28 of the United States Code, effective since September 1948. With changes, former sections 687 and 688 became sections 1738 and 1739 in Chapter 115: "Evidence; Documentary," of Title 28: "Judiciary and Judicial Procedure," of the United States Code of 1948.

The procedure applied in revising the United States Code needs to be recalled. At the direction of the House of Representatives Committee on Revision of the Laws, the revision of the old text was undertaken by a staff of the West Publishing Company and the Edward Thompson Company, headed by a reviser, aided by an Advisory Committee, a committee of the Judicial Conference, consultants, and counsel of the Committee on Revision of the Laws.²²³ On the bill with the proposed new text introduced in the 80th Congress hearings were held before a sub-committee of the House Judiciary Committee.²²⁴ The chairman of the Committee on Revision stated that the policy of the revision was avoidance wherever possible and whenever possible of the adoption in the revision of what may be described as controversial substantive changes of the law.²²⁵ In the opinion of the chairman, that policy had been very carefully adhered to.²²⁶ The chief reviser declared that extreme care had been taken to make no changes of substantive law concerning which there might be any controversy.²²⁷ Similarly, representatives of the advisory committees assured the legislature that care had been taken to make no changes in the existing laws which would not meet with substantially unanimous approval, and that departures from the strict letter of existing statutes represented improvements of a non-controversial character.²²⁸ One of the consultants, who testified, pointed at several changes he regarded as fairly important, adding that, of course, there will be differences of view as to the importance of other changes.²²⁹ Neither he nor any one else mentioned the changes in the provisions derived from the Acts of Congress of 1790 and 1804. Nor were these changes mentioned in the debates in Congress.

²²³ See Barron, "The Judicial Code 1948 Revision," 8 F.R.D. 439 (1949).

²²⁴ Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055, 80th Cong., 1st sess., March 7, 1947.

²²⁵ Id. at 6 (Eugene J. Keogh, chairman in the 79th Congress of the House Committee for Revision of the Laws).

²²⁶ Ibid.

²²⁷ Id. at 24 (William W. Barron, chief reviser, West Publishing Co.).

²²⁸ E.g., id. at 19 (Hon. Albert B. Maris, chairman of the Committee of Three appointed by the Judicial Conference of Senior Circuit Judges); id. at 32 (Hon. John B. Sanborn, member of the Advisory Committee).

²²⁹ Id. at 27-30 (Prof. James W. Moore).

Two changes of interest to this discussion have been made. One involves "phraseology" (under the classification employed in the Reviser's Notes to the sections).²³⁰ Where the old text read: "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 . . . from which they are taken,"²³¹ the new text now reads: ". . . shall have the same full faith and credit in every court within the United States . . . as they have by law and usage. . . ."²³²

Apart from the question of style, it would seem to be at least doubtful whether adding "full" and speaking of "the same full faith and credit" is an improvement. In the decisions on the Act of 1790, it has been many times said that the issue under the Full Faith and Credit clause is not whether the records and proceedings have "full" or "less than full" faith in the court from which they come, but that they must be given by the courts in the other state "the" faith they have in the original jurisdiction. The addition of "full" can narrow down the command. To the extent that the Full Faith and Credit clause is self-executing, any such narrowing down would have to be discarded as in contravention of the command by the Constitution.

But, of course, the question remains whether the section, in fact, "prescribes the effect. . . ." In *Peck v. Williamson*, Chief Justice Marshall said for the Circuit Court:

"In our opinion congress have not prescribed the effect [the effect of the record]. To suppose that they have is to believe that they use the words 'faith and credit' in a sense different from that which they have in the clause of the constitution upon which they were legislating."²³³

Notwithstanding *Mills v. Duryee*, we think that this is exact. And the view now prevailing on the clause, namely, that it is self-executing for judgments, has, to some extent at least, also been influenced by doubts as to the value attaching to the implementing legislation on "the effect." No basis exists for assuming that, in 1948, Congress wished to disturb these views in one way or another.

²³⁰ Reviser's note: "Changes were made in phraseology." H.Rep. 308, 80th Cong., 1st sess., A150 (1947). 28 U.S.C. (1952) §§1738, 1739.

²³¹ 28 U.S.C. (1940) §§687, 688.

²³² 28 U.S.C. (1952) §§1738, 1739.

²³³ (C.C. N.C. 1812) 19 Fed. Cas. 85, No. 10,896. See notes 156, 157 *supra*.

The other change which was made in 1948, the Reviser's note explains as follows: "At the beginning of the last paragraph, words 'Such Acts' were substituted for 'And the said.' This follows the language of Article IV, section 1 of the Constitution."²³⁴ Thus what read before: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit [etc.] . . ."²³⁵ has become: "Such Acts [of the legislature], records and judicial proceedings . . . shall have the same full faith and credit [etc.]."²³⁶

On the advice that "this follows the language of the Constitution," the 80th Congress thus has done what the first and the 8th Congresses deliberately did not do: legislate on the effect of public acts. It was done through the mechanical device of extending what has been said for records and proceedings.

