Proof of Sister State Laws in Australia and the United States

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I. SISTER STATE LAWS AS FOREIGN QUESTIONS OF FACT

Both in England and the United States it has long been established that foreign law is a question of fact.[1] The rule is based on quite practical considerations. A judge is presumed to know domestic law; counsel merely refreshes his memory. If a judge does not in fact know an applicable rule he will be sufficiently versed with the legal methods and sources of the forum to look it up. In regard to foreign law it cannot be assumed the court is familiar with it, and, even if it does have the requisite background knowledge, it may not have access to library facilities which would make it possible to find and to verify the relevant rules of the foreign law.[2]

Which laws are foreign? The laws of jurisdictions other than the forum are considered foreign. There are certain exceptions to this rule. For example, the Federal laws of the United States would not be considered foreign in State jurisdictions,[3] the laws of a former sovereignty to the extent they have become part of the *lex fori* are not foreign,[4] and it would seem that, to the extent English authori-

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1 The English cases dated from the eighteenth century. See, for example, *Mostyn v. Fabrigas*, 1 Cowp. 161; 98 Eng. Rep. 1021 (K.B. 1774); *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260 (P.C. 1937) (Cyprus). There are numerous American authorities in point; for example, *Kline v. Baker*, 99 Mass. 253 (1868); *Bank of China v. Morse*, 168 N.Y. 458; 106 N.E. 774 (1901); *Pfleuger v. Pfleuger*, 304 N.Y. 148; 106 N.E. 2d. 495 (1952); *United States v. Pink*, 315 U.S. 203; 62 S.Ct. 552 (1942).

2 Schlesinger, *Comparative Law* at pp. 39-40 (1959). See also, Stern, 45 Calif. L. Rev. 23 (1957).

3 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 556-57 (3rd ed. 1940):
(c) The Federal laws of the United States (as well as Canada) are equally the laws of each State, and hence the Courts of one of the States notice Federal laws, whether ordinary public acts of Congress or treaties. They are of course noticed by the Federal Courts.
(d) Since the judicial powers of the Federal Courts extend to many cases arising under the laws of the various States of the Union, such State laws are for the purpose in hand part of the law of the Federal Courts, and will therefore be noticed by them. Extending this principle, it has been held by State Courts that in cases where appeal may be made to the Federal Courts on questions of Federal law, e.g., the effect of a judgment in another State Court, the law of such other State may be noticed. (Footnotes omitted).

4 Ibid. One instance is the judicial noticing of pre-American Revolution English law by American state courts.

ties are authoritative in Australia, they could not be properly characterized as foreign but as part of the domestic law of the Australian States. But, the general rule has been applied to states in a federation. In Australia there is authority for the general proposition that one State is foreign to another for the purposes of conflict of laws.[5] Moreover, there is authority specifically on point referring to sister State law as foreign and factual. In *Re E. & B. Chemicals & Wool Treatment Pty. Ltd.*,[6] Lowe, J., of the Supreme Court of Victoria stated:—

> "The law of South Australia, as regards the legislation in question, is foreign law, and it is a trite observation that foreign law must be proved as a question of fact. If nothing more appears the foreign law will be assumed to be the same as our own . . ."[7]

There is also significant authority to similar effect in the United States. In *Hanley* v. *Donoghue*[8] the United States Supreme Court stated:—

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5 In *Chaff and Hay Acquisition Comm. v. J. A. Hemphill & Sons Pty. Ltd.* (1947), 74 C.L.R. 375, 396. Williams, J. remarked: "For the purposes of private international law, South Australia is a foreign country in the courts of New South Wales." Similarly, in *J. E. Lindley & Co. v. Pratt*, [1911] V.L.R. 444, 448, it was stated: "I think I may say that before the Common Law Procedure Statute of 1852 there was no authority in the Courts of Westminster to issue writs to be served anywhere outside the territorial limits of England; and I apprehend, until I can be shown some statutory authority for it, this Court has no jurisdiction over persons outside the territorial limits of this State; and for the present purposes I must treat Queensland as being as much a foreign country as Japan or France or Germany."
Jordan, C.J., of the Supreme Court of New South Wales, was of the opinion in *Pezet v. Pezet* (1946), 47 S.R. (N.S.W.) 45, 52 that: ". . . although in relation to matters in which Private International Law is involved the Australian Capital Territory stands in no better position than a foreign country, it stands in no worse."
But cf., *In the Estate of Searle*, [1963] S.A.S.R. 303, 308-9: ". . . I doubt if the State of New South Wales should be considered a 'foreign country' . . . ."
Cf. also, *Zwillinger v. Schulof*, [1963] V.L.R. 407, 412: "In *Lauric v. Carroll* (1958), 98 C.L.R. 310, at p. 331, it was said by the High Court: 'It must be borne in mind that in questions of jursdiction and conflict of laws each Australian State is to be treated (subject to the Commonwealth Constitution and legislation under it such as the Service and Execution of Process Act) as a distinct and separate country or law area and accordingly doctrines developed in England . . . are applied . . . .' But the words 'subject to the Commonwealth Constitution and legislation under it' in the passage are not without significance . . . for s. 118 of the Constitution provides that 'Full faith and credit shall be given throughout the Commonwealth to the laws' . . . 'and the judicial proceedings of every State'. (See also s. 18 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901-1950). Whatever the precise limits of the operation of these provisions . . . they prevent one State being regarded completely as a 'foreign dominion' in respect of another State."

