Res Judicata and Decisions of Foreign Tribunals

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1. *Introduction*

The common law principle of estoppel by *res judicata* (or cause of action estoppel) is shortly expressed in a classic work on the subject as follows:

> [W]here a final judicial decision has been pronounced by... [a] judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner.[1]

The principle, and the associated principle of issue estoppel, express:

> a broad rule of public policy based on the principles expressed in the maxims "*interest reipublicae ut sit finis litum*" ["it is in the public interest that there should be an end to litigation"] and "*nemo debet bis vexari pro eadem causa*" ["no person should be proceeded against twice for the same cause"].[2]

There should be institutional means of securing finality in litigation, it is often said, to promote efficient and economical use of the adjudicatory facilities provided by the courts, largely at public expense, to avoid needless and wasteful relitigation of matters already decided by adjudication and which are not likely to be decided differently if readjudicated, and also to prevent harassment of individuals by resort to processes of adjudication. If there were no finality to litigation, Coke observed in 1599:

> great oppression might be done under colour and pretence of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to leave and relinquish his right ... .[3]

The repose in judicial outcomes compelled by estoppel by *res judicata* and related principles serves also to avoid inconsistent judgments and to foster respect for and reliance upon adjudications.[4] "The convention concerning

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1 Bower, G S and Turner, A K, *The Doctrine of Res Judicata* (2nd edn, 1969) par 9.

2 *Jackson v Goldsmith* (1950) 81 CLR 446 at 466 per Fullagar J.

3 *Ferrer's Case* (1599) 6 Co Rep 7a at 9a; 77 ER 263 at 266.

4 See *Allen v McCurry* 449 US 90 at 94 (1980).

finality of judgments", the American Law Institute's *Restatement of the Law of Judgments, Second* (1982) asserts, "has to be accepted if the idea of law is to be accepted, certainly if there is to be a practical meaning to the idea that legal disputes can be resolved by judicial process".[5]

In the legal systems of the common law world, pleas of estoppel by *res judicata*, and sometimes pleas of issue estoppel as well, may be raised not only in respect of decisions of courts and of certain tribunals established under the constitution and laws of the forum but also in respect of decisions of foreign courts and of certain foreign tribunals. The application of the relevant estoppel principles to foreign courts and tribunals has been justified not only for the general reasons advanced in support of those principles as part of a domestic corpus of law, but also for reasons which go to the institutional arrangements which are deemed necessary to promote harmonious relationships between nation states. By extension of those principles to the final judgments of foreign adjudicatory agencies of government, the creators of those principles have sought to discourage relitigation within a domestic forum of causes and issues which have already been adjudicated in a foreign forum, and adjudicated in a way which, prima facie, constitutes a final adjudication which merits respect.

Under English common law, a court or tribunal is generally considered to be foreign if the agency has been established under the constitution or laws of a state other than the forum state, and if it forms part of the official system of courts and tribunals within that foreign state. Within the British Empire the courts of one colony or dependency were considered to be foreign vis-a-vis the courts of other colonies and the courts of the realm.[6] Similarly in federal systems courts of the states constituting the federation have generally been considered to be foreign vis-a-vis the courts of sister states, courts of the territories and possessions of the national government, and courts established under federal law,[7] subject, however, to Full Faith and Credit obligations which may arise under the federal constitution. Courts and tribunals established by international agreement are also deemed to be foreign even if they exercise their jurisdiction within the forum.[8]

The principles of estoppel governing decisions of foreign courts and tribunals differ in some respects from the principles of estoppel governing decisions of courts and tribunals of the forum. These special principles are linked to — and some might say are part of — general principles of private international law concerning the recognition and enforcement of foreign judgments. In England, and in other legal systems founded on the common law, the recognition and enforcement of foreign judgments is governed primarily by common law, though in many of the jurisdictions the common law has been affected by local legislation, including by legislation to give effect to international obligations.

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5 Volume 1 at 11.

6 *Henderson v Henderson* (1844) 6 QB 288; 115 ER 111; *Bank of Australasia v Nias* (1851) 16 QB 717; 117 ER 1055. For other cases see Bower and Turner, above n1 at par 69. The courts of Scotland and of the Isle of Man are also foreign vis-a-vis English courts: Ibid.

7 *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 396; *Pedersen v Young* (1964) 110 CLR 162 at 170.

8 See *Dallal v Bank Mellat* [1986] QB 441 and cases cited therein.

In Australia and the United States the common law is also affected by the federal constitutional and legislative provisions on Full Faith and Credit.

This article is mainly to do with the *res judicata* effects of foreign judgments under Australian law: its common law, statutory laws and the Full Faith and Credit clause in the Australian federal Constitution. Reference is made to comparable laws of other nations whose legal systems stem from the English system. And particular attention is given to questions about the *res judicata* effects of decisions of foreign tribunals on matters involving the application of public law.

2. *Common Law*[9]

Subject to a number of exceptions, estoppel by *res judicata* and issue estoppel can be created by the judgment of a foreign court if that court is recognised under the common law (or statute law) of the forum as being a court of competent jurisdiction and the judgment is, under the law of the rendering state, a final and conclusive judgment — final and conclusive in the sense that it cannot be recalled or varied by the court which pronounced it[10] — on the merits.[11] Estoppel by *res judicata* is created only if the cause of action in the foreign proceedings is the same as that presented in the domestic proceedings. For issue estoppel there must be a relevant identity of issues.[12] A plea of issue estoppel may also be raised in the circumstances indicated by the *Henderson v Henderson* principle. The principle was explained in Chancery by Sir James Wigram VC, as follows:

> where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which

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9 For full accounts see Dicey, A V and Morris, J H C, *Conflict of Laws* (11th edn, 1987) at 427–77; Sykes, E I and Pryles, M C, *Australian Private International Law* (3rd edn, 1991) ch3; Bower and Turner, above n1 at pars 66–76, 137–62.

10 *Nouvion v Freeman* (1889) 15 App Cas 1; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 918–9, 927, 936, 969–70 (hereinafter *Carl Zeiss*); Dicey and Morris, id at 426, n53 and 428, n75; Sykes and Pryles, id at 117–8.

11 In *The Sennar (No 2)* [1985] 1 WLR 490 at 494, Lord Diplock suggested that the requirement that the judgment by on the merits added nothing to the requirement that the judgment be final and conclusive.