But, in fact, it was not even correct to say that this follows the language of the Full Faith and Credit clause, for the clause speaks of "public acts," whereas the new text speaks of "acts of the legislature." "Such," in "Such Acts," namely refers to the first part of section 1738, which reads: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto." "Public Acts" is probably broader than "Acts of the Legislature." Attention should have been called to the difference. But this is a mere trifle compared with the principal decision to recommend the addition.

Here was a question, not only not "uncontroversial" but perhaps the most controversial in the entire interstate conflicts area: Is the clause self-executing for public acts? Should implementing legislation bring the command to execution? Yet the amendment got into the statute book without any discussion, on the reviser's word that this "follows the language of the Constitution." Perhaps

²³⁴ H. Rep. 308, 80th Cong., 1st sess., A150 at 505 (1947), 28 U.S.C. (1952) §1738.

²³⁵ 28 U.S.C. (1940) §687.

²³⁶ 28 U.S.C. (1952) §1738: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto."

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form."

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

the reviser thought that what was suggested was without legal consequences, that it had no "effect," but in that case he should have known that he could not know.²³⁷ Perhaps it is not too much to say that this episode reflects upon the legislative process used.

Views on the significance of the amendment have by no means been uniform. In the 1951 edition of a leading case book on *Conflict of Laws* we read for example: "It would seem that the change does extend the effectiveness of the statutory provision to 'Acts,' which had not previously been covered by the statute, and that this may turn out to be a change of considerable importance."²³⁸

Several years have passed since. Nothing has come from the Supreme Court to support the view. The question was raised in a dissent but left unanswered by the dissenters.²³⁹ Of course, it must be considered that even before the change the Court had held the Full Faith and Credit clause self-executing for public acts.²⁴⁰

Inasmuch as experience has shown that everything may happen in the matter of overruling, it is not excluded that, at a future day, a differently-manned Supreme Court will find that, after all, without implementing law the command in the clause is ineffec-

²³⁷ The change may be "among the many annoying because probably meaningless but possibly meaningful changes made by the 1948 revisers of the Judicial Code." Hart, "The Relations Between State and Federal Law," 54 COL. L. REV. 489 at 531, n. 160 (1954).

²³⁸ CHEATHAM, GOODRICH, GRISWOLD AND REESE, *CASES ON CONFLICT OF LAWS*, 3d ed., 76, n. 1 (1951) [Kept unchanged in the fourth, 1957, edition, at p. 77]. Following the above quotation is a reference to Goodrich, "Yielding Place to New: Rest versus Motion in the Conflict of Laws," 50 COL. L. REV. 881 at 891 (1950). At the place referred to, Judge Goodrich merely says, with a reference to Cheatham, "A Federal Nation and Conflict of Laws," 22 ROCKY MOUNT. L. REV. 109 at 114 (1950): "The question posed by the language of the new judicial code is this: will the Supreme Court take the opportunity which is apparently offered by this provision to begin an era of national conflict of laws rules?" Professor Cheatham had said at the place indicated: "... The 1948 amendment to the full faith and credit statute has presented a new basis for possibility that national rules of conflict of laws have entirely supplanted the state rules. For that amendment included within the statute "public acts," which had been quite deliberately left out of the Judiciary Act [sic] of 1790. There is now the same statutory basis at least for the Supreme Court taking over the unwelcome burden as to public acts which it assumed as to judgments in determining their extra-state effect." But cf. Cheatham, "Federal Control of Conflict of Laws," 6 VAND. L. REV. 581 at 585 (1953), where no specific statement is made in this direction.

²³⁹ "Furthermore, the new provision of 28 U.S.C. §1738 cannot be disregarded. In 1948 Congress for the first time dealt with the full faith and credit effect to be given statutes. The absence of such a provision was used by Mr. Justice Stone to buttress the Court's opinions both in *Alaska Packers*, 294 U.S., at 547, and *Pacific Employers*, 306 U.S., at 502. Hence, if §1738 has any effect, it would seem to tend toward respecting Missouri's legislation. See Reese, Full Faith and Credit to Statutes: The Defense of Public Policy, 19 U. of CHI. L. REV. 339, 343 *et seq.*" Justice Frankfurter, dissenting in *Carroll v. Lanza*, 349 U.S. 408 at 422. Burton and Harlan, JJ., joined in the dissent.

²⁴⁰ In *Hughes v. Fetter*, 341 U.S. 609 at 613-614, n. 16 (1951), Justice Black remarked, speaking for the Court: "In deciding the present appeal . . . we have found it unnecessary to rely on any changes accomplished by the Judicial Code revision."

tive with regard to public acts when the act conflicts with the law of the forum. That day, the effectiveness of the 1948 amendment for "acts of the legislature" will come to a test.