6 [1939] V.L.R. 278.

7 Ibid., at 282. Note Lowe, J., went on to point out that Federal and State legislation has somewhat altered the modes of proof. But cf., in *Re Commonwealth Agricultural Serv. Eng'rs. Ltd.*, [1928] S.A.S.R. 342, 346.

8 116 U.S. 1; 29 L. Ed. 535 (1885).

"No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice . . . . It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the Courts of one State are not presumed to know, and therefore not bound, to take judicial notice of the laws of another State."[9]

Numerous State authorities have followed this directive and held sister state laws to be foreign and questions of fact.[10] Further, many of these cases are quite recent. In *Rymanowski* v. *Rymanowski*,[11] decided in 1969, the Supreme Court of Rhode Island remarked:—

"Ordinarily, when a state is cast in the role of 'third State', as we are in the proceedings before us, the course to be followed is to determine the law of the wife's domicile as to the survival of the support rights and to utilize that law as the basis for decision . . . We will not adhere to that procedure for two reasons. First, we do not, on the record before us, have any evidence of the law of Massachusetts. It is well settled that in such circumstances this court will not of its own initiative take judicial notice of the law of another State."[12]

II. EFFECTS OF THE "FACT" DOCTRINE

Treating sister state law as factual has, of course, a number of consequences.[13] But not all the usual results, appertaining to ques-

9 Ibid., at 4, 536. See also, *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622; 30 L. Ed. 519, 522 (1887): "Whenever it becomes necessary under this requirement of the Constitution for a court of one State, in order to give full faith and credit to a public Act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court matters of fact . . . ."

10 *Hieber v. Hieber*, 151 So. 2d 646 (Fla. Dist. Ct. App. 1963); *Record Truck Line, Inc. v. Harrison*, 137 S.E. 2d 65 (Ga. Ct. App. 1964); In *Re Drumheller's Estate*, 110 N.W. 2d 833 (Iowa. 1961); *Delta Equip. & Const. Co. v. Cook*, 142 So. 2d 427 (La. Ct. App. 1962); *Clair v. Gaudet*, 144 So. 2d 638 (La. App. 1962); *Harrison v. Burton*, 303 P. 2d 962 (Okl. 1956); *Constantine v. Constantine*, 72 So. 2d 831 (Ala. 1954); *Campbell v. Powell*, 206 Ga. 768; 58 S.E. 2d 829 (1950); *Gapsch v. Gapsch*, 277 P. 2d 278 (Idaho 1954); *Geller v. McGowan*, 64 Nev. 102, 177 P. 2d 461 (1947); *Chappell v. Chappell*, 186 Misc. 968; 60 N.Y.S. 2d 447 (Sup. Ct. 1946); *Gray v. Martin*, 242 P. 2d 698 (Okl. 1952); *Carras v. Birge* 211 S.W. 2d 998 (Tex. Civ. App. 1948); *John Hancock Mut. Life Ins. Co. v. Stanley*, 215 S.W. 2d 416 (Tex. Civ. App. 1948); *Perkins v. Perkins*, 237 S.W. 2d 659 (Tex. Civ. App. 1951); *Whitmore Oxygen Co. v. Utah State Tax Comm'n*, 114 Utah 1; 196 P. 2d 976 (1948); *Harris v. Harris*, 403 S.W. 2d 445 (Tex. Civ. App. 1966); *Gay v. Gay*, 203 So. 2d 379 (La. Ct. App. 1967); *Collins v. Collins*, 160 Fla. 732; 36 So. 2d 417 (1948); *Pfleuger v. Pfleuger*, 304 N.Y. 148; 106 N.E. 2d 495 (1952).
9 Wigmore, *supra*, n. 3, at 555 states: "The State law of another of the States of the United States is, in theory, that of an independent sovereign; hence its law, equally with the law of other nations, was in theory not to be noticed by the Courts of another of the United States." (Footnotes omitted).

11 249 A. 2d 407 (R.I. 1969).

12 Ibid., at 412.

13 This article is only concerned with the evidential effect. For other consequences see Schlesinger, *supra*, n. 2 at 42-45; Dicey & Morris, *The Conflict of Laws*, 1110-11 (8th ed. 1967) [Hereinafter cited as *Dicey*].

tions of fact, follow. Matters of foreign law do not fall to be determined by juries.[14] Also, both statutes and case law now provide, in several American and English jurisdictions, that an appellate court's jurisdiction which is limited to appeal or review on questions of law includes appeal or review of questions of foreign law.[15]

Perhaps the most important consequence of treating foreign law as a question of fact is that it must be pleaded and proved and generally judicial notice cannot be taken of it.[16] There is a substantial body of authority requiring the law of sister States to be proved in the same way as foreign law. In *Collins* v. *Collins*[17] Adams, J., of the Supreme Court of Florida remarked:—