12 *Carl Zeiss* above n10; *The Sennar*, ibid. It is not clear whether, under Australian law, pleas of issue estoppel can be raised in relation to judgments of foreign tribunals. See *Tanning Research Laboratories Inc v O'Brien* (1990) 64 ALJR 211 at 217 per Brennan and Dawson JJ.

properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[13]

With respect to issue estoppel, the ordinary requirements as to privity of parties must also be satisfied.[14]

A. *What is a Court?*

Surprisingly little attention has been given in judicial opinions and in the academic literature to the question of what characteristics a foreign institution must exhibit to be recognised as a court. Presumably the institution must at least have authority to adjudicate derived from a public instrument. What, however, is not entirely clear is whether the status of the institution under foreign law is conclusive. The most the decided cases suggest is that the institution must be a court proper. In *Gage v Bulkeley*[15] in 1744 an English court declined to recognise a French Commissary Court as a court proper on the ground that it was political in character. In *Robinson v Bland*[16] in 1760 it was held that a French Court of Honour was not a court proper. It had been established for the enforcement of gambling debts, which were not enforceable in the ordinary courts of France, and it formed no part of the state system of courts.[17]

While the law of the foreign state in which a decision was rendered is clearly relevant in determining whether the maker of the decision was a court proper, the fact that the decision-maker had no authority at all under the municipal law of that state is not conclusive. English courts have accorded *res judicata* effects to the decisions of tribunals whose jurisdiction depends on international agreement or practice.[18] Such decisions are recognised if the tribunal is competent under the municipal law of the contracting states and, if the tribunal has sat in a state which is not a contracting party, that non-contracting state has acquiesced in the exercise of jurisdiction. There seems to be a further requirement that the cause of action has some connection with one of the contracting states.

There is no good reason why courts applying the common law in relation to recognition of foreign judgments — and in particular, the common law re-

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13 See also *Henderson v Henderson*, above n6. ((1843) 3 Hare 100 at 115; 67 ER 313 at 319.) The principle has been endorsed by the High Court of Australia (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589), the Judicial Committee of the Privy Council (*Hoystead v Commissioner of Taxation* [1926] AC 155 at 170; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1010–11; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Brisbane City Council v Attorney General for Queensland* [1979] AC 411 at 425), and the House of Lords (*Carl Zeiss* above n10 at 915–6, 966; *Arnold v National Westminster Bank Plc* [1991] 2 AC 93).

14 Even if there is not the requisite identity of parties to create an estoppel in respect of a judgment in personam, it may be an abuse of process on the part of the party seeking to relitigate an issue decided against that party in the foreign proceedings: *J H Rayner (Mincing Lane) Ltd v Bank für Gemeinwirtschaft AG* [1983] 1 Lloyd's R 462.

15 3 Atk 215; 26 ER 925.

16 2 Burr 1077; 97 ER 717.

17 See also *R v Beech, Pollitt and Strudwick* (1928) 20 Cr App R 175; *Francis, Times, & Co v Carr* (1900) 82 LT 698; *Merrifield, Ziegler, & Co v Liverpool Cotton Association* (1911) 105 LT 97.

18 .Above n8.

lating to the estoppel effects of such judgments — should adopt a narrow view of what is to be recognised as a judgment of a court. Domestic rules governing recognition of foreign judgments have, after all, been shaped to accommodate decisions of adjudicatory bodies in a wide variety of legal systems, many of which differ markedly from English-style systems, and some of which may commit adjudicatory functions to bodies outside the regular court system to a greater extent than is done under the law of the forum. What decisions of foreign agencies are to be recognised as judgments of courts proper is, of course, a matter to be determined by the law of the forum. But if the law of the forum adopts a generous view of what domestic agencies can be counted as judicial tribunals for the purposes of estoppel principles, is there any rational basis for adopting a more stringent view in relation to foreign agencies? It seems to me that, prima facie, the tests of what is to be regarded as a judicial tribunal for estoppel purposes should be the same, regardless of the source of an agency's jurisdiction. When regard is had to the purposes of the estoppel principles, there can be no basis for discriminating between decisions of domestic and foreign agencies. Indeed one of the justifications given for the common law which allows for recognition of foreign judgments is precisely the same as that for the doctrine of estoppel *per res judicata*.[19] It is the public interest in promoting finality in litigation.

This is not to say that domestic law regarding the estoppel effects of decisions of foreign agencies should be the same in all respects as that regarding the estoppel effects of decisions of agencies deriving their authority under the laws of the forum. English common law discriminates between domestic and foreign judgments, both as regards recognition generally and as regards estoppel effects in particular. It does so principally by rules which are peculiar to foreign judgments. These special rules, which are dealt with below, relate primarily to:

(i) the tests to be applied when a plea of estoppel is countered by an objection by a party opposing the plea on the ground that the decision presented as qualifying for recognition was not in a matter within the jurisdiction of the body which rendered it;

(ii) the procedural standards with which the foreign agency must have complied before its decision qualifies for recognition under domestic law;

(iii) recognition of the foreign decision would entail enforcement of foreign laws which are penal, which pertain to the revenues of a foreign state or the public laws of a foreign state; and

(iv) considerations of public policy which justify non-recognition.

B. Jurisdiction

A plea of estoppel by *res judicata* cannot be sustained if the court or other body in respect of whose judgment the plea was raised lacked jurisdiction in the matter. This general principle applies irrespective of whether the rendering court is a domestic or a foreign court. But in the case of foreign judgments,

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19 *Carl Zeiss* above n10 at 967.

the question of jurisdiction has to be determined primarily with reference to the principles of private international law of the forum.

Under the common law, the jurisdictional requirements differ according to whether the judgment is in personam or in rem. In the case of a judgment in personam, the judgment debtor, if the defendant in the cause, must have been resident in the foreign country at the time the proceedings were instituted,[20] or have voluntarily submitted to the jurisdiction of the foreign tribunal by voluntarily appearing in the proceedings, or, prior to the commencement of the proceedings, have agreed to submit to the jurisdiction of the foreign court in the particular matter. A foreign court is also regarded as having jurisdiction if the judgment debtor was the plaintiff, or counter claimed in the foreign proceedings. In the case of a judgment in rem in respect of the status of a thing (tangible or intangible), the essential jurisdictional requirement is that the thing should have been situated in the rendering state at the time the proceedings were instituted. Connections with the rendering state are required also when the judgment determines the status of persons.[21]

There are several cases in which it has been held that if, under the private international law of the forum, the tribunal had jurisdiction, it is immaterial that the tribunal lacked jurisdiction under the law of the foreign state.[22] There are however, decisions to the contrary, most of them involving judgments in rem.[23] Dicey and Morris have suggested that a distinction should be drawn between foreign judgments which are liable, under the foreign law, to be set aside for irregularity and those which, under the foreign law, are complete nullities. They maintain that only the latter should be impeachable in domestic proceedings.[24] They suggest, however, that "[a] judgment pronounced by a foreign court is far more likely to be irregular than void".[25]

This statement may be true of superior courts but it overlooks the fact that, in the common law world at least, the doctrine of jurisdiction applied to inferior courts and other bodies subject to supervisory judicial control often requires the decisions of such bodies to be pronounced *void ab initio* and for reasons that often do not appear on the face of the record. On the other hand, voidness is, under the common law, a relative concept, and a decision may be valid and binding until it is pronounced *void ab initio* by a reviewing court.[26] If the jurisdiction of a foreign tribunal under foreign law is to be regarded as material in determining whether it is creative of an estoppel under common law, it may be thought desirable to limit inquiry to the question of whether, under the foreign law, the tribunal had jurisdiction over the cause and the parties.