Mills v. Duryee will be distinguishable, whatever the thoughts on this decision may be. It is one thing to say that "the lights can be switched on" for judgments by merely repeating the words in the clause, with the result that the doctrine of *Walker v. Witter* is refuted and the principle of the conclusiveness put into effect for judgments from sister states. It is quite another thing to assert that, through a like primitive "switch," corresponding results can be produced for public acts, or acts of the legislature. For no "corresponding" results can be thought of in terms of an answer to the infinite variety of conflicts problems faced when the act of the legislature and the law of the forum clash. A key to automatic solution of choice of law problems has still to be found. A very different multiple switch, with a computation machine, would be needed to obtain whatever light may be obtainable in this respect.

The argument will be made that the "intention" of Congress was to throw the solution of conflicts into the laps of the Supreme Court of the United States. *Mills* came up for decision after the burning of the Capitol in which the bills of the first Congress are said to have perished. We do not wish to think of an atomic explosion destroying the sources of the 1948 revision. The facts as we have them would seem to rule out any contention that the 80th Congress intended just that. Under democratic processes the pros and cons of a constitutional venture of far-reaching consequences would have required a minimum of discussion.

While we shall be waiting for these events—we hope no explosion—to happen, thought should be given to repeal of the 1948 amendment. Currently without practical interest but provoking arguments about its possible effect, the amendment detracts from the real task which confronts us: the study of what if anything can be achieved by *proper* legislation under the clause or, possibly, by way of uniform legislation²⁴¹ to help solve interstate conflicts and achieve a more perfect union.

²⁴¹ The National Conference of Commissioners on Uniform State Laws has postponed any consideration of codification of Conflict of Laws until the revision of the *Restatement* has been completed. [1955] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 127, 131. Simultaneous consideration of possibilities of uniform legislation and of federal legislation under the Full Faith and Credit clause, jointly by the American Law Institute and the Conference, would seem to suggest itself after termination of the work of the Institute on the Conflicts volume of the *Restatement*.

APPENDIX

EXTRACTS FROM MADISON'S DEBATES

Wednesday August 29th. 1787. In Convention

Art: XVI. taken up.

[Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State.]

Mr. Williamson moved to substitute in place of it, the words of the Articles of Confederation on the same subject. He did (not) understand precisely the meaning of the article.

Mr. Wilson & Doctr. Johnson supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included [as they may sometimes serve the like purpose as act], for the sake of Acts of insolvency &—

Mr. Pinkney moved to commit art XVI, with the following proposition, "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange"

Mr. Ghorum was for agreeing to the article, and committing the (proposition.)

Mr. Madison was for committing both. He 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. He moved the following proposition.

"Whenever the Act of any State, whether Legislative, Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State wherein the said act was done."

On the question for committing art: XVI with Mr. Pinkney's motion

N.H. no. Mas. no. Ct. ay. N.J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo. ay. [Ayes—9; noes—2]

The motion of Mr. Randolph was also committed nem: con:

Mr. Govr. Morris moved to commit also the following proposition on the same subject.

"Full faith 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, determine the proof and effect of such acts, records, and proceedings." and it was committed nem: contrad:

The committee appointed for these references, were Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Wilson, & Mr. Johnson.

Saturday Sept. 1. 1787. In Convention.

Mr. Rutledge from the Committee to whom were referred sundry propositions (see Aug: 29), together with art: XVI, reported . . .

and insert the following as Art: XVI—viz

"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, & proceedings shall be proved, and the effect which Judgments obtained in one State shall have in another."

After receiving these reports The House adjourned to 10 oC. on Monday next

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Monday Sept. 3. 1787. In Convention

Mr. Govr. Morris moved to amend the Report concerning the respect to be paid to Acts Records &c of one State, in other States (see Sept. 1.) by striking out "judgments obtained in one State shall have in another" and insert the word "thereof" after the word "effect"

Col: Mason favored the motion, particularly if the "effect" was to be restrained to judgments & Judicial proceedings

Mr. Wilson remarked that if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations.

Doctr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State.

Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of *Judgments*.

On the amendment as moved by Mr. Govr. Morris
Mas. ay. Ct. ay. N.J. ay. Pa. ay. Md. no. Va. no. N.C. ay. S.C. ay. Geo. no.
[Ayes—6; noes—3.]

On motion of Mr. Madison, "ought to" was struck out, and "shall" inserted; and "shall" between "Legislature" & "by general laws" struck out, and "may" inserted, nem: con:

On the question to agree to the report as amended viz "Full faith & credit shall be given in each State to the public acts, records & judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts records & proceedings shall be proved, and the effect thereof" Agreed to witht. a count of Sts.

The clause in the Report "To establish uniform laws on the subject of Bankruptcies" being taken up.

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