> "There may be found some authority for a court to notice the law of a sister state. See Wigmore on Evidence, 2nd ed., vol. 5, page 582, sec. 2573 . . . But by more than a score of cases covering the entire history of this Court and without a single exception we have held consistent with the great weight of authority that foreign law is a question of fact to be pleaded and proved . . .
> We can see no reason at this time to assume the insurmountable burden of ascertaining the statute and case law of the several States. If we did, the contention undoubtedly would be made that we should also take notice of the law of each sovereign nation. When the contrary has not been alleged we have assumed the law of the other State to be the same as our own. Our holdings are consistent with settled principles of law and have served the interests of our State well. We shall not extend or depart from them now."[18]

The Anglo-Australian rule is that foreign law must be proved by expert evidence. Producing texts of foreign statutes, decisional laws,

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14 In *Saloshin v. Houle,* 85 N.H. 126; 155 Atl. 47 (1931), Allen, J., stated: "Conceding that foreign law is a matter of fact, yet it also is law in every true sense. It stands the test of the definition of law as 'a rule or standard which it is the duty of a judicial tribunal to apply and enforce'. When a case is to be tried and its merits determined by foreign law because foreign rather than local law is applicable to it, it is here no less the duty of the judge to say what the law is than where local law is administered." See also, *Jansson v. Swedish-American Line,* 185 F. 2d 212 (1st Cir. 1950); *Liechti v. Roche,* 198 F. 2d 174 (5th Cir. 1952). In most States of the United States statutes have been enacted providing that issues of foreign law are not jury questions. See, Schlesinger, *supra,* n. 40, at p. 43. There is similar legislation in the Australian States. See, Nygh, *Conflict of Laws in Australia,* 261 (1968).

15 See, e.g., N.Y.C.P.A. 344; *Leichti v. Roche, supra,* n. 14; *Parkasho v. Singh,* [1967] 2 W.L.R. 946 (P.D.A. 1966). Dicey notes that in *Singh's Case* the Matrimonial Causes Rules 1957, authorized the appellate review and concedes that it is not clear, in the absence of such provision, whether this is permissible.

16 *Dicey,* 1110 (Rule 185); Schlesinger, *supra,* n. 2 at p. 43; Stern, 45 Calif. L. Rev. 23 (1957); *Chicago & Alton R.R. Co. v. Wiggins Ferry Co., supra,* n. 9; *Strother v. Lucas* 6 Pet. 763; 8 L. Ed. 573 (U.S. 1832); *Commissioner v. Hyde* 82 F. 2d 174 (2d Cir. 1936); *Lane v. St. Louis Union Trust Co.,* 356 Mo. 76, 201 S.W. 2d 288 (1947); *Geller v. McCowan,* 64 Nev. 102; 177 P. 2d 461 (1947); *Brenan & Galen's Case* (1847), L.R. 10 Q.B. 492; *Re Marseilles Extension Ry. & Land Co.* (1885), 30 Ch. D. 598; *Lazard Bros. & Co. v. Midland Bank Ltd.,* [1933] A.C. 289 at 298.

17 160 Fla. 732; 36 So. 2d 417 (1948).

18 Ibid. See also, *Constantine v. Constantine,* 261 Ala. 40, 72, So. 2d 831 (1954); *Sheard v. Green,* 219 La. 199; 52 So. 2d 714 (1951).

or authoritative books is not sufficient. Such materials can only be brought before the Court as part of the evidence of an expert witness. A Court may not conduct its own research into foreign law and is only entitled to examine the texts of foreign laws to the extent used by expert witnesses.[19] The modes of proving foreign law in American jurisdictions are somewhat wider. Evidence of expert witnesses may be given[20] but it would seem this is not mandatory and other means can be used. Declarations and certificates of the foreign jurisdiction may be sufficient.[21] Further, proof is permitted by production of copies of the pertinent laws.[22]

In the absence of sufficient proof of foreign law, courts may resort to the use of presumptions. In *Parrot* v. *Mexican Central Ry. Co.*[23] Knowlton, C.J., of the Supreme Judicial Court of Massachusetts presumed a contract was valid under Mexican law:—

> "We are of the opinion that, in an action upon a simple contract of this kind, there is a broad general presumption of fact that such a contract creates a liability in all civilized countries, which presumption is sufficient to entitle the plaintiff to recover, if no evidence is introduced of the law of the place where the contract was made . . . . We treat this, not as a presumption that the law of the foreign country is the same as the law of the forum, but as a presumption that all countries, in their courts of justice, will give effect to recognized fundamental principles of right and wrong in deciding between contending parties."

In *Gerli & Co. Inc.* v. *Cunard S.S. Co. Ltd.*[24] Circuit Judge, L. Hand, said:—

> "The extent of our right to make any assumptions about the law of another country depends upon the country and the question involved; in common law countries we may go further than in civil law; in civilized, than in backward or barbarous. We can say more in the case of France or Italy, than of Abyssinia, or Afghanistan . . . less, than in the case of England or Australia."

The extent of the presumption, then, may depend on the jurisdiction involved. In civil law countries it can be presumed that certain general principles of law apply; for example, that a contract creates a binding obligation. The presumptions applicable to common law jurisdictions may go further, and it may be presumed that their laws are the same as the *lex fori* until the contrary is shown.[25] Professor Kales, whose article was cited by Judge

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19 See generally, *Dicey*, 1113-18; *Nygh*, 261.