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20 The requirement of residence may be satisfied if the defendant "was served with process while present in the foreign jurisdiction", Sykes and Pryles, above n9 at 113–4.

21 See Sykes and Pryles, above n9 at 117 and ch13.

22 *Vanquelin v Bouard* (1863) 15 CB (ns) 341; 143 ER 817; *Pemberton v Hughes* [1899] 1 Ch 781 at 791; see also *S A Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] 1 QB 279.

23 *Price v Dewhurst* (1838) 4 My & Cr 76 at 85; 41 ER 30 at 33; *Castrique v Imrie* (1870) LR 4 HL 414 at 429, 448; *R v Aughet* (1918) Crim App R 101 at 107; *Papadopoulos v Papadopoulos* [1930] P 55; *Adams v Adams* [1971] P 188.

24 Above n9 at 466–7.

25 Id at 466.

26 See *Martin v Ryan* [1990] 2 NZLR 209.

To do so would be to apply the same test as is applied in determining whether, for estoppel purposes, a court of the forum state had jurisdiction.[27]

One situation in which a court of the forum clearly must have regard to the existence of jurisdiction in a foreign court under the law of the rendering state is exemplified by *Adams v Adams*.[28] The judgment presented for recognition in that case was a divorce decree pronounced by a judge of a Rhodesian court. The judge who pronounced the decree had been appointed, following Rhodesia's Unilateral Declaration of Independence from Great Britain, under a revolutionary constitution which, under British law, had no force. Under British law, Rhodesia's constitution was still that provided for by the supreme legislature, the Queen in Parliament. Under that constitution the judge who pronounced the divorce decree had been invalidly appointed. According to Simon P, the decree could not be recognised in England unless the Rhodesian court which rendered it had jurisdiction under Rhodesian law, but Rhodesian law was that laid down by the Queen in Parliament.[29]

C. Exceptions

There are several well recognised exceptions to the general common law rules governing recognition of foreign judgments. Foreign judgments are not recognised if they have been procured by fraud, whether on the part of the tribunal or the party in whose favour judgment was given, or by duress; if recognition would be contrary to public policy; or if the proceedings before the tribunal were contrary to natural justice.[30]

The standards of natural justice which must be met are the standards imposed by the common law of the forum rather than those which may be imposed by the foreign law. They are limited to standards of procedural fairness and the principle *nemo judex in causa sua*.[31] The substantive fairness of the outcome is irrelevant except insofar as it may bear on the question of whether it would be contrary to public policy to recognise the judgment. Cases in which foreign judgments have been successfully impeached for failure to accord natural justice have been few and have, in the main, involved matrimonial causes. Usually the alleged denial of natural justice has been a failure to give the defendant sufficient notice of the foreign proceedings or a fair opportunity to present his case. Whether the standards of natural justice to be fulfilled are as exacting as those which would be required of a domestic tribunal in a similar case is unclear.

D. Recognition Contrasted with Enforcement of Foreign Judgments

While the enforcement of a foreign judgment rendered under the law of a state other than that of the rendering state necessarily involves the recognition of the foreign judgment, a foreign judgment may be recognised notwithstanding

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27 See Bower and Turner, above n1 at pars140–141.
28 Above n23.
29 Id at 215.
30 See Dicey and Morris, above n9 at 467–77; Sykes and Pryles, above n9 at 119–23.
31 *Price v Dewhurst* (1837) 8 Sim 279; 59 ER 111; affirmed on other grounds (1839) 4 My & C 76; 41 ER 30. See Sykes and Pryles, above n9 at 121.

that, under the law of the forum state, the judgment cannot be enforced in that forum.[32]

At common law the penal, revenue and some other public laws of foreign countries are not enforceable.[33] Equally foreign judgments which themselves enforce such laws are not enforceable outside the territory of the rendering state, directly or indirectly.[34] Such judgments may nonetheless be capable of being recognised and thus capable of creating estoppels under *res judicata* principles.

Whether a foreign law or judgment is penal, of the revenue or relevantly public is to be ascertained by reference to the law of the forum.[35] The question of what foreign laws are of a public character is not free from difficulty. In *Attorney General (New Zealand) v Ortiz* Lord Denning MR suggested that they were "laws which are eiusdem generis with 'penal' and 'revenue' laws".[36] In *Attorney General (United Kingdom) v Heinemann Publishers Pty Ltd*,[37] a majority of the High Court of Australia held that whether a claim before a court of the forum is essentially one for enforcement of the public laws of another country depends on whether the claim is "based on or related to the exercise of foreign governmental power ..."[38] — that is, power "peculiar to government ..."[39] — or is "a claim to enforce governmental interests".[40] The character of the claim, the Court said, "is to be characterised, by reference to the substance of the interest sought to be enforced, rather than the form of the action ...".[41] The test of whether a foreign judgment concerns the enforcement of foreign public laws is presumably the same.

Cases in which unenforceable foreign judgments are nevertheless capable of being recognised without infringement of the non-enforceability rules are likely to be rare.

E. *Judgments on the Validity of Governmental Acts*

The judgments of foreign courts may, on occasions, have involved determination of the constitutionality or validity of some governmental act, whether it be an act in purported exercise of legislative power, or an executive or judicial act. The question of constitutionality or validity may have been the central question for determination by the foreign court and may have been raised by way of a direct challenge of the particular governmental act. Even though that question arose incidentally for decision by the foreign court, the determination

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32 Dicey and Morris, above n9 at 102, 104, 106, 418–20. It should be noted also that, at common law, the only foreign judgments in personam which may be enforced, as distinct from being recognised, are those for a debt or a definite sum of money, id at 426. In general, foreign judgments in rem can be recognised, but not enforced: id at 1067–8.

33 Id at 100–15, 428. See also Sykes and Pryles, above n9 at 281–301.

34 *Huntington v Attrill* [1893] AC 150 at 156–7; *Government of India v Taylor* [1955] AC 491 at 505–7; *United States of America v Harden* [1963] SCR 366.

35 *Vervaeke v Smith* [1983] 1 AC 145 at 162; Dicey and Morris, above n9 at 101.

36 [1984] AC 1 at 20–1.

37 (1988) 165 CLR 30.

