# THE CONFLICT OF LAWS IN AUSTRALIA AND THE UNITED STATES

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IN A SHORT paper it is obviously impossible to do justice to a subject as vast as this. What is perhaps appropriate is to touch upon a few points which serve to illustrate the manner in which problems in the conflict of laws are approached and resolved in these two federal systems of government.

It is well known that the authors of the Australian Constitution prepared the draft of that instrument with the United States Constitution beside them. Both instruments follow the pattern of allocating specific powers to the central authority and of leaving the residue of powers with the states. Again in each case, it was deemed desirable to provide for the mutual recognition of acts and judgments of sister states, and this was reflected in the incorporation of full faith and credit provisions in both constitutions. This, as we shall see later, has raised interesting problems of a conflictual character, which in some respects have been treated differently in the two federations.

On the other hand, there are important differences between the two structures. There are no due process clauses in the Australian constitution. Therefore, the problems arising out of the requirement of due process which at times have been raised in American conflicts cases, have never troubled Australian courts. There is, again, a very important difference between the two countries in the structure of their judicial systems. The Supreme Court of the United States is not a general court of appeal. As I understand its jurisdiction, it reviews decisions of state courts only when a constitutional issue is involved. Thus, for example, such a case as *Huntington* v. *Attrill*,[1] in which the Supreme Court ruled on the meaning of a penal law in the conflict of laws, binds state tribunals only if the question is one in which the Supreme Court has jurisdiction. In the Australian system, however, the High Court of Australia is a court of general appellate jurisdiction both in federal matters and in matters wholly within state competence. Thus, while in both systems of government, great areas of

[1] (1892) 146 U. S. 657.

what is normally described as private law remain with the states, the High Court of Australia, unlike the Supreme Court of the United States, entertains appellate jurisdiction with respect to them.

This point is of great importance. It may be illustrated by reference to the question of the essential validity of contracts in the conflicts field. The late Professor Beale in his treatise lamented the great confusion which, in his opinion, was exhibited in the varying decisions of state courts.[2] Decisions of the Supreme Court of the United States, for the reasons already given, bind state courts only in specific circumstances, so that in the United States the general picture is one of diversity of decisions in the various state courts. In Australia, the general appellate jurisdiction of the High Court, which carries with it the rule that the decisions of this tribunal bind *all* courts within the Commonwealth has, in this field, as in others, produced uniformity of decision and doctrine.

There is a further point with respect to the judicial structure. As is well known, the Judicial Committee of the Privy Council is invested with an appellate jurisdiction from Australian Courts, and its decisions bind the High Court of Australia and all inferior Australian tribunals. Although the Judicial Committee is not technically an English Court, it is composed principally of English judges. The result has been, especially in the field of conflicts, that its decisions tend to be regarded as stating the English law. Two or three illustrations may serve to point this observation: *Le Mesurier* v. *Le Mesurier*[3] on divorce jurisdiction, *Attorney-General for Alberta* v. *Cook*[4] on the domicile of married women, and the *Vita Food Case*[5] on the governing law of a contract. Such decisions as these are frequently cited by the English authorities as stating the English law. It is perhaps interesting to note that on occasion, no doubt *per incuriam*, judges in the Privy Council have used language which suggests that they regard themselves as stating English law.[6] It follows, therefore, that in many respects the English and Australian rules of conflicts are substantially similar. It may be that this tendency will become more accentuated, since, in recent years, the Australian High Court has propounded a rule obliging Australian courts to follow the rulings of the English House of Lords in cases falling

[2] Beale, Conflict of Laws (1935) Vol. 2, p. 1077. But see Nussbaum, "Conflict Theories of Contracts: Cases versus Restatement" (1942) 51 Yale Law Journal 900 *et seq.*

[3] [1895] A. C. 517.

[4] [1926] A. C. 444.

[5] [1939] A. C. 277. But see Boissevain v. Weil [1949] 1 K. B. 482.

[6] Jaber Elias Kotia v. Katr Jiryes Nahas [1941] A. C. 403, 413. See Cheshire, Private International Law (3rd ed. 1947) p. 124.

within the purview of the common law.[7] Since the great part of conflicts law is common law, this may very well serve to tie the two systems even more closely together.