20 *Matter of Masocco v. Schaaf*, 234 App. Div. 181; 254 N.Y. Supp. 439 (1931),

21 *United States v. Pink*, 315 U.S. 203; 62 S.Ct. 552 (1942).

22 Stern, 45 Calif. L. Rev. 23, 26 (1957).

23 207 Mass. 184; 93 N.E. 590 (1911).

24 48 F. 2d 115 (1931).

25 9 Wigmore, *supra*, n. 3, at 492-93: "If it is the law of a State possessing the English common law as the foundation of its system, in particular, one of the United States, it is generally said to be the same as that of the forum. Even if it involves the existence of a statutory enactment altering the common law, the same rule is often applied (i.e. by presuming that the statutory alteration in the forum has been repeated in the other State by

L. Hand, in *Gerli's Case*, stated in 1906:—

> "There are three possible rules for determining when the Court of the forum will make a presumption as to the law of the foreign state, and what presumption if any it will make; or as I would prefer to say, there are three possible rules which indicate when the Court of the forum will shift the burden of going forward with evidence as to the foreign law upon the party not having the burden of proof of the whole issue which the foreign law is part.
> The first is as follows: When the Court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the Court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both; otherwise there is no presumption at all.
> The second position is that the law of the forum (even though it be statutory) is always applicable, in the absence of the proof of the foreign law. In the application of this rule it is entirely unnecessary to make the slightest distinction between whether the foreign state is one which has fundamentally the same system of law as the forum or not . . .
> The third possible position is a combination of the first and second. It is like the first when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as the forum. It is like the second when the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law from that of the forum . . . ."[26]

Anglo-Australian courts presume that foreign law is the same as the *lex fori* until evidence is adduced to the contrary.[27] This rule applies irrespective of the type of legal system involved. Judicial notice of some laws of common law jurisdictions is also sometimes taken.[28]

The application of the foreign-law-as-fact doctrine to sister States has been criticized. The author of a leading American work on evidence expressed his views in no uncertain terms:—

> "The judges manipulate an esoteric logical dream-machine which has caused them to forget the world of reality. Judicial power should be used to get at the facts more directly and candidly. The professional common sense, fortunately, began some time ago to revolt at the needless expenditure of effort involved in compelling formal proof of what was in most instances virtually indisputable. Particularly absurd was the technical insistence on treating the States of the Union as foreign to each other . . . .
> No one would demand that a Court take judicial notice of foreign

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25—*continued*
a similiar process of evolution) though many courts draw a distinction here and confine the presumption to the common or judicially declared law. But if the foreign State is not one whose system is founded on the common law, the presumption will probably not be made, unless the principle involved is one of the law merchant common to civilized countries."
See also, Stern, *supra*, n. 22, at 29.

26 Kales, *Presumption of the Foreign Law*, 19 Harv. L. Rev. 401 (1906).

27 *Wright Heaton & Co. v. Barrett* (1892), L.R. (N.S.W.) 206; *Hartman v. Konig*, 50 T.L.R. 114, 117 (H.L. 1933); *Re Tank of Oslo*, [1940] 1 All E.R. 40, 42 (C.A.); *Re Parana Plantations Ltd.*, [1946] 2 All E.R. 214 (C.A.).

28 Nygh, 258-59.

> systems of law in foreign languages. But the laws of other States of the Union, the laws (if locally accessible) of other States or Dominions in the Anglo-American system the regulations and rulings of important administrative departments and boards, all of these can ordinarily be brought to a Court's attention, through diligence of counsel and conciliatory stipulation, without formal proof under the rules of Evidence."[29]

The legal systems within the Australian and United States federations are substantially similar. The differences between States do not render out-of-state law incomprehensible nor difficult to understand. Further, there are library facilities in all States of the United States and Australia which are probably sufficient to enable the laws of sister States to be ascertained.[30] There are several national decision reporting systems in the United States, while in Australia the facts that the number of States is numerically small and that there is a general Federal appellate court, whose decisions are binding on all courts, would not make the task of finding the law of another State much more difficult than ascertaining the *lex fori*. It is to be doubted whether the laws of sister States should be treated as foreign and hence questions of fact to be extracted and brought before the court in a way different from the *lex fori*.

III. FEDERAL LEGISLATION

(a) Australia

The State and Territorial Laws and Records Recognition Act 1901-1950 has changed the concept of sister-state laws as foreign fact in two respects. Firstly, s. 3 of the Act provides that all courts shall take judicial notice of all Acts of the Parliament of any State and of all Ordinances of any Territory. It should be noted that the section provides that judicial notice "shall" not "may" be taken. It would therefore seem mandatory for courts to judicially notice the statutory laws of sister states.[31] Mr. Justice Lowe of the Supreme Court of Victoria in *Re E. & B. Chemcials and Wool Treatment Pty. Ltd.*[32] seemed to restrict the operation of s. 3 by implying that a court only has to take judicial notice of statutes of sister states which are brought to its notice by counsel presumably:—

> "The law of South Australia, as regards the legislation in question, is foreign law, and it is a trite observation that foreign law must be proved as a question of fact. If nothing more appears, the foreign law will be assumed to be the same as our own . . .
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> My attention has been drawn to s. 70 of the Evidence Act 1928 which provides: 'All courts and persons acting judicially within Victoria shall take judicial and official notice of . . . all Acts of Parliament

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29 9 Wigmore, *supra*, n. 3, at 558.