38 Id at 43.

39 Id at 44.

40 Id at 46.

41 Ibid. Cf *Attorney General (UK) v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180.

of it may have been critical to the outcome of the cause. If a question concerning the constitutionality or validity of a governmental act has been decided, the act in issue will normally have been one in purported exercise of powers of the state whose court has pronounced on the question. If, however, the court has, under the governing rules of private international law, applied the law of another state, the issue of constitutionality or validity will have been determined according to the constitution and laws of that other state.

General principles regarding recognition of foreign judgments suggest that if a foreign judgment qualifies for recognition, the estoppel effects of the judgment extend to any determinations of validity issues which the judgment entails and that the correctness of those determinations cannot be impugned.[42] In an extreme case, a foreign judgment upholding the validity of a governmental act could perhaps be denied recognition, and therefore any estoppel effects, on the ground that the foreign court's ruling on the validity issue was patently wrong — say, because it ignored a constitutional guarantee of a basic human right — and that to recognise the judgment would be contrary to the public policy of the forum.[43]

Special problems may arise where the foreign judgment merely assumes the validity of some governmental act. If the issue of validity could have been raised in the foreign proceedings but was not, the principle laid down in *Henderson v Henderson*[44] may preclude the issue being raised in a court of the forum. But what if the foreign court had no jurisdiction to rule on the validity or constitutionality of the governmental act in question? Suppose the case is one in which the foreign court merely assumed the constitutionality of the legislation applied in determining the case before it, and that it was required to assume constitutionality because jurisdiction to adjudicate constitutional questions was reserved to a special constitutional court.[45] Is the foreign judgment in that case preclusive of the constitutional issue? This question raises the more fundamental question whether a court of the forum can pronounce on the validity or constitutionality of foreign governmental acts.

There is a general principle, described by the High Court of Australia as a "principle of international law, which has long been recognised, namely, that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory".[46] This general principle, which is also accepted as a principle of English,[47] United States[48] and Australian municipal law, is said to rest "partly on international comity and expediency".[49] In the words of the United States Supreme Court:

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42 *Godard v Gray* (1870) LR 6 QB 139. See also Dicey and Morris, above n9 at 460–1.

43 See text accompanying nn 62 and 63 below.

44 See nn 6 and 13 above.

45 As in Germany.

46 *Attorney General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* above n37 at 40.

47 *Buttes Gas Co and Oil v Hammer* [1982] AC 888 at 933.

48 *Underhill v Hernandez*, 168 US 250 (1897); *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

49 *Attorney General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* above n37 at 41.

> To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations".[50]

For the purposes of this general principle, governmental acts include all acts involving the exercise of governmental authority by the organs and agents of a foreign state.[51] It is a principle which has particular relevance in cases in which, under the rules of private international law of the forum, the *lex causae* is the law of a foreign state.

Rigorously applied, the principle precludes inquiry by a domestic court into the validity or constitutionality of foreign governmental acts under the law of the foreign state and also into whether those acts contravene public international law.[52] There have, however, been English cases in which courts have examined the validity of foreign governmental acts under the constitution and laws of the foreign state in the context of determining what the prescriptions of the governing foreign law were, and the effect of that law.[53] In none of these cases did the court consider whether examination of the validity of the foreign law in question was compatible with the general principle regarding the acts of foreign states. Indeed, Dicey and Morris consider these cases principally in the context of proof of foreign law. Under the common law, foreign law, including the effect of a foreign judgment under the law of the rendering state, is required to be proved by evidence of expert witnesses.[54] (If there is no such proof, the foreign law is presumed to be the same as the law of the forum.) According to Dicey and Morris,

> where the evidence of expert witnesses as to the constitutionality or *vires* of foreign legislation conflicts, it seems that the court can determine the question, provided at any rate that it is one which, according to the foreign law, is determinable by ordinary judicial proceedings.[55]

In ascertaining what applicable foreign law requires, a court must have regard to evidence as to what, if any, authoritative pronouncements have been made on the validity or constitutionality of foreign legislation in the relevant foreign state and the consequences which flow from such pronouncements under the

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50 *Oetjen v Central Leather Co* 246 US 297 at 304 (1918). Cited with approval in *Attorney General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* ibid.

51 In principle, judgments of foreign courts should be included. If they are, their validity cannot be impugned; cf p316 above.

52 It is not yet settled whether the principle extends to cases in which the act of the foreign state is alleged to violate customary international law. See Dicey and Morris, above n9 at 975–77; cf *Anglo Iranian Oil Co Ltd v Jaffrate* [1953] 1 WLR 246.

53 *King of the Hellenes v Brostrom* (1923) 16 Lloyd's LR 167 at 190, 192; *Re Amand* [1941] 2 KB 239; *Re Amand (No 2)* [1942] 1 KB 445; *A/S Tallina Laevauhisis v Estonian State Steamship Line* (1947) 80 Lloyd's LR 99 at 114. See also *Ginsberg v Canadian Pacific Steamships Co Ltd* [1940] 66 Lloyd's LR 206 at 223; *The Kabalo* [1940] 67 Lloyd's LR 572 at 573–4.

54 See Bower and Turner, above n9 at par 75.

55 Above n9 at 223. The proviso refers to cases where the act is non-justiciable or justiciable only in a special court. The authors refer to Lipstein, K, "Proof of Foreign Law: Scrutiny of its Constitutionality and Validity" (1967) 42 *BYBIL* 265 and Mann, F A, *Studies in International Law* (1973) at 444–9. See also Kahn-Freund, O, *General Principles of Private International Law* (1976) at 305; Staker, C, "Public International Law and the Lex Situs in Property Conflicts and Foreign Expropriations" (1987) 58 *BYBIL* 151 at 178–82.

internal law of that state.[56] But it is another thing for the court to decide questions of the validity or constitutionality of foreign laws in the absence of such pronouncements. For it to do so in those circumstances would be to fly in the face of the general principle referred to above. It could also involve the court in determination of questions which it will often be ill fitted to decide and the decision of which would often entail nothing short of a trial within a trial.

The constitutional jurisprudence of foreign states, it needs to be borne in mind, can be very different from that of the forum state. English courts, to take but one example, are not accustomed to handling constitutional issues of the kind arising under federal constitutions or constitutions entrenching individual rights in terms which allow scope for varying judicial interpretations. The legal consequences of an authoritative pronouncement on a question of constitutionality can also be different. A pronouncement that legislation is unconstitutional does not always mean that the legislation is to be counted as void *ab initio*. Sometimes it means rather that the legislation is avoided as from the date of the pronouncement but erga omnes.[57] Even within a legal system in which an authoritative pronouncement that a governmental act is unconstitutional normally spells voidness *ab initio*, the retroactive effect of the pronouncement may be limited, though not necessarily in pre-ordained or predictable ways.[58] The techniques adopted by the United States Supreme Court to limit the normal retroactive effect of its rulings on Bill of Rights issues are a case in point.[59]

Even though a court of the forum is precluded from examination of the validity or constitutionality of an act of government of a sovereign foreign state within its own territory, it may still decline to recognise the act as having any effect in litigation before it. As has already been mentioned[60] the penal, revenue and some other public laws of foreign states are not enforceable, directly or indirectly. Foreign laws otherwise applicable under the forum's choice of law rules will not be applied if application of them is considered to be contrary to the public policy of the forum.[61] English courts have taken the view that it would be contrary to the public policy of the forum to recognise foreign laws which involve a gross violation of human rights.[62] Laws or decrees expropriating

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56 The best evidence of foreign law, it has been said, is that stated by the court of last resort in the relevant foreign country: *Carl Zeiss* above n10 at 924, 939, 973.