There are several interesting points of contrast which are of particular significance in federal structures. While the various states are foreign jurisdictions with respect to one another, legislative intervention by the Commonwealth Parliament (within the scope of the power vested in it by the Constitution) has modified this in certain respects. Provision has been made, subject to safeguards imposed in the interest of defendants, for civil process to be served outside the state in which action is brought, in cases in which it is not reasonably possible to serve the defendant within the jurisdiction. It has been held that a judgment based upon such service is entitled to full faith and credit in a sister state.[8] Again the Commonwealth Parliament has availed itself of full faith and credit powers to provide for the enforcement in other states of judgments of all important courts of sister states by the simple device of registration. This legislation is framed in terms which give the party against whom it is sought to register such judgments an opportunity to oppose such registration. This provision covers not only money judgments, but also court orders for specific performance and injunction.

No such provision exists within the United States. Whether it is constitutionally possible to follow the Australian legislation is a question on which I am not competent to express an opinion. It is noteworthy that Walter Wheeler Cook in his writings referred with approval to the Australian legislative action in these two fields. Of the registration of judgments he wrote:[9]

"In the opinion of the present writer the direct enforcement of state judgments in other states upon registration in the latter, as provided in the Australian legislation, would be far simpler and better than requiring new suits to be brought in other states on such judgments."

Cook also remarked upon the arbitrary and unsatisfactory requirement of personal service on a defendant in so many cases. The Australian rule, in this respect, ensures protection for a defendant in the sense that he is well safeguarded against surprise actions, while it recognizes that within a

[7] Piro v. W. Foster & Co Ltd. (1943) 68 Commonwealth L. R. 313. See Cowen (1944) 60 Law Quarterly Review 378.

[8] *In re* E. and B. Chemicals and Wool Treatment Proprietary Ltd. [1939] S. A. S. R. 441.

[9] Logical and Legal Bases of the Conflict of Laws (1942) p. 103.

federation it can hardly be desirable to allow a defendant to escape liability by the simple device of keeping out of the territorial jurisdiction of one member state.

The existence of full faith and credit provisions in both constitutions gives rise to much interesting speculation. The question has been posed by more than one writer in the United States whether the conflict of laws has become a branch of Constitutional law. While Australian courts are, perhaps happily, not troubled with questions of due process, considerations arising out of the full faith and credit provisions pose the same type of question in Australia. The scope of the Australian Full Faith and Credit Clause has not been systematically examined, and its limits are not yet in any sense marked out. However, the operation of the clause has been discussed in one or two cases which may bear brief examination.

In *Merwin Pastoral Company Proprietary, Limited* v. *Moolpa Pastoral Company Proprietary, Limited*[10] the question was whether a contract for the sale of land and chattels in New South Wales was governed by New South Wales law so as to attract the operation of a moratorium act passed by the legislature of that state. This legislation was enacted during the depression years. In the Supreme Court of Victoria, the trial judge had invoked the doctrine of public policy to deny the application of the moratorium legislation, holding that it would work manifest injustice on one of the parties. This decision was reversed by the High Court of Australia. Three judges referred to the Full Faith and Credit Clause. In a joint opinion, Rich and Dixon, JJ., stated briefly that to invoke the doctrine of public policy in such circumstances contravened the full faith and credit provision. Evatt, J., stated his view more elaborately:

"It is, in my view, not permissible for a Victorian court to adopt such an attitude here. All that the Legislature of New South Wales did, was, in a period of unexampled economic crisis, to revise, alter, suspend or discharge certain contractual obligations over which it could exert its constitutional power. The Legislature of Victoria too enacted a law which differed in degree only from that of New South Wales. And, further, the Commonwealth Constitution expressly requires that 'full faith and credit shall be given, throughout the Commonwealth, to the laws. . .of every State' (sec. 118). In the United States the constitutional provision from which our sec. 118 is taken has been regarded as prohibiting a refusal by the Courts of one State 'to give effect to a substantive defence under the applicable law of another State.'"[11]

[10] (1933) 48 Commonwealth L. R. 565.
[11] At 587–8.

Evatt, J., cited in support of this proposition of United States law, the statement of Brandeis, J., in *Bradford Electric Light Company* v. *Clapper*:[12]

"A state may, on occasion, decline to enforce a cause of action. In doing so, it merely denies a remedy, leaving unimpaired the plaintiffs' substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defence under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done."

The correctness of this dictum of Brandeis, J., has been questioned. In an essay on the subject of public policy in the conflict of laws,[13] Professor Nussbaum has observed that this doctrine was not adopted by all members of the Court, and further that it is not in accord with a body of authority, federal and state. This is not the place to investigate the correctness of Justice Brandeis's doctrine in American law. What is interesting in the *Moolpa* decision is the enunciation of a view that public policy may not be invoked to exclude the operation of a statute of the country whose law was held to be the governing law of the transaction in question. It is regrettable that Justices Rich and Dixon did not amplify their terse statement, for it is not clear whether they would go as far as Evatt, J., in denying the application of the public policy doctrine in cases where it would destroy a defence otherwise open to a defendant. This is the only case which I have been able to find which bears upon this particular aspect of the problem, and it is obvious that further decisions must be awaited before the scope of this particular phase of the public policy doctrine can be marked out with any degree of certainty or confidence.

Another extremely interesting problem involving the application of the Australian full faith and credit provision may be briefly noted. In the Victorian case of *Harris* v. *Harris*,[14] a situation involving substantially the same problem as the second *Williams* v. *North Carolina*[15] case arose. Put simply, the issue for the Court was whether a Victorian court was bound to recognize a decree of divorce pronounced in New South Wales on a wife's undefended petition. The judge in the Victorian proceedings dealt with the case on the footing that when the New South Wales court pronounced the decree, specifically basing its jurisdiction on domicile, the parties were in fact domiciled outside that state. It was put to the court on the footing of the second *Williams Case* that there was no obligation to

[12] (1932) 286 U. S. 145, 160.
[13] (1940) 49 Yale Law Journal 1027, 1033–4.
[14] [1947] Victorian L. R. 44.
[15] (1945) 325 U. S. 226.

recognize the New South Wales decree under the Full Faith and Credit Clause, as recognition was predicated upon jurisdiction, and jurisdiction depended upon domicile. As Frankfurter, J., had put it in the *Williams Case*:[16]

"The decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."

The Victorian judge declined to accede to this argument. In his view, having regard to the Australian provisions for full faith and credit, it was not open to a court of a sister state to decline to recognize a decree of another state unless the original decree was not final and conclusive in the state in which it was pronounced. Here the decree was final and conclusive in New South Wales, and it must therefore be recognized. The judge examined the American authority to the contrary, but concluded that different considerations were applicable in Australia. I have discussed this decision more fully elsewhere.[17] These two approaches to this problem reveal all the difficulties involved in the interpretation of *full* faith. The sharp conflicts in the Supreme Court of the United States in the *Williams Case* and the real difficulties felt by the judge in the *Harris Case* expose in a stark way the conflicting considerations of social policy which are involved in the working out of the legal institutions and machinery of a federal system.

One final point which has no relation to the problem of full faith and credit, but does in some way relate to the *Williams* decision—in this case the first *Williams*[18] *Case*—may be briefly noted. The Privy Council decision in *Attorney-General for Alberta* v. *Cook*[19] already referred to, lays down that in no circumstances can a married woman acquire a domicile separate from her husband. This archaic rule binds Australian tribunals. In the United States, this doctrine has long been rejected, and the power of a wife in many circumstances to acquire a separate domicile has been affirmed. The *Williams Case* is authority for the proposition that a divorce decree pronounced by the Court of the domicile of either party on constructive service to the other spouse, must be accorded recognition. In Australia, the common-law rule based upon the *Cook Case* and on the

[16] At 232.
[17] (1948) 2 International Law Quarterly 21 *et seq.*
[18] (1942) 317 U. S. 287.
[19] [1926] A. C. 444.

Privy Council decision in *Le Mesurier* v. *Le Mesurier*[20] is that the courts of the domicile of the husband are alone competent to pronounce a divorce decree. A measure of statutory relief was afforded in some states in Australia from a relatively early date, but recent legislation has effected a drastic revision of this rule. By the Matrimonial Causes Act, 1945, section 10, it is provided that any person domiciled in an Australian state, who has resided in another Australian state for a minimum of one year prior to suit, may institute proceedings in matrimonial causes in the courts of the State of residence. Section 11 provides that the court in which such an action is heard shall apply the law of the domicile of the person instituting proceedings. This was enacted by the Commonwealth Parliament pursuant to a power vested in it to legislate with respect to divorce and matrimonial causes. What is particularly interesting in this legislation is the separation of the questions of jurisdiction and choice of law, a distinction pointed to by the New York case of *Gould* v. *Gould*[21]. Although this case has been criticized in some quarters,[22] it is supported by Cook who views the separation of jurisdictional and choice of law questions in these cases as desirable. It is interesting to note that the Australian legislature has moved along these lines.

These remarks on the conflict of laws in Australia and in the United States are inevitably sketchy. As I remarked in introducing the paper, it is obviously impossible in the course of a short address to do more than sketch a few of the salient points of accord and difference between the two federal systems in dealing with this branch of law.

[20] [1895] A. C. 517.

[21] (1923) 235 N. Y. 14.

[22] See Beale, Conflict of Laws, Vol. 1, pp. 481–2.