30 Schlesinger, *supra*, n. 2, at p. 40. See also, *Prudential Ins. Co. v. O'Grady*, 97 Ariz. 9; 396 P. 2d 246, 248 (1964).

31 *Koop v. Bebb* (1951), 84 C.L.R. 629.

32 [1939] V.L.R. 278.

> of any Australasian State whether passed before or after the commencement of this Act and of the date of the coming into operation of any such Act.' There is, in addition to that provision of the State Legislature, s. 33 of the State and Territorial Laws and Records Recognition Act 1901-1928 of the Commonwealth which provides that: 'All Courts shall take judicial notice of all Acts of the Parliament of any State and of all Ordinances of any Territory.' In view of that legislation, I am not merely permitted, but am bound to take judicial notice of the South Australian Act ...
> I felt pressed with the argument that there might be other legislation in South Australia relating to this question ... and that, possibly, I had not all the relevant law of South Australia before me, and this may still turn out to be the actual position, but, so far as the matter now rests before me, the only material I have to the law of South Australia is in the Act to which my attention has been drawn. I am bound to look at that Act and, looking at it and that being the only material before me, I think ... ."[33]

In *Koop* v. *Bebb*,[34] Dixon, Williams, Fullagar and Kitto, JJ., of the High Court held that the "Victorian court also takes judicial notice of *all* statutes of New South Wales, being required to do so by s. 3 of the ... Act".[35] Their Honours did not limit this proposition to statutes brought to the Court's attention by the parties. In *Close* v. *Mirror Newspapers Ltd.*,[36] an action concerning a tort committed in a sister state, it was argued that the sister-state law should be pleaded as a question of fact. *Wolfe* v. *Wilson*,[37] a case concerned with proof of English Law in Australia, was cited as supporting authority. Richardson, J., found it unnecessary to decide the contention but observed:—

> "... since the decision in *Wolfe* v. *Wilson*, the State and Territorial Laws and Records Recognition Act, 1901, was passed by which the courts in this State are empowered to take judicial notice of all acts of the Parliament of Queensland, the sister state in question, indeed of the Parliaments of all the State of Australia."

It is submitted that Australian Courts are required to judicially notice all statutes of sister states whether brought to the notice of the court by counsel or not. This would enable a judge to make his own inquiries as to the laws of other States and require him to apply any relevant statutes he may discover whether or not referred to by counsel.

The second way in which the Act alters the position of States as foreign entities is by prescribing how certain other matters may be proved. These are enumerated in ss. 6-17. By s. 18, such matters, when proved as prescribed, are required to "... have such full faith and credit given to them in every Court and public office as they have in the Courts and public offices of the State or Territory from whence they are taken." The power of the Commonwealth Parliament to legislate in this area is not exclusive, and the State legislatures

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33 Ibid., at 282-83.
34 *Supra*, n. 31.
35 Emphasis added.
36 (1961) W.N. (N.S.W.) 200.
37 (1911) S.R. (N.S.W.) 51.

can prescribe modes of proving similar matters. Such State laws would be valid and effectual subject to s. 109 of the Constitution which makes Commonwealth laws prevail over inconsistent State laws.[38] Section 19 of the State and Territorial Laws and Records Recognition Act, itself provides that its provisions are in addition to and not in derogation of any powers existing at common law, or given by the law at any time in force in any State or Territory.

(b) The United States

A Congressional Act of 1948[39] specifies how statutes, records and judicial proceedings may be authenticated and provides that such documents, authenticated in the prescribed manner, 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. This is similar terminology to the Australian statute. The apparent effect of the 1948 enactment is to make authenticated documents virtually conclusive evidence of what they purport to be. Hence, for example, if a judgment of another State was produced and authenticated, it would not be open for a party to submit that the document did not set out all the terms or the correct terms of the out-of-state judgment.[40] As in the case of Australia, it appears that State legislation in the area is not excluded and a State may enact a valid statute authorizing the introduction of a sister-state record in evidence without compliance with all the requisites established by the Federal statute.[41]

IV. MATTERS EXTRANEOUS TO FEDERAL LEGISLATION

(a) The United States

The rule that sister-state law is a question of fact to be proved by evidence was not altered by the 1948 Act. That statute did not provide for judicial notice to be taken, it merely specified how certain documents could be proved. Common or decisional law is not embraced by the Act and on common law principles it has to be proved in the usual way by expert witnesses and the like.

The criticism of treating sister-state law as factual has already been noted.[42] Dissatisfaction with the rule prompted a large majority

38 Wynes, *Legislative, Executive and Judicial Powers in Australia,* 223 (3rd ed., 1962). Accord *Renton v. Renton* (1918), 25 C.L.R. 291, at p. 298: "I would add that subsec. xxiv and xxv of s. 51 of the Constitution cannot be relied on for a general displacement of State legislation by Federal legislation on the matters there mentioned. Those powers are given as concurrent with the powers of the States."

39 62 Stat. 947 (1948).

40 *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265; 32 L. Ed. 239 (1888).

41 20 Am. Jur. *Evidence,* section 1015 (1939).

42 *Supra,* at pp. 128-9.

of the States to change it. The National Conference of Commissioners on Uniform State Laws (1953) drafted the Uniform Rules of Evidence, s. 9 (1) of which provides that "judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every State, territory and jurisdiction of the United States . . .". Though few States adopted these rules, many have enacted the earlier Uniform Judicial Notice of Foreign Law Act which provides, in s. 1, that "every court of this State shall take judicial notice of the common law and statutes of every State, territory and other jurisdiction of the United States". The 1937-38 American Bar Association's Committee on the Improvement of the Law of Evidence had strongly recommended the adoption of the Uniform Statute:—

> "By a curious anomaly of usage, inherited from the tradition of insular England, any State other than the State of the forum is for our country a 'foreign' State. Thus every one of our sister States in the Union is a 'foreign' State. So when that 'foreign' law becomes material, it is not (at common law) judicially noticed, and as an ordinary fact it is to be evidenced to the jury and decided by them . . . . But in this Union of fifty independant jurisdictions, each one 'foreign' to the other (though not to the Federal Courts), and each one's law constantly coming into issue in extra-State intercourse, the traditional rule became anomalous. In the first place, it is comparatively a simple matter to invoke judicial notice of a sister State's law in the usual manner, i.e., by producing the statutes and decisions of that State for information of the Court. And, in the second place, the proof of such law to the jury is unsatisfactory . . . . Dissatisfaction with this double rule started more than a decade ago . . . . We recommend that the Uniform Act on Judicial Notice of Foreign Law be enacted by all Legislatures."[43]

By 1965 twenty-eight jurisdictions had adopted the Act.[44] In addition several States, which did not adopt the Uniform Act, enacted statutes of their own, providing for judicial notice to be taken of the law of sister states.[45]

In a few States, moreover, the rule has apparently been changed at common law. In *Prudential Ins. Co.* v. *O'Grady*[46] the Supreme Court of Arizona expressed dissatisfaction with the rule as applicable to sister states:—

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43 Report of the American Bar Association's Committee on the Improvement of the Law of Evidence; reproduced in 9 Wigmore, *supra*, n. 3, at pp. 559-60.

44 Maguire, Weinstein, Chadbourne & Mansfield, *Cases and Materials on Evidence*, 70 (5th ed. 1965).

45 Ibid. at p. 71. Examples of the application of judicial notice statutes in relation to sister state laws include: *Harmon v. Harmon*, 324 P. 2d 901 (Cal. Dist Ct. App. 1958); *Price v. Atchison, T. & S. F. Ry. Co.*, 330 P. 2d 933 (Cal. Dist. Ct. App. 1958); *Jukes v. North Am. Lines, Inc.*, 309 P. 2d 692 (Kan. 1957); In *Re Cramer's Estate*, 332 P. 2d 560 (Kan. 1958); *De Gategno v. De Gategno*, 146 N.E. 2d 497 (Mass. 1957); *Yeargans v. Yeargans*, 265 N.Y.S. 2d 562 (App. Div. 1965); *Standard Agencies, Inc. v. Russell*, 135 N.E. 2d 896 (Ohio, Ct. App. 1954); *Medeiros v. Perry*, 124 N.E. 2d 240 (Mass. 1955); *Lewis v. Furr*, 228 N.C. 89; 44 S.E. 2d 604 (1947); *Cohn v. Krauss*, 67 N.E. 2d 62 (Ohio Ct. App. 1943).

46 97 Ariz. 9; 396 P. 2d 246 (1964).

> "The rule, derived from the common law of England, had a reason for its existence as before an English court, all foreign laws were composed in a foreign language and were based on all-alien system. This, of course, did not lend itself to judicial notice. But the conditions are totally different in the sister States of this country. The law of another State is in our own language; its principles are substantially the same and their tenor is readily ascertained by reference to the reported systems . . . . In this modern day with easy access to many law libraries with copies of the State statutes and the State and national reporter systems, and the obvious fact that the states are not 'foreign' to each other, the reason for the common law rule no longer exists."[47]

The Court then changed the rule:—

> "It might be argued that such a change should come from the legislature, but it should be pointed out that this rule was judicially created. Because of its long survival it does not become invulnerable to judicial attack. The rule having been engrafted upon Arizona law by judicial enunciation it may properly be changed or abrogated by the same process . . . . We therefore hold that the Constitution, statutes and reported court decisions of our sister states are proper subjects for judicial notice."[48]

(b) Australia

The State and Territorial Laws and Records Recognition Act provides for judicial notice to be taken of the statutory laws of the States. However, this does not mean that all the common law of the States has to be proved in the usual way. Anglo-Australian courts have evinced some readiness to judicially notice the non-statutory law of common law jurisdictions. In *McKelvey v. Meagher*[49] Griffith, C.J., expressed doubts whether the law of Natal was a question of fact for the purposes of the Fugitive Offenders Act of 1881:—

> "It is not necessary to express any definite opinion on the matter, but it seems to me that this law, which the authorities of each British possession are called upon to administer, may reasonably be said to imply that such officers shall make themselves acquainted with the laws of the other British communities in order to discharge their duties."

Dicey states: "The court may take judicial notice of a foreign law if its content is, at least in part, determined by a rule of English law, and if, according to English law, the foreign law is the same as, or substantially similar to, English law."[50] However, the principles may be somewhat narrower and may mean no more than a court will presume English common law to apply in a common law jurisdiction until the contrary is shown,[51] and the House of Lords has recently indicated that presumptions should not be carried too far.[52] Dicey

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47 Ibid., at 248.

48 Ibid., at 249. See also, *Choate v. Ransom*, 323 P. 2d 700, 703 (Nev. 1958): "In our view it is time that we recognize the statutes and reported court opinions of our sister states are a proper subject for judicial notice."

49 (1906), 4 C.L.R. 265; 12 A.L.R. 483.

50 *Dicey*, at p. 1111.

51 See *Nygh*, 258-59 citing *Dryden v. Dryden* (1876), 2 V.L.R. 74 and *R. v. Ford*, [1913] N.Z.L.R. 1219.

52 *Carl Zeiss Stiftung v. Rayner & Keller Ltd.*, [1967] 1 A.C. 853, at pp. 923-24.

also notes that, in a few cases, courts have determined questions of foreign law although, so far as one can see from the reports, no evidence of the foreign law was given.[53] In *Re Barlow's Will*,[54] Cotton, L.J., considered the provisions of the 1879 Lunacy Act of New South Wales, interpreted and commented upon it without expert evidence having been called. Similarly, in *Roe* v. *Roe*,[55] Shearman, J., held that there was sufficient evidence that a valid marriage took place between the parties in St. Helena. The only evidence adduced as to the *lex loci celebrationis* was counsel's citation of an 1851 Ordinance of that jurisdiction specifying how a marriage could be solemnized and counsel's submission that the common law applied in St. Helena.[56]

All the Australian States have enacted legislation in this area[57] which, among other things, provides how certain documents may be proved. The Acts of Tasmania, Victoria and Western Australia provide for judicial notice to be taken of the statutes of sister states; but, like the Federal enactment they are silent as to common or decisional law. Some of the statutes have made the common law requirements of the proof of foreign law far less stringent. Commonly, they have enabled some courts to dispense with the necessity of calling expert witnesses and have enabled the courts to consider copies of foreign statutes, and other laws proved authentic.[58]

V. THE PLACE OF FULL FAITH AND CREDIT

It has been seen that in Australia there is Federal legislation, and in some jurisdictions, State legislation as well, requiring the statutory laws of sister-states to be judicially noticed. Common or

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53 *Dicey*, at p. 1112.

54 36 Ch. D. 287 (1887).

55 115 L.T. 792 (P. 1916).

56 The colonial laws in these cases may have been proved under the Colonial Laws Validity Act 1865 or under the Evidence (Colonial Statutes) Act 1907. However neither of these statutes is mentioned in the reports. See *Dicey*, 1112.

57 Evidence Act 1958 (Vict.); Evidence Act 1898 (Qld.); Evidence Act 1910-1967 (W.A.); Evidence Act 1898-1966 (N.S.W.); Evidence Act 1929-1960 (S.A.).

58 E.g. s. 19 of the Evidence Act 1898-1966 (N.S.W.) provides:—
(1) Evidence of any statute, code, or other written law of any part of the British dominions other than New South Wales, or of any foreign State, may be given by the production of a printed copy in a volume of such statute, code, or law either—
(a) purporting to be published by authority of the Government . . . of such State; or
(b) proved to the satisfaction of the Court to be commonly admitted as evidence in the Courts and judicial tribunals of such . . . State.
(2) Evidence of the unwritten or common law of any part of the said dominions, or any such State, may be given by the production of a book or reports of cases adjudged in the courts thereof, purporting or proved to the satisfaction of the Court to be authorized reports.

decisional law must be proved, though some States have modified the traditional requirements of proof. In the absence of sufficient evidence presumptions as to sister-state law may be used. In the United States the rule that States are foreign countries whose laws are to be proved as questions of fact has been altered in most States, commonly by the enactment of legislation providing for judicial notice to be taken of the laws of other States. States which have not enacted such legislation nor changed the rule by judicial decision apparently require sister-state law to be proved; and, in the event that law is not proved, resort may be had to presumptions.

It is important to decide if there is any Constitutional obligation to judicially notice the laws of sister-states in Australia and the United States for two reasons. In the first place there is no legislation in Australia requiring judicial notice to be taken of the common law of the States[59] while in the United States a few States may not require judicial notice to be taken by their courts of the common or statutory law of other States in the federation. Secondly, in those States of the United States where judicial notice is taken, the old rule has been changed by state law. No matter how unlikely it may seem at present it must be conceded that it is possible for state legislature to revert to the former position of requiring sister-state laws to be proved unless there is a Federal obligation as well.

Article IV, s. 1 of the United States Constitution provides:—

> "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."

That clause was substantially transcribed into the Australian Constitution. Section 118 provides:—

> "Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State."

Whatever else these provisions do, it would at least seem arguable that they obviate the necessity of proving sister-state law as a question of fact. Yet despite criticism of the foreign-law-as-fact rule in the United States, in relation to sister-states, and wide concession that the premises on which that rule is based are not present in a federation, there has been little resort, or attempted resort, to the full faith and credit provisions. The application of those provisions does not appear to have been considered in depth and rejected, they have hardly been consulted at all. Two decisions of the Supreme Court of Washington hold that in order to give full faith and credit to the

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59 It has been suggested that there is only one Australian common law and no individual state common law. See *King v. Kidman* (1915), 20 V.L.R. 425, at pp. 435-39. But cf., *Washington v. Commonwealth* (1939), S.R. (N.S.W.) 133, at pp. 139-40(and see Cowen, *Bilateral Studies in Private International Law, American-Australian Private International Law*, at p. 48 (1957): "Why there should not be differences of view on common law matters as between State courts within Australia is not immediately obvious."

judgment of a sister-state the relevant statutes of that State will be judicially noticed;[60] and, a rather old law review article examines the position of proof of sister-state statutes.[61] But there is little else and the vast majority of cases considering proof of sister-state laws are silent as to full faith and credit. In Australia, reference to the full faith and credit provisions has been similarly scarce. In *Re Commonwealth Agricultural Serv. Eng'rs Ltd.*,[62] Napier, J., of the Supreme Court of South Australia, remarked:—

> "The effect of s. 118 of the Constitution has yet to be determined. It may well be that this Court is required to take judicial notice of the Statute law of Queensland . . . not merely as a matter of comity, but as the law of this State prescribed for that purpose by the Constitution."[63]

It is surprising that there has been such little consideration of the full faith and credit provisions. The States of the American and Australian unions were not destroyed by federation. But certain principles of federalism, certain national considerations, were imposed upon them in the political, economic and legal spheres. In dealing with sister-states, and inter-state transactions, courts were no longer to be at liberty to do as they wished. The freedom of state courts in legal conflicts with foreign countries was left largely unfettered but in the inter-state area controls were imposed. The full faith and credit clauses of the Australian and United States Constitutions, and legislation enacted in pursuance thereof, is one such restraint. There was in the United States, and still is in Australia, long debate as to whether these provisions imposed an obligation on one state to recognize the laws and judgments of sister-states in matters of substance. But there was little debate that a duty to recognize sister-state laws and judgments in an evidential sense was encompassed within the obligation. Indeed, the records of the Australian Constitutional Convention debates, which are otherwise conspicuous by their absence of a consideration in depth of the full faith and credit provisions, especially their possible substantive operation, contain comments which leave little doubt as to the intention of the Australian founding fathers in the evidential regard. In the 1897

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60 *Miller v. Miller*, 90 Wash. 333; 156 Pac. 8, 10 (1916): "A second reason given for holding the judgment insufficient is that there was no proof that the court in which the judgment was rendered, the municipal court of Chicago, was a court of record, a question which was made an issue by the allegations of the complaint and the denials of the answer. But we have held, in cases where similar questions arose, that in determining whether the court rendering the judgment sued upon had jurisdiction to render such a judgment, we will take judicial notice of the laws of the state from whence the judgment comes. . . . the rule has its foundation in the full faith and credit clauses of the Constitution and laws of the United States beforementioned."
See also *Edlin v. Edlin*, 256 P. 2d 283 (Wash. 1953).

61 Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 Minn. L. Rev. 439 (1928).

62 [1928] S.A.S.R. 342.

63 Ibid., at p. 346.

Australasian Convention, Barton remarked that the effect of s. 118 would be "to cause the courts of the Commonwealth to take judicial notice of the laws, acts and records of the States without the necessity of requiring them to be proved by cumbrous evidence".[64] He repeated words to this effect several times in the same debate[65] and no other Convention members are reported as joining issue with this view.[66] The United States Constitutional debates are less clear on the evidential effect. Nevertheless as the present American interpretation requires substantive recognition of sister-state laws and judgments[67] it would seem *a fortiori* that recognition should be required in an evidential sense.

What evidential effect do the full faith and credit provisions have? In relation to sister-state laws there is a lot to be said for the view put forward by Barton; namely, that such laws should be judicially noticed. Indeed, the full faith and credit provisions may well alter the status of sister-state laws as "foreign" and "factual", and require them to be brought to the court's notice in the same way as the *lex fori*. If this is so, it would seem that requiring a litigant to plead and prove the law of a sister-state as a question of fact would be unconstitutional. Moreover, the application of presumptions as to foreign law, in the absence of proof of sister-state law, may well constitute a denial of full faith and credit. If a court of one State is required to apply the law of a sister-state, the application of the *lex fori* on the basis of a presumption that that State's law is the same as the *lex fori* necessarily denied full faith and credit, for, the law of another State is applicable but has not been resorted to.

The reasons for treating foreign law as factual to be so proved, have little persuasion when considered in relation to sister-states. There are facilities for looking up sister-state law and the system of which it forms part is quite comprehensible throughout the country. Many States of the United States have seen the desirability of altering the rule and have done so. But, too, often in both Australia and the United States, the possible operation of the full faith and credit provisions have been ignored. They may well prescribe the obvious solution, and one binding upon State courts as a mandatory Federal Constitutional directive.

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64 *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897, at p. 1005.

65 Ibid., at p. 1006.

66 It is interesting to note that Barton thought his views accorded with the then prevailing United States view.

67 See, e.g., *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Yarborough v. Yarborough*, 290 U.S. 202 (1933); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).