57 See Cappelletti, M, *Judicial Review in the Contemporary World* (1971) chV; Cappelletti, M and Cohen, W, *Comparative Constitutional Law: Cases and Materials* (1979) at 96–102; Grant, J A C, "The Legal Effect of a Ruling that a Statute is Unconstitutional" [1978] *Detroit College of Law R* 201.

58 See eg *Reference Re Language Rights under Manitoba Act, 1870* (1985) 19 DLR (4th) 1 (SCC) and Gibson, D and Lercher, K, "Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections" (1986) 15 *Manitoba LJ* 305. See also *Peters v Attorney General (NSW)* (1988) 84 ALR 319 at 331–3.

59 But in recent years the Court has been disinclined to limit the retroactive effect of its rulings on constitutional questions — see Fallon, R H and Meltzer, D J, "New Law, Non-Retroactivity and Constitutional Remedies" (1991) 104 *Harv LR* 1733.

60 See Part 2 D above.

61 See Carter, P B, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 *BYBIL* 111.

62 *Oppenheimer v Cattermole* [1976] AC 249 at 265, 276–8, 282–3; *Settebello Ltd v Banco Totta and Acores* [1985] 1 WLR 1050 at 1056; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at 428.

property situated within the territory of a foreign state have, however, been recognised notwithstanding that no provision has been made for compensation.[63] On the other hand, some such laws may be characterised as penal in character and denied recognition for that reason.[64]

Foreign laws which are denied recognition on public policy grounds may, conceivably, be laws which are invalid or unconstitutional under the constitution and laws of the foreign state, or else laws which are contrary to international law or the recognition of which by a court of the forum could involve a breach of the forum state's obligations under international agreement.[65] The same public policy considerations may arise when a foreign judgment, presented for recognition, is based on an invalid or unconstitutional law.

3. *Full Faith and Credit*[66]

The phrase Full Faith and Credit derives from clauses in the constitutions of the United States of America and the Commonwealth of Australia and legislation enacted by the national legislatures of those federations.[67] As judicially interpreted, these clauses have modified the common law relating to the recognition and enforcement of certain foreign laws and judgments, namely those of the States forming the federation. The extent to which the common law has been modified by the federal clauses has not, however, been fully resolved.

Australia's Full Faith and Credit provisions were patterned after the American clauses, but there are some significant differences in the wording of the two. The Australian constitutional provisions were modelled on Article IV, section 1 of the United States Constitution which provides that:

> 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.

The Australian counterparts of this provision are section 118 and section 51(xxv) of the federal Constitution. Section 118 provides that: "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".

Section 51(xxv) authorises the federal Parliament to make laws with respect to: "The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States".

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63 For example, *Luther v Sagor* [1921] 3 KB 532. See further Dicey and Morris, above n9 at 975–7.

64 See *Re Helbert Wagg & Co Ltd* [1956] Ch 323 at 345–52.

65 For example, the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

66 On Full Faith and Credit see Pryles, M and Hanks, P, *Federal Conflict of Laws* (1974) ch3; Sykes and Pryles, above n9 at ch7; Nygh, P E, "Full Faith and Credit: A Constitutional Rule for Conflict Resolution" (1991) 13 *Syd LR* 415.

67 The expression "faith and credit" does, however, appear in a few English decisions dating from the late 17th century: see Ross, G W C, "'Full Faith and Credit' in a Federal System" (1936) 20 *Minnesota LR* 140 at 141; Degnan, R E, "Federalized Res Judicata" (1976) 85 *Yale LJ* 741 at 743.

A United States Congressional statute, enacted in 1790, pursuant to Article IV section 1 of the Constitution — now (as amended) 28 USC section 1738 (1982) — provided for the mode of authentication of the records and judicial proceedings of courts of the States, United States Territories and Possessions. It obliges the courts of the United States and Territories to accord to the authenticated records and judicial proceedings of the States, United States Territories and Possessions such full faith and credit "as they have by law or usage in courts of such State, Territory or Possession from which they are taken".

The Australian federal legislative counterpart is section 18 of the *State and Territorial Laws and Records Recognition Act* 1901 (hereinafter referred to as the *Recognition Act*)[68] which provides that:

> All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

The definition section in this Act, section 2, provides that:

> In this Act, unless the contrary intention appears:
>
> > "Court" includes the High Court and all Federal Courts and Courts exercising federal jurisdiction, all Courts of the several States and Territories of the Commonwealth, all Judges and Justices and all Arbitrators under any Act, State Act or Ordinance of a Territory, and all persons authorized by law or by consent of parties to hear, receive and examine evidence.

There are some significant differences between the United States and Australian Full Faith and Credit clauses which need to be noticed. They are as follows:

(i) The command of Full Faith and Credit contained in the first sentence of Article IV, section 1 of the United States Constitution applies only to the "public Acts, Records, and Judicial Proceedings" of States and is directed only to States, whereas section 118 of the Australian Constitution adopts as its subject "the laws, the public Acts and records, and the judicial proceedings of every State" and expresses the obligation to give Full Faith and Credit as one applying "throughout the Commonwealth".[69] Whatever the obligations imposed by the two constitutional provisions may be, it is clear that in the United States, they are not, under the Constitution, incumbent on federal institutions, whereas in Australia they are.

(ii) The second sentence in Article IV, section 1 of the United States Constitution and section 51(xxv) of the Australian Constitution confer a power on the federal legislature to enact legislation: in the case of the United States Constitution, a power to prescribe by "general Laws ... the

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68 Enforcement of civil judgments of States and Territories is dealt with in Part 6 of the *Service and Execution of Process Act* 1992 (Cth) enacted pursuant to s51(xxiv) of the Constitution. This Act replaces the Act of the same name enacted in 1901.

69 The phrase includes at least some of the Territories of the Commonwealth (*Lamshed v Lake* (1958) 99 CLR 132 at 142 per Dixon CJ (Webb and Taylor JJ concurring); cf *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 31 per Kitto J.

Manner in which" the public Acts etc. of States "shall be proved, and the Effect thereof"; in the case of section 51(xxv) of the Australian Constitution, a power to legislate with respect to "recognition throughout the Commonwealth" of the specified acts of States. The second sentence of Article IV, section 1 of the United States Constitution has been regarded as authority for enactment of Congressional legislation to subject federal and Territory courts to obligations to afford Full Faith and Credit to the public Acts etc of States.[70] But, unlike section 118 of the Australian Constitution, Article IV, section 1 does not impose any direct obligations on federal institutions.

(iii) The Full Faith and Credit obligations imposed by section 1738 of title 28 of the United States Code are incumbent only on the federal courts and the courts of United States Territories and Possessions, and only in relation to the "records and judicial proceedings of courts" of States and of Territories and Possessions of the United States. In contrast, section 18 of the Australian *Recognition Act* does not confine the subjects of the direction to give Faith and Credit to the acts of courts, for the Act defines the bodies subject to the direction more broadly. Those bodies are all bodies defined by section 2 as courts and every "public office", a term which is not defined.[71]

There have been relatively few judicial decisions concerning the effect of section 118 of the Australian Constitution and its relationship with section 51(xxv). Indeed it has recently been remarked by one Justice of the High Court "that section 118 still awaits authoritative exposition in this Court".[72] While the preponderance of judicial opinion favours the view that section 118 is self executing in the sense that it operates independently of any federal legislation under section 51(xxv), or under any other head of federal legislative power,[73] it is not entirely clear what its precise effects are.

The general view now is that section 118 is not merely evidentiary in effect, but has some substantive effect. On the other hand section 118 does not on its face command recognition of the matters to which it refers, that is, "the laws, public Acts and records, and the judicial proceedings of every State". In *Breavington v Godleman*[74] Mason CJ stated that: "In view of the presence of section 51(xxv) it is impossible to regard section 118 as a special command that State laws should be recognised. That function is left to Commonwealth legislation pursuant to section 51(xxv)".[75] Wilson and Gaudron JJ expressed much the same view, though as regards choice of law governing legal liability, they accepted that section 118 is not without substantive effects.[76] In the

70 There is some dispute about the ambit of the Congressional power. See Pryles and Hanks, above n66 at 57. Possibly the power rests on the power of Congress under articles III and IV to constitute Federal and Territory courts.

71 Courts are defined so as to include a wide variety of administrative tribunals.

72 *Breavington v Godleman* (1988) 169 CLR 41 at 134 per Deane J. The most recent High Court case on s118 is *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

73 Pryles and Hanks, above n66 at 59.

74 Above n72.

75 Id at 79.

76 Id at 96–8; cf 115 per Brennan J, and 130 per Deane J.

subsequent case of *McKain v R W Miller & Co (SA) Pty Ltd*[77] a majority of the High Court favoured a fairly narrow interpretation of section 118, but again in the context of its effect in relation of choice of law. If, as the majority in this later case have concluded, section 118 does not dictate any particular choice of law, it would seem to follow that the section is not to be construed as a command to recognise the "public ... records, and judicial proceedings of every state". Such recognition is commanded rather by section 18 of the *Recognition Act*.

On the other hand, the High Court has held that section 118 precludes a court from refusing to apply the law of another State, on the ground that the law of the other State is contrary to the public policy of the forum, or is a penal law.[78] This prohibitory effect of section 118 presumably also modifies the common law governing recognition of foreign judgments by removing the public policy disqualification and likewise the disqualifications in respect of enforcement of penal, revenue and certain other public laws.[79] It must also inhibit the concurrent powers of State Parliaments to legislate in respect of the recognition and enforcement of judgments of courts of sister States, and the federal Parliament's powers under section 51(xxiv) and section 51(xxv) of the Constitution.[80]

Even if recognition is not commanded by section 118 of the Constitution, there is little doubt that it is ordained by section 18 of the *Recognition Act*. If proved and authenticated as required by the preceding sections of the Act,

> all public acts records and judicial proceedings of any State or Territory ... shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State of Territory from whence they are taken.

This section, enacted under section 51 (xxv) and section 122 (the Territories power) of the Constitution, has been held to have substantive effect in relation to judgments to the extent of precluding their impeachment on the ground of want of jurisdiction, according to rules of private international law, in the court of the rendering State or Territory.[81] On the other hand, section 18 does not rule out inquiry into whether the court of the rendering State or Territory had jurisdiction under the law of that State or Territory. The "faith and credit" which section 18 requires to be given is that which "public acts records and judicial proceedings ... have by law or usage in the Courts and public offices of the State or territory from whence they are taken". If therefore a plea of *res*

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77 Above n72.

78 *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565; *Miller v Teale* (1954) 92 CLR 406. See also Pryles and Hanks, above n66 at 98–9.

79 *R v White; Ex p TA Field Pty Ltd* (1975) 133 CLR 113 at 117. In this case the Court held that the *Service and Execution of Process Act 1901* (Cth) permitted enforcement of the revenue laws of Territories.

80 In *Thomas v Washington Gas Light Co* 448 US 261 at 272, note 18 (1980) the United States Supreme Court expressed the view that "while Congress clearly has the power to increase the measure of faith and credit that a State court must accord to the laws or judgments of another State, there is at least some question whether Congress can cut back on the measure of faith and credit required by a decision of this Court".

81 *Harris v Harris* [1947] VLR 44. See also *Breavington v Godleman* above n72 at 80 per Mason CJ; *Bond Brewing Holdings Ltd v Crawford* (1989) 92 ALR 154.

judicata is raised in a court of one State in respect of a judgment of a court of another State, the sustainability of the plea must presumably turn, at least in part, on whether, under the law of the rendering State, the judgment gave rise to an estoppel. Resolution of that question may involve inquiry into whether, under the law of the rendering state, the judgment emanated from a court of competent jurisdiction.

Such inquiry was made in *Posner v Collector for Inter-State Destitute Persons (Vic)*[82] in relation to the jurisdiction of a Western Australian inferior court to make a maintenance order sought to be enforced in Victoria. Fullagar J's decision in *Harris v Harris*,[83] however, suggests that, if the judgment presented for recognition is the judgment of a superior court, its jurisdiction cannot be impeached since the judgment itself implies a determination that jurisdiction existed, which determination is to be respected.[84] This view is consistent with the general principle of common law that a superior court may "determine conclusively its own jurisdiction" and that, even if it exceeds its jurisdiction, its decision "is at worst voidable, and is valid unless and until it is set aside".[85]

The ambit of the federal Parliament's legislative power under section 51(xxv) of the Constitution in relation to judicial proceedings of States is not entirely clear. In determining whether a law is one with respect to recognition of such proceedings, the High Court would certainly be entitled to have regard to the common law in relation to recognition of foreign judgments and to what, at common law, is understood to be involved in the recognition of a foreign judgment. To the extent that the common law of recognition entails application of principles of estoppel to foreign judgments, the legislative power conferred by section 51(xxv) may involve a power to affect those principles.

As has already been stated, section 118 of the Constitution must inhibit the federal legislative power conferred by section 51(xxv), so a law with respect to recognition of judicial proceedings of States cannot be valid if it does not accord Full Faith and Credit to those proceedings throughout the Commonwealth. Whether the faith and credit to be accorded to a State judgment must be precisely that accorded to the judgment in the State of rendition, as at present under section 18 of the *Recognition Act*, has not arisen for judicial decision. But there is probably no basis for reading section 51(xxv) of the Constitution in so limited a fashion. So long as the federal law operates uniformly throughout the Commonwealth and does not contravene section 118, there seems no reason in principle why that law should not impose a uniform test of recognition.

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82 (1946) 74 CLR 461 at 479–80.

83 Above n81.

84 Id at 51.

85 *Cameron v Cole* (1944) 68 CLR 517 at 590, 598. See also *Sanders v Sanders* (1967) 111 CLR 366 at 376; *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 34 ALR 148 at 150–1, 156–7.

4. *Full Faith and Credit and Administrative Decisions*

Whether section 118 of the Australian federal Constitution and section 18 of the *Recognition Act* have any bearing on the recognition of administrative decisions and the application of principles of estoppel to those decisions is, as yet, unsettled. These questions ultimately come down to whether any administrative determinations can come within the categories of matters referred to in section 118 of the Constitution and section 18 of the Act, in particular "public records", "judicial proceedings" or "public acts" within the meaning of section 18.

For the purposes of section 118 and section 51(xxv) of the Constitution, "the judicial proceedings of the States" clearly encompass judgments of State courts exercising a State jurisdiction. But given that the power granted to the federal Parliament by section 51(xxiv) is a power to make laws with respect to, inter alia, "The ... execution throughout the Commonwealth of ... the judgments of the courts of the States", it is arguable that, for the purposes of section 51(xxv), the words "judicial proceedings" encompass more than judgments of State courts in the strict sense and include those determinations of State administrative agencies which involve adjudication.[86] The arguments for construing the phrase "judicial proceedings" broadly are certainly strengthened by the High Court's acceptance that, for the purposes of section 51(xxiv), the term "courts" is not confined to bodies exercising judicial power in the strict sense.[87]

Even if an administrative determination is not capable of being characterised as a judicial proceeding, it might still be characterised, for the purposes of section 18 of the *Recognition Act*, as a "public act". The reference to "public acts" in that section, the High Court has held, is not to statutes — that is, the "public Acts" referred to in sections 51(xxv) and 118 of the Constitution.[88] Section 18, the Court has ruled, has no application to statutes or other laws. The expression "public acts" refers rather to non-statutory acts and, in particular, the classes of acts the proof and authentification of which is provided for in the preceding sections of the Act, for example, proclamations, orders, commissions, regulations and by-laws.[89] If the command of section 18 is confined to the "public acts" and other matters for the proof and authentication of which the Act elsewhere makes provision, it follows that the section can have no bearing in a case where an administrative determination presented for determination falls outside the classes of acts covered by the evidentiary provisions. In such a case the "faith and credit" to be given to the administrative determination would depend rather on the effect, if any, of section 118 of the Constitution.

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86 In its report on *Service and Execution of Process* (No 40–1987) the Australian Law Reform Commission argues in favour of a wide interpretation of the power conferred by s51(xxiv) in respect of judgments and one which would encompass the decisions of at least some tribunals (pars 47–60).

87 *Ammann v Wegener* (1972) 129 CLR 415 at 436, 442.

88 *Breavington v Godleman* above n72.

89 Id at 80, 94–5, 115, 148–9.

In passing, it should be noted that the High Court has not questioned the competence of the federal Parliament to provide, as it has in section 18 of the *Recognition Act*, for the "faith and credit" to be accorded to the public acts of the States, as distinct from their statutes. The Court has rather assumed that section 18 is authorised by section 51(xxv) and section 122 of the Constitution. The assumption that the federal statutory provision for recognition of State "public acts" is valid presumably rests on the supposition that the power to legislate for the recognition of the laws of the States includes a power to legislate in respect of recognition of non-legislative acts performed in exercise of authority conferred by those laws.

When the time comes for Australian courts to grapple squarely with the effect of the Australian Full Faith and Credit clauses on administrative determinations, the courts will undoubtedly be invited to have regard to the not inconsiderable case-law on the comparable constitutional and legislative provisions in the United States of America.[90] The American case-law has been taken into consideration by Australian courts in the past, though the judges have frequently cautioned that American precedents have to be read in the light of significant differences in the terms of the Full Faith and Credit clauses operating in the two federations and in their historical settings.[91]

The United States Supreme Court has held that administrative adjudications of a judicial character may create estoppels, at least in relation to fact-findings.[92] It has also held that Article IV, section 1 of the Constitution can operate in relation to the determinations of State administrative agencies. The test applied in *Magnolia Petroleum Co v Hunt*[93] to determine whether the award of a worker's compensation board was entitled to Full Faith and Credit in a sister State, so as to preclude a further claim for compensation in the sister State, was essentially whether, under the law of the rendering State, the award was *res judicata*. In *Industrial Commission of Wisconsin v McCartin*[94] the Court, however, held that a settlement of a worker's compensation claim, administratively approved in one State, did not preclude a claim under the law of a sister State (a) because the law of the rendering State did not make remedy under the State law exclusive, and (b) because the approved terms of the settlement expressly left the employee free to pursue a remedy in the other State. The approach in *McCartin's* case has since been condemned as contrary to the Full Faith and Credit principle. In *Thomas v Washington Gas Light Co*[95] the Supreme Court concluded that although Article IV, section 1 of the Constitution does not preclude an employee from obtaining a supplementary compensation award in a second State after having obtained an award under the law of another State, the Full Faith and Credit principle requires the second State to give preclusive effect to the facts determined on the first award.

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90 See Pryles, M C, "Full Faith and Credit: Administrative Determinations" (1971) 24 *Alabama LR* 87. For a shorter account see Pryles and Hanks, above n66 at 94–5. See also *University of Tennessee v Elliott* 478 US 788 (1986).

91 See eg *Breavington v Godleman* above n72 at 131–2 per Deane J.

92 *United States v Utah Construction and Mining Co* 384 US 394 at 421–2 (1966); *Kremer v Chemical Construction Corporation* 456 US 461 at 484–5 (1982).

93 320 US 430 (1943).

94 330 US 622 (1947).

95 Above n80.

There are differences of opinion in the United States as regards the basis on which State administrative determinations may attract the operation of the Full Faith and Credit principle. In *McCartin's* case the United States Supreme Court suggested that such determinations came into the category of "public Acts", but there have been other cases in which "judicial proceedings" has been regarded as the relevant category.[96] The Supreme Court's more recent decision in *University of Tennessee v Elliott*[97] suggests that the Court now regards "judicial proceedings" as the relevant category and that to qualify for Full Faith and Credit, an administrative determination must proceed from an agency which acts in a judicial capacity and must have the same finality as a judgment of a court proper.[98]

The principal significance of *University of Tennessee v Elliott*, however, resides in the readiness of the Supreme Court to fashion a preclusive principle of federal common law, binding on federal courts, in the light of the policy underlying Article IV, section 1 of the Constitution. The constitutional obligation to give Full Faith and Credit, as already pointed out,[99] applies only to States and the statutory Full Faith and Credit obligation of federal and Territory courts applies only to judgments of State courts. *Elliott's* case was concerned with the effect to be given by a federal court to a determination of a State administrative agency.

The State agency had conducted a hearing, in accordance with Tennessee's *Uniform Administrative Procedures Act*, into a proposal by the University to dismiss one of its employees. The agency decided that, rather than being dismissed, the employee should be re-assigned to another position for one year. In its findings the agency concluded that the University's allegation of poor performance on the part of the employee was not racially motivated. Subsequently the employee brought an action against the University in a federal court under Title VII of the federal *Civil Rights Act* 1964, alleging unlawful discrimination, and under other federal statutes on civil rights, including section 1983 of 42 United States Code. The Supreme Court concluded that although the State determination did not preclude the Title VII action, it did preclude the section 1983 action.

For present purposes it is not necessary to examine in detail the Court's reasons for these particular conclusions. For our purposes, the important aspect of the Court's judgment is its reasoning in support of the general proposition that, as a matter of federal common law, State administrative determinations may have preclusive effects in the federal domain. One initial hurdle the Court had to surmount was the argument that, since the statutory Full Faith and Credit obligation imposed on federal courts was limited to judgments of State courts,[100] Congress must have intended that this obligation

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96 Pryles, above n90 at 90. See in particular *City of New York v Shapiro* 129 F Supp 149 at 154 (1954); cf *Ohio Department of Taxation v Kleitch Bros* 98 NW 2d 636, 643 (1959); *City of Philadelphia v Cohen* 184 NE 2d 167 (1962).

97 For an analysis of the case see Morris, R P, "How Many Bites are Enough? The Supreme Court's Decision in University of Tennessee v Elliott" (1988) 55 *Tennessee LR* 205.

98 Above n90 at 797–8.

99 See Part 3(i) above.

100 28 USC section 1738 (1982). See p323 above.

should not extend to State administrative determinations and that the Court could not therefore adopt a preclusive rule at variance with Congressional intent. The Court rejected this argument on the ground that Congress could have expressed no view on the matter for its statute had been enacted in 1790 when administrative adjudications were virtually unknown.[101]

The Court offered two reasons for adoption of a general federal preclusive rule in respect of the fact findings of State administrative agencies which perform an adjudicatory function. According to the plurality:

> Giving preclusive effect to administrative fact finding serves the value underlying general principles of collateral estoppel [ie issue estoppel]: enforcing repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources ... is equally implicated whether fact finding is done by a federal or state agency.[102]

Secondly: "Having federal courts give preclusive effect to the fact-finding of state administrative tribunals also serves the value of federalism".[103] After referring to opinions in *Thomas v Washington Gas Light Co,*[104] and noting that Article IV, section 1 of the Constitution did not bind federal courts, the plurality went on to assert that "in fashioning federal common law rules of preclusion", the Court "can certainly look to the policies underlying" the Full Faith and Credit clause in the Constitution and its principal purpose in acting "as a nationally unifying force".[105] That principal purpose, it was said, "is served by giving preclusive effect to state administrative fact finding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results".[106] In a footnote, the Court acknowledged the competence of the United States Congress to decide "that other values outweigh the policy of according [under federal law] finality to state administrative fact finding".[107]

In Australia there is little or no room for the adoption, as a matter of federal common law, of a preclusive rule such as that adopted by the United States Supreme Court in *Elliott's* case since Australia's Full Faith and Credit clauses clearly bind federal courts. United States doctrine may nonetheless assist arguments in support of a generous reading of the concept of "judicial proceedings" in the context of Full Faith and Credit and section 18 of the *Recognition Act*. If, under the law of the rendering State, a decision is one which is capable of creating estoppels by *res judicata*, there can be no reason in principle why that decision should not be regarded as a judicial proceeding for the purposes of section 18 of the Act and should not be given the same "faith and credit" in a sister State or in a court or tribunal deriving jurisdiction from a federal source as it has in the State of rendition.

For the institutions of one State to be required to give such "faith and credit" to administrative determinations of agencies of a sister State as those

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101 *University of Tennessee v Elliott*, above n90 at 795.
102 Id at 798.
103 Ibid.
104 Above n80.
105 *University of Tennessee v Elliott*, above n90 at 799.
106 Ibid.
107 Above n7. Title VII of the *Civil Rights Act* 1964 represented such a decision by Congress.

determinations have in the State of rendition would not, of course, be to impose an unqualified obligation to recognise those determinations. There would be no obligations to accord recognition to a determination which the rendering body had no jurisdiction to make under the laws of the State of rendition. Equally the administrative determination could not normally be creative of an estoppel in relation to rulings on purely collateral questions such as the existence of a state of affairs upon which jurisdiction depended. To take another example, if, say a tribunal in State A determined a statutory compensation claim by X against Y, under the laws of State A, the determination could not be preclusive of a further claim for compensation by X against Y, arising out of the same series of events, before a tribunal of State B, under the statutory compensation laws of State B. This would simply be a case in which the tribunal of State A had no jurisdiction to determine claims under the law of State B. The legislature of State A would probably not even be competent to enact legislation which had the effect of debarring claims under the law of State B.

5. Res Judicata *and Federal Jurisdiction*

Federal jurisdiction in Australia refers to jurisdiction in those matters listed in sections 75 and 76 of the Commonwealth of Australia Constitution. Original jurisdiction in the matters listed in section 75 is invested by that section in the High Court of Australia.[108] Further original jurisdiction in the matters listed in section 76 may be given to that Court by Act of the federal Parliament.[109] The Parliament is also authorised to create federal courts and to invest them with federal jurisdiction.[110] Federal jurisdiction may also be invested in State courts.[111]

The first question which arises in relation to the *res judicata* effects of judgments of courts exercising a federal jurisdiction is whether a proceeding before a State court when it is exercising a federal jurisdiction is a judicial proceeding of a State for the purposes of the Full Faith and Credit clauses of the Constitution and the *Recognition Act*. It could be argued that, in this context, judicial proceