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THE "FULL FAITH AND CREDIT" CLAUSE

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Article IV of the Constitution, sometimes called "the Federal Article", defines in certain particulars the relations of the state entities to one another and of the national government to the states. Its opening section reads as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." What was the intention and what has been the operation of this provision?

I

The historical background of the above section is furnished by that branch of private law which is variously termed "Private International Law", "Conflict of Laws" or "Comity". This comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country or "jurisdiction" will ordinarily, *in the absence of a local policy to the contrary*, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction."¹

The nature of the problem thus dealt with is indicated in the following passages from Story's classic work on the *Conflict of Laws*:

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¹ STOWELL, *INTERNATIONAL LAW* (1931) 246-60, contains an excellent brief discussion. An outline of the subject is supplied in HOLLAND, *JURISPRUDENCE* (13th ed. 1924) Ch. XVIII, where the designation "assimilation of laws" is suggested.

"A person sometimes contracts in one country, and is domiciled in another, and is to pay in a third; and sometimes the property, which is the subject of the contract, is situate in a fourth; and each of these countries may have different, and even opposite laws, affecting the subject-matter. What then is to be done in this conflict of laws? What law is to regulate the contract, either to determine the rights, or the remedies, or the defenses growing out of it; or the consequences following from it? What law is to interpret its terms, and ascertain the nature, character, and extent of its stipulations?"²

And again:

"Suppose . . . a marriage celebrated in England, where marriage is indissoluble, and a divorce obtained in Scotland, *a vinculo matrimonii*, as it may be for adultery under the laws thereof, will that divorce be operative in England, so as to authorize a new marriage there by either party? Suppose a marriage in Massachusetts, where a divorce may be had for adultery, will a divorce obtained in another State, for a cause unknown to the laws of Massachusetts, be held valid there? If, in each of these cases the divorce would be held invalid in the country, where the marriage is celebrated, but would be held valid, where the divorce is obtained; what rule is to govern in other countries as to such divorce? Is it to be deemed valid, or invalid there? Will a new marriage contracted there by either party be good, or be not good?"³

Illustrative of the solutions supplied to such questions by Comity, Conflict of Laws, or Private International Law—as one chooses to call it—is the rule that a marriage which is good in the country where performed (*lex loci*) is good elsewhere;⁴ likewise the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise;⁵ also the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitæ* ⁶); also the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (*lex domicilii* ⁷); also the rule that regardless of where the cause arose, the courts of any country where personal service can be got upon the defendant will take jurisdiction of certain types of personal actions, hence termed "transitory", and accord such remedy as the *lex fori* affords.⁸ Still other rules of

² STORY, CONFLICT OF LAWS (5th ed. 1857) § 232. The first edition appeared in 1834.

³ *Id.* § 203.

⁴ A rather extreme case is *Wall v. Williamson*, 8 Ala. 48 (1845).

⁵ In certain circumstances this rule is fortified in the United States by the "obligations of contracts" clause. See *Morley v. Lake Shore Ry.*, 146 U. S. 162, 13 Sup. Ct. 54 (1892).

⁶ *Clark v. Graham*, 6 Wheat. 577 (U. S. 1821), is an early case in which the Supreme Court enforced this rule.

⁷ 2 KENT, COMMENTARIES (14th ed. 1896) *428-9. While the rule generally holds as a rule for the inheritance of property, it is today subject to many exceptions, as a rule for voluntary transfers.

⁸ *Le Forest v. Tolman*, 117 Mass. 109 (1875); *Machado v. Fontes*, [1897] 2 Q. B. 231 (Eng.) are illustrative.

first importance in the present connection determine the recognition which the judgments of the courts of one country shall receive from those of another country.

So even had the states of the Union remained in a mutual relationship of entire independence, still private claims originating in one would often have been assured recognition and enforcement in the others. But even the framers of the Articles of Confederation had felt that the rules of private international law should not be left as among the states altogether on a basis of comity, and hence subject always to the overruling local policy of the *lex fori*, but ought to be in some measure at least placed on the higher plane of constitutional obligation.

The fourth of the Articles⁹ is, indeed, the immediate source of the provision now under consideration. The latter, however, exhibits two developments upon its predecessor: the "acts" and "records" to which it extends full faith and credit are not confined to those of "courts and magistrates", and it endows Congress with power to enact supplementary and enforcing legislation. A motion to the latter effect, which was offered on the floor of the Convention by Gouverneur Morris, was recast in committee to confine Congress's power to that of prescribing 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*", whereupon Morris moved to strike out the phrase here given in italics and proposed the substitution for it of the word "thereof". Despite a warning by Johnson of Connecticut that this would authorize the new government "to declare the effect of the legislative acts of one state in another state" and the more general protest of Randolph that such loose definitions of power would enable the new government to usurp all the state powers, the amendment was carried.¹⁰

In point of fact, these fears have to date proved largely groundless. Congressional legislation under the "full faith and credit" clause is today embraced in sections 905 and 906 of the Revised Statutes, which consolidate the acts of May 26, 1790 and of March 27, 1801.¹¹ The former section lays down the rules for the authentication of the legislative acts of the several states and territories and of "any country subject to the jurisdiction of the United States", and of the records and judicial proceedings of the same. It then provides that "the said records and judicial proceedings authenticated as aforesaid shall be given such faith and credit in every court of the United States as they have by law and usage in the courts of the state from whence the said records are or shall be taken". Section 906 lays down similar provisions with reference to non-judicial records.

⁹ "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."

¹⁰ 2 FARRAND, RECORDS 488-9.

¹¹ 1 STAT. 122 (1790); 2 STAT. 298, 299; 28 U. S. C. A. §§ 687-8 (1928).

Several points clearly emerge: (1) the word "effect" is construed as referring to the effect of the records when authenticated, not to the effect of the authentication; (2) the "faith and credit" which is required by the rules of private international law is superseded as to "the records and judicial proceedings" of each state by a rule of complete obligation; *as to these the local policy of the forum state can have no application*. On the other hand, (3) while the Act of 1790 lays down a rule for the authentication of the statutes of the several states, it says nothing regarding their extraterritorial operation; and (4) it is similarly silent regarding the common law of the several states. The practical effect whereof to date has been, in the main, to leave the extrastate protection of rights, except such as have ripened into a definite judicial judgment, exactly where the Constitution found it, that is to say, on a basis of comity, and so at the mercy of the adverse local policy of the *forum* state.

In this connection it is instructive to turn to the famous case of *Scott v. Sandford*.¹² Said Justice Nelson, who spoke the sentiments of the Court on this point: "No State, therefore, can enact laws to operate beyond its own dominions. . . . Nations, from convenience and comity . . . recognise and administer the laws of other countries. But of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself;"¹³ and, he added that it was the same with the states of the Union in relation to one another. It followed that even though Dred had become a free man in consequence of his having resided in the "free" state of Illinois, he had nevertheless upon his return to Missouri which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially, reverted to servitude under the laws and judicial decisions of that state. It was upon this ground indeed that the Court had intended originally to dispose of the case, when the slaveholding majority of the Justices fancied they saw an opportunity for the Court to settle the slavery question in the way they wanted it settled, by passing upon the validity of the Missouri Compromise. And even Justices McLean and Curtis assented to the underlying premise of the above doctrine, the subjection of extrastate acquired rights to local policy. They merely contended that Missouri's laws and judicial decisions did not evince the policy toward the kind of case before the Court that the majority of the Justices imputed to her.

Since the Civil War the Thirteenth and Fourteenth Amendments have, to be sure, imposed radical restrictions upon the power of the states in the determination of the *status* and legal capacities of even their own inhabitants. Furthermore, as we shall see in a later section, the Supreme Court has in

¹² 19 How. 393 (U. S. 1856).

¹³ *Id.* at 460.

recent decades handed down a series of judgments based on the "full faith and credit" clause which attribute what is unquestionably a limited extra-territorial operation in certain situations to state laws. But this has been done apologetically and to the accompaniment of denials that it was being done; and it is still undoubtedly true in the main that "no state can legislate except with reference to its own jurisdiction."¹⁴

Thus the clause has not abolished the general principle of the dominance of local policy over the rules of comity. These, indeed, have always been regarded by the Court as constituting merely a part of the local common law of each state.¹⁵ Nor has it to date been held to require the states to open their courts to actions in cases of personal liability, the "transitory actions" above referred to. Such constitutional obligation as rests upon the states in this respect comes from section 2 of Article IV or from the Fourteenth Amendment. Neither does the section, as heretofore applied, enable state courts to send their writs across state lines. "No sovereignty", says Story, "can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions";¹⁶ and this principle has been followed by the Supreme Court in its application both of the "full faith and credit" clause and the "due process" clause of Amendment XIV.¹⁷

Article IV, section 1, has had its principal and, apart from the cases just alluded to, its sole operation in relation to *judgments*. The cases fall into two groups: first, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the state where rendered, as for example, when an action for debt is brought in the courts of state *B* on a judgment for money damages rendered in state *A*; secondly, those, in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or "collateral" proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in state *A* is offered as barring a suit for divorce by the other party to the marriage in the courts of state *B*.

The English courts and the different state courts in the United States, while recognizing "foreign judgments *in personam*" which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the *status* of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be reopened. When offered in defense, on the other hand, "foreign judgments *in personam*"

¹⁴ *Bonaparte v. Tax Court*, 104 U. S. 592 (1881), where it was held that a law exempting from taxation certain bonds of the enacting state did not operate extraterritorially by virtue of the "full faith and credit" clause. See also note 68 *infra*.

¹⁵ *Bank of Augusta v. Earle*, 13 Pet. 519, 589-96 (U. S. 1840). See *e. g.* *Kryger v. Wilson*, 242 U. S. 171, 37 Sup. Ct. 34 (1916); and *Bond v. Hume*, 243 U. S. 15, 37 Sup. Ct. 366 (1917).

¹⁶ STORY, *op. cit. supra* note 2, § 539.

¹⁷ The leading case is *Pennoy v. Neff*, 95 U. S. 714 (1877).

were always ordinarily treated as conclusive, as between parties, of the issues they purported to determine, provided they had been rendered by a court of competent jurisdiction and were not tainted with fraud. And judgments "*in rem*" rendered under the same conditions were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem* to which all the world are parties."¹⁸

II

The earliest cases to arise in which the support lent by the "full faith and credit" clause to the above principles was invoked were actions in debt brought on money judgments rendered in a sister state; and the question at issue was the precise *status* of such a judgment in the courts of the *forum* state. Was it a "foreign judgment" or a "domestic judgment" or was it something approaching a national judgment?

The pioneer case was *Mills v. Duryee*,¹⁹ decided in 1813. In an action brought into the circuit court of the District of Columbia—the equivalent of a state court for this purpose—on a judgment from a New York court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of "*nil debet*", his argument being that "the full faith and credit" due the judicial records and proceedings of a state under Article IV was only such as was due them as "evidence", and that therefore, from the nature of evidence they were open to rebuttal. From the other side it was answered, in the words of the Act of 1790 itself, that such records and proceedings were entitled in each state to the same faith and credit as in the state of origin; and that inasmuch as they were records of a court in the state of origin, and so conclusive of the merits of the case there, they were equally so in the *forum* state.

The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—as to the reception of foreign judgments, but to amplify and fortify these. And in *Hampton v. McConnell*²⁰ some years later, Chief Justice Marshall went even further, using language which seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister states not simply the faith and credit of conclusive evidence, but the *validity of a final judgment*.

¹⁸ *Mankin v. Chandler*, 2 Brock. 125 at 127 (C. C. D. Va. & N. C. 1823). An English admiralty court recognized a duty to cooperate in the enforcement of a foreign judgment as early as 1607, 1 Rolle Abr. 530; and Sir Leoline Jenkins instructed the King and Privy Council to like effect in 1666, 2 WYNNE, LIFE OF JENKINS 762. Cf. STOWELL, *op. cit. supra* note 1, at 252n., 256-7.

¹⁹ 7 Cranch 481 (U. S. 1813). Cf. *Bartlet v. Knight*, 1 Mass. 401 (1805).

²⁰ 3 Wheat. 234 (U. S. 1818).

When, however, the next important case arose, the Court had come under new influences. This was *McElmoyle v. Cohen*,²¹ decided in 1839, in which the issue was whether a statute of limitations of the State of Georgia which applied only to judgments obtained in courts other than those of Georgia could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Carolina. On the one hand, it was contended, on the strength of the above cases that the "judgment of a state court carries with it into every state all its original attributes and incidents;" that "it goes forth armed with the powers of the court that pronounced it, and clothed with the authority of the laws under which it was pronounced". But it was answered on the other hand, that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori*"; that the Act of Congress only established a rule of evidence, of conclusive evidence to be sure, but still of evidence only; and that it was necessary, in order to carry into effect in a state the judgment of a court of a sister state, to institute a fresh action in the court of the former, in strict compliance with its laws; and that consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*.

The Court adopted the latter position, declining to follow Marshall's lead in *Hampton v. McConnell*.²² The result is that even nowadays it is sometimes confronted with the contention that a state need not provide a *forum* for some particular type of judgment from a sister state, a claim which it has by no means met with clear-cut principles. Thus in one case it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the state was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister state.²³ But in a later case it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the state to an action on a judgment obtained in a sister state on such a contract, although the contract in question had been entered into in the *forum* state and between its citizens.²⁴ Subsequent cases follow the later rather than the earlier precedent.²⁵ Nor is there any apparent reason

²¹ 13 Pet. 312 (U. S. 1839).

²² The result is undoubtedly harmonious with common law principles by which a judgment can only be executed in the jurisdiction where rendered, so that if enforcement of it in another jurisdiction is desired, a fresh action must be brought on it. In civil law countries, on the other hand, a foreign judgment, either after examination into its merits or without such examination, is executed directly as if it were in all respects a domestic judgment.

²³ *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92 (1903).

²⁴ *Fauntleroy v. Lum*, 210 P. S. 230, 28 Sup. Ct. 641 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction", the Mississippi statute to "merits", but four Justices could not grasp the distinction.

²⁵ *Kenney v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371 (1920), and cases there cited. Holmes again spoke for the Court. See also Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421, 434.

why Congress, acting on the implications of Marshall's word in *Hampton v. McConnell*, should not clothe extrastate judgments of any particular type with the full *status* of domestic judgments of the same type in the several states.²⁶

III

The second great class of cases to arise under the "full faith and credit" clause embraces those raising the question whether a judgment for which extrastate operation was being sought, either as the basis of an action or as a defense in one, had been rendered with jurisdiction. The question occurs both in relation to judgments *in rem* against property or a *status* alleged not to have been within the jurisdiction of the court which handed down the original decree, and also in connection with judgments *in personam* against a non-resident defendant or defendants upon whom it is alleged personal service was not obtained in the state of the origin of the judgment.²⁷ We shall consider the latter type first.

The pioneer case is that of *D'Arcy v. Ketchum*,²⁸ decided in 1850. The question presented was whether a judgment rendered by a New York court under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be accorded full faith and credit in Louisiana when offered as the basis of an action in debt against a resident of that state who had not been served by process in the New York action.

Pressed with the argument that by "the immutable principles of justice" no man's rights should be impaired without his being given an opportunity to defend them, the Court ruled that, interpreted in the light of the principles of "international law and comity" as they existed in 1790, the Act of Congress of that year did not reach the case. The truth is that the decision virtually amended the Act, for had the Louisiana defendant ventured to New York, he could, as the Constitution of the United States then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. The subsequent disappearance, or at least reduction, of this disparity between the operation of a personal judgment in the home state and a sister state is to be attributed to the adoption of the Fourteenth Amendment.

Thus in *Pennoyer v. Neff*,²⁹ decided in 1877, and so under the Amendment, the Court held that a judgment given in a case in which the state court

²⁶ Thus why should not a judgment for alimony be made directly enforceable in sister states instead of merely furnishing the basis of an action in debt? See *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129 (1913).

²⁷ On the general subject see *Cooper v. Reynolds*, 10 Wall. 308 (U. S. 1870).

²⁸ 11 How. 165 (U. S. 1850).

²⁹ Note 17, *supra*.

had endeavored to acquire jurisdiction of a non-resident defendant by an attachment upon property of his within the state and "constructive notice" to him, had not been rendered with jurisdiction and hence could not afford the basis of an action in the court of another state against such defendant, although it bound him so far as the property attached was concerned, on account of the inherent right of a state to assist its own citizens in obtaining satisfaction of their just claims. Nor would such a judgment, the Court further indicated, be due process of law in the state where rendered to any greater extent. In the words of a recent case, "An ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as outside of it."³⁰

Meantime, in 1855 the court had decided *Lafayette Insurance Co. v. French et al.*,³¹ a pioneer case in its general class. Here it was held that "where a corporation chartered by the state of Indiana was allowed by a law of Ohio to transact business in the latter state upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process" ought to receive in Indiana the same faith and credit as it was entitled to in Ohio.³²

Later cases establish under both the Fourteenth Amendment and Article IV, section 1, that the cause of action must have arisen within the state obtaining service in this way,³³ that service on an officer of a corporation, not its resident agent and not present in the state in an official capacity, will not confer jurisdiction over the corporation;³⁴ that the question whether the corporation was actually "doing business" in the state may be raised.³⁵ On the other hand, the fact that the business was interstate is no objection.³⁶

³⁰ *McDonald v. Mabee*, 243 U. S. 90 at 92, 37 Sup. Ct. 343 at 344 (1917). See also *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236 (1907); *Wetmore v. Karrick*, 205 U. S. 141, 27 Sup. Ct. 434 (1907). The claim that a judgment was "non-responsive to the pleadings" raises the jurisdictional question (*Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773 (1891)); but the fact that a non-resident defendant was only temporarily in the state when he was served in the original action does not vitiate the judgment rendered as the basis of an action in his home state. (*Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. 1194 (1886); *Jaster v. Currie*, 198 U. S. 144, 25 Sup. Ct. 614 (1905).) Inasmuch as the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was no party or privy to the original action raises the question of jurisdiction; and while a judgment against a corporation in one state may validly bind a stockholder in another state to the extent of the par value of his holdings (*Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506 (1900)), an administrator acting under grant of administration in one state stands in no sort of relation of privy to an administrator of the same estate in another state (*Stacy v. Thrasher*, 6 How. 44, 58 (U. S. 1848); *Brown v. Fletcher*, 210 U. S. 82, 28 Sup. Ct. 702 (1908)).

³¹ 18 How. 404 (U. S. 1855).

³² To the same effect is *Connecticut Mut. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308 (1899).

³³ *Simon v. Southern Ry.*, 236 U. S. 115, 35 Sup. Ct. 255 (1915).

³⁴ *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559 (1895); *Riverside Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579 (1915).

³⁵ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944 (1914); *Riverside Mills v. Menefee*, *supra* note 34.

³⁶ *International Harvester Co. v. Kentucky*, *supra* note 35.

Still more recently, by analogy to the above cases, it has been held that a state may require non-resident owners of motor vehicles to designate an official within the state as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the state;³⁷ and while these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home state.

IV

In sustaining the challenge to jurisdiction in cases involving judgments "*in personam*" the court was in the main making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments "*in rem*" it has had to make law outright. The leading case is *Thompson v. Whitman*,³⁸ decided in 1873. Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman, and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States circuit court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction inasmuch as the sloop which was the subject matter of the proceedings had been seized outside the county to which, by the statute under which it had acted, its jurisdiction was confined.

As previously explained, the plea of lack of privity cannot be set up in defense in a sister state against a judgment *in rem*. It is, on the other hand, required of a proceeding *in rem* that the *res* be within the court's jurisdiction, which was the point denied in *Thompson v. Whitman*. Yet could the Court consider this challenge with respect to a judgment which was offered not as the basis for an action for enforcement through the courts of a sister state, but merely as a defense in a collateral action? As the law stood in 1873, it most clearly could not.³⁹

All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court in a single sweeping gesture. Whenever, it said, the record of a judgment rendered in a state court is offered "in evidence" by either of the parties to an action in another

³⁷ *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30 (1916); *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632 (1927).

³⁸ 18 Wall. 457 (U. S. 1873).

³⁹ See 1 BLACK, JUDGMENTS (1891) § 246.

state, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist."

In other words, the challenge to jurisdiction is treated as equivalent to the plea *nul tiel record*, a plea which was recognized even in *Mills v. Duryee* as always available against an attempted invocation of the "full faith and credit" clause. What is not pointed out by the Court, is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the Act of Congress, of the judgment in the original case. The decision in *Thompson v. Whitman* boils down to the proposition that it may be asserted that there is no record where palpably there is one. Nor does it help to say that the trial court had no jurisdiction to produce the record, for the very point at issue was whether this question could be raised.

This, however, is only the beginning of the Court's law-making in cases *in rem*. The most important class of such cases arising under Article IV, section 1, is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister state. By the almost universally accepted view prior to 1906 a proceeding in divorce was one against the marriage *status* and might be validly brought by either party in any state where he or she was *bona fide* domiciled.⁴⁰ But in the year named, the Court, under the leadership of the ever ingenious Justice White, discovered by a vote of five to four, a situation in which a divorce proceeding is one *in personam*.

The case referred to is *Haddock v. Haddock*,⁴¹ while the earlier rule is illustrated by *Atherton v. Atherton*, decided five years previously. A comparison of the two cases is indeed striking. In the latter it was held, in the former denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another state, was entitled to recognition under the "full faith and credit" clause and the acts of Congress; the difference between the cases consisting solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court which granted the divorce in *Atherton v. Atherton* was held to have had jurisdiction of the marriage *status*, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. *Haddock's* suit on the contrary, was held to be as to the wife *in per-*

⁴⁰ *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544 (1901); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 848; *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869); *Ditson v. Ditson*, 4 R. I. 87 (1856); *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841 (1896). "In divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally." 2 COOLEY, *op. cit. supra* at 858. See also note 49 *infra*.

⁴¹ 201 U. S. 562, 26 Sup. Ct. 525 (1906). See also *Thompson v. Thompson*, *supra* note 26.

sonam, and so to require personal service upon her, or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid as to the state where obtained on account of the state's inherent power to determine the *status* of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married.⁴²

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time.⁴³ In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the state the court has jurisdiction in this respect.⁴⁴

The *Haddock* case is another of these instances in which the Court—or a narrow majority of it—permitted itself to be overpersuaded that it owed society a duty superior to logic, respect for precedent, or even common sense. This is revealed by Justice White's expression of concern lest, if the implications of the *Atherton* case were to be followed, "the States whose laws were the most lax" in the matter of causes for divorce and in residence and procedural requirements, "would in effect dominate all the other States."⁴⁵ In point of fact, the obstacle set up in the *Haddock* case to easy divorce is a ridiculously feeble one. On the one hand, it does not and could not prevent applicants from flocking to states with lax laws and respondents from putting in necessary appearances to validate the proceedings; on the other hand, the vast majority of divorces are granted by courts within whose jurisdictions both parties reside, and to such instances the *Haddock* case again has no application.

Furthermore, while a divorce granted to one not *bona fide* domiciled within a state is, as already indicated, granted without jurisdiction, and hence not entitled to extrastate recognition under the "full faith and credit"

⁴² The Court had said in *Atherton v. Atherton*, *supra* note 40, at 162, 21 Sup. Ct. at 547: "A husband without a wife, or a wife without a husband, is unknown to the law." In *Dunham v. Dunham*, *supra* note 40, at 606, 44 N. E. at 847. Judge Carter of the Illinois Supreme Court had characterized in anticipation, as it were, the doctrine of *Haddock v. Haddock* by the remark that "It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one."

⁴³ See especially Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586. In an article published twenty years later, however, Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, Professor Beale retracts much of his earlier criticism.

⁴⁴ See Note (1903) 59 L. R. A. 135, 162 and 167; (1909) 18 *id.* (N. S.), 647, 649. No constitutional question is, of course, raised when a state gives full faith and credit to a divorce granted in another state, whether this was constitutionally required or not.

⁴⁵ *Haddock v. Haddock*, *supra* note 41, at 574, 26 Sup. Ct. at 529.

clause,⁴⁶ not the slightest disposition has appeared within recent years to challenge judicially the power of the states to determine what shall constitute domicile for divorce purposes. Thus in March, 1931, Nevada, in an effort, as we learn, "to retain for Reno its position as the nation's divorce capital against competition from Hot Springs, Arkansas, and Boise, Idaho," enacted a law requiring only six weeks residence by an applicant for divorce in the courts of that state.⁴⁷ But why six weeks? Why not six days, or six hours? *Haddock v. Haddock* or not, suit for divorce seems to have become for those who can pay the transportation charges little more than an *ex parte* proceeding.

V

Some other aspects of judgments may be dealt with more briefly. Many of the cases involve decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister state.⁴⁸ What is more important, however, is that the *res* in such a proceeding, that is, the estate, must, in order to entitle the judgment recognition under Article IV, section 1, have been located in the state or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.⁴⁹ This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the state; as to tangibles and realty outside the state, the decree of the probate court is entirely at the mercy of the *lex rei sitæ*.⁵⁰

That a statute legitimizing children born out of wedlock does not entitle them by the aid of the "full faith and credit" clause to share in the property located in another state is not surprising, in view of the principle that statutes do not have extraterritorial operation.⁵¹ For the same reason adoption proceedings in one state are not denied full faith and credit by the law of a

⁴⁶ *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237 (1903). See also *German Savings Society v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. 221 (1904).

⁴⁷ See *New York Times*, Mar. 17, 1931. During the first six weeks of the new dispensation 513 cases were filed and 331 decrees granted. *Id.* May 31, 1931.

⁴⁸ *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. 1 (1907); *Burbank v. Ernst*, 232 U. S. 162, 34 Sup. Ct. 299 (1914).

⁴⁹ *Blodgett v. Silberman*, 277 U. S. 1, 48 Sup. Ct. 410 (1928).

⁵⁰ *Kerr v. Devises of Moon*, 9 Wheat. 565 (U. S. 1824); *McCormick v. Sullivan*, 10 Wheat. 192 (U. S. 1825); *Robertson et al. v. Pickrell et al.*, 109 U. S. 608, 3 Sup. Ct. 407 (1883); *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree." *Fall v. Eastin*, 215 U. S. 1 at 11, 30 Sup. Ct. 3 at 7 (1909).

⁵¹ *Olmsted v. Olmsted*, 216 U. S. 386, 30 Sup. Ct. 292 (1910).

sister state which excludes children adopted by proceedings in other states from the right to inherit land therein.⁵²

A proceeding which combines some of the elements of both an *in rem* and an *in personam* action is the proceeding in garnishment cases. Suppose that *A* owes *B* and *B* owes *C*, and that the two former live in a different state than *C*. *A* while on a brief visit to *C*'s state is presented with a writ attaching his debt to *B* and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in *C*'s favor against *A* to the amount of his indebtedness to *B*. Subsequently he is sued by *B* in their home state, and offers the judgment, which he has in the meantime paid, in defense. It was argued in behalf of *B* that *A*'s debt to him had a *situs* in their home state, and furthermore that *C* could not have sued *B* in this same state without formally acquiring a domicile there. Both propositions were however rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against *C*'s action.⁵³

Are there other challenges than the jurisdictional one to the recognition of a judgment outside the state where rendered? There are *dicta* to the effect that judgments for which extraterritorial operation is demanded under Article IV, section 1, and acts of Congress are "impeachable for manifest fraud", but unless the fraud affected the jurisdiction of the Court the vast weight of authority is against the proposition.⁵⁴ And it is universally agreed that a judgment may not be impeached for alleged error or irregularity;⁵⁵ or as contrary to the public policy of the state where recognition is sought for it under the "full faith and credit" clause; although as we have seen, there are cases in which the Court has in fact permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.⁵⁶

Finally, the clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of

⁵² *Hood v. McGehee*, 237 U. S. 611, 35 Sup. Ct. 718 (1915).

⁵³ *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625 (1905). See also *Chicago, R. I. & Pac. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797 (1899).

⁵⁴ *Christmas v. Russell*, 5 Wall. 290 (U. S. 1866); *Maxwell v. Stewart*, 21 Wall. 71 (U. S. 1874); *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242 (1885); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370 (1888); *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269 (1890); *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369 (1891); *American Exp. Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381 (1909). In *Cole v. Cunningham*, the Court sustained the Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that state, a Massachusetts creditor from continuing in New York courts an action which had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied "full faith and credit" to the New York proceedings, the jurisdiction of the New York courts being unquestioned. The decision commanded the assent of only five Justices, and must be reckoned another of the numerous instances of the Court's attempting the role of special providence under this clause.

⁵⁵ Cases just cited, *supra* note 54.

⁵⁶ Notes 23 and 24 *supra*.

another."⁵⁷ In the leading case of *Huntington v. Attrill*,⁵⁸ however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal", and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts, to be entitled under Article IV, section 1, to recognition and enforcement in the courts of sister states. And a recent case⁵⁹ suggests the possibility that a judgment for taxes might be sued upon in the name of the taxing state in the courts of sister states.⁶⁰

VI

The most significant cases arising under the "full faith and credit" clause within recent years have been those, referred to in the opening section of this paper, in which the Court has invoked the clause in order to give statutes extrastate operation in certain situations. The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the states, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction claimed his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late seventies, however, the states, abandoning the common law rule on the subject, began passing laws which authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.⁶¹ The question at once presented itself whether, if such an action was brought in a state other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the *forum* state, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory actions *ex contractu*, where the contract involved had been made under laws peculiar to the state where made, and with those laws in view.

⁵⁷ Chief Justice Marshall, in *The Antelope*, 10 Wheat. 66, 123 (1825); see also *Wisconsin v. Pelican Ins. Co.*, *supra* note 54. The importance of the maxim is chiefly felt in connection with the question of what causes of actions originating in sister states the courts of a state shall treat as transitory, and so furnish a *forum* for them. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193-225.

⁵⁸ 146 U. S. 657, 13 Sup. Ct. 224 (1892); *Dennick v. R. R.*, 103 U. S. 11 (1880) had paved the way for the later case.

⁵⁹ *Moore v. Mitchell*, 281 U. S. 18, 50 Sup. Ct. 175 (1930).

⁶⁰ In *Am. Exp. Co. v. Mullins*, *supra* note 54, it was held that a summary judgment whereby property was seized and destroyed as contraband in one state must be recognized when offered in defense in a suit brought in the courts of another state for the value of the property. Clearly this result cannot rest on the principle of *res judicata*. Perhaps the case should be classified with those dealt with in the next section.

⁶¹ *Dennick v. R. R.*, *supra* note 58, was the first of the so-called "Death Act" cases to reach the Supreme Court. See also *Stewart v. B. & O. R. R.*, 168 U. S. 445, 18 Sup. Ct. 105 (1897).

In *Chicago and Alton R. R. v. Wiggins*,⁶² decided in 1887, the Court, confronted with the latter form of the question, indicated its clear opinion that in such situations it was the law under which the contract was made, not the law of the *forum* state, which should govern. Its utterance on the point was, however, not merely *obiter*; it was based on an error of the most palpable nature, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the Act of 1790 does "judicial records and proceedings". Notwithstanding which, this *dictum* is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's right of action originated sets thereto, except that courts of sister states cannot be thus prevented from taking jurisdiction in such cases.⁶³

Nor is it alone to defendants in transitory actions that the "full faith and credit" clause is today a shield and a buckler. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.⁶⁴ One such relationship is that of a stockholder and his corporation. Hence, notwithstanding the principle that no state need admit a "foreign" corporation to do local business except on such terms as it chooses to lay down, yet if it does so and a question later arises as to the liability of the stockholders of the corporation, the courts of the state are required by the "full faith and credit" clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation's home state.⁶⁵

And the same principle applies to the relationship which is formed when one takes out a policy in an insurance company. Thus in *Royal Arcanum v. Green*,⁶⁶ in which a fraternal insurance association chartered under the laws of Massachusetts was being sued in the courts of New York by a citizen of the latter state on a contract of insurance made in that state, the Court held that the defendant company was entitled under the "full faith and credit" clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

⁶² 119 U. S. 615, 7 Sup. Ct. 398 (1887).

⁶³ *Glenn v. Garth*, 147 U. S. 360, 13 Sup. Ct. 350 (1893); *Northern Pac. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978 (1894); *Slater v. Atchison, T. & S. F. Ry. v. Sowers*, 213 U. S. 55, 67, 28 Sup. Ct. 397, 401 (1908); *Tennessee Coal Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587 (1914). A state court does not violate the "full faith and credit" clause by mere error in construing the law upon which a transitory action from another state depends, *Glenn v. Garth*, *supra*; *Banholzer v. N. Y. Life Ins. Co.*, 178 U. S. 402, 20 Sup. Ct. 972 (1900).

⁶⁴ See *Holmes*, in *Modern Woodman of Am. v. Mixer*, 267 U. S. 544, 551, 45 Sup. Ct. 389 (1925).

⁶⁵ *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415 (1912); *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926 (1914).

⁶⁶ 237 U. S. 531, 35 Sup. Ct. 724 (1915); followed in *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 45 Sup. Ct. 129 (1924); *Modern Woodmen of Am. v. Mixer*, *supra* note 64.

Finally, by a recent case the relationship of employer and employee, so far as the obligations of the one and the rights of the other under a workmen's compensation act are concerned, is similarly classified.⁶⁷ The cause of action in the case was an injury in New Hampshire, resulting in death, to a workman who had entered the defendant company's employment in Vermont, the home state of both parties. The Court held that the case was governed under the "full faith and credit" clause by the Vermont workmen's compensation act, not that of New Hampshire. The relationship, it said, "was created by the law of Vermont, and so long as that relationship persisted its incidents were properly subject to regulation there."⁶⁸

Thus the Court from according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs alone", so also it is true that it was not made for the benefit of defendants alone. The day may come when the Court will approach the question of the relation of the "full faith and credit" clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of local policy of the *forum* state will be superseded by that of judicial review.⁶⁹

VII

The question arises whether the application to date, not by the Court alone but by Congress and the Court, of Article IV, section 1, can be said to have met the expectations of its framers. In the light furnished by the account given in an earlier paragraph of the framing of the clause this may

⁶⁷ *Bradford Electric Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571 (1932).

⁶⁸ *Id.* at 158. The Court had earlier remarked that "Workmen's Compensation legislation rests upon the idea of *status*, not upon that of implied contract". *Cudahy Packing Co. v. Parramore*, 263 U. S. 418 at 423, 44 Sup. Ct. 153 at 154 (1923). In contrast to the above cases, see *Kryger v. Wilson*, *supra* note 15. Where it was held that the question whether the cancellation of a land contract was governed by the *lex rei sitae* or the *lex loci contractus* was purely a question of local common law; also *Bond v. Hume*, *supra* note 15, where the general principle of the dominance of local policy over the rules of comity is set forth at length by Chief Justice White, only to be ignored in the decision of the case.

⁶⁹ Reviewing some of the cases treated in this section, a writer in 1925 said: "It appears, then, that the Supreme Court has quite definitely committed itself to the program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts . . . although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear." E. M. Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533-562. It can hardly be said that the law has been subsequently clarified on this point.

be seriously doubted. The protest was raised against the clause, it will be recalled, that in vesting Congress with power to declare the effect state laws should have outside the enacting state, it enabled the new government to usurp the powers of the states; but the objection went unheeded.

The main concern of the Convention, it may be admitted, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this objective has been by no means completely realized, owing to the doctrine of the Court that before a judgment of a state court can be enforced in a sister state, a new suit must be brought on it in the courts of the latter; and the further doctrine that with respect to such a suit, the judgment sued on is only "evidence"; the logical deduction from which proposition is that the sister state is under no constitutional compulsion to give it a *forum*.

These doctrines were first clearly stated in the *McElmoyle* case and flowed directly from the new states' rights premises of the Court; but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term "judicial proceedings" refers only to final judgments and does not include intermediate processes and writs; but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several states.

Under the present system, suit has ordinarily to be brought where the defendant, the alleged wrongdoer resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" ⁷⁰

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the "full faith and credit" clause. Congress has the power under the clause to decree the effect that the statutes of one state shall have in other states. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union, and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.⁷¹

⁷⁰ Cook, *supra* note 25, at 430. The entire article is important; see also the Australian Service and Execution of Process Act, given in an appendix to it, at 441-9.

⁷¹ I SCHOFIELD, *ESSAYS ON CONSTITUTIONAL LAW AND EQUITY* (1921) 211 *et seq.*

Nor should the limited initiative taken by the Court in this matter in recent years deter Congress from action. The little that can be accomplished by "the judicial process of inclusion and exclusion" will go neither far nor fast toward meeting present-day necessities. Besides it is to *Congress* that the Constitution itself reserves the initiative in the application of the "full faith and credit" clause, not to the Court.

As was seen earlier, the legislation of Congress comprised in sections 905 and 906 of the Revised Statutes lays down a rule not merely for the recognition of the records and judicial proceedings of state courts in the courts of sister states, but for their recognition in "every court of the United States", and it further lays down a like rule for the records and proceedings of the courts "of any territory or any country subject to the jurisdiction of the United States."

These features of the acts of Congress are to be referred not to Article IV, section 1, but to Congress's power under the "necessary and proper" clause in relation to Article III, and to its powers in connection with the government of the territories and of the District of Columbia.⁷² Doubtless, Congress might also by virtue of its powers in the field of foreign relations lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present, the duty to recognize such judgments even in the national courts rests only on comity and is qualified, in the judgment of the Supreme Court by a strict rule of reciprocity.⁷³

⁷² *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25 (1882); *Atchison, T. & S. F. Ry. v. Sowers*, *supra* note 63.

⁷³ *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." *Id.* at 234, 16 Sup. Ct. at 171. At the same sitting of court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171 (1895). See also *Ingenohl v. Olsen*, 273 U. S. 541, 47 Sup. Ct. 451 (1927), where a decision of the supreme court of the Philippine Islands was reversed for refusal to enforce a judgment of the supreme court of the British colony of Hongkong, which was rendered "after a fair trial by a court having jurisdiction of the parties." In (1897) *FOREIGN RELATIONS OF THE UNITED STATES* 7-8, will be found a three-cornered correspondence between the State Department, the Austro-Hungarian Legation, and the governor of Pennsylvania, in which the last named asserts that "under the laws of Pennsylvania the judgment of a court of competent jurisdiction in Croatia would be respected to the extent of permitting such judgment to be sued upon in the courts of Pennsylvania. . . ." *Stowell, op cit. supra* note 1, at 254-5. Another instance of international cooperation in the judicial field is furnished by "letters rogatory." "When letters rogatory are addressed from any court of a foreign country to any district court of the United States, a commissioner of such district court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts," 28 U. S. C. A., *supra* note 11, § 653. Some of the states have similar laws. See 2 MOORE, *DIGEST OF INTERNATIONAL LAW* (1906) 108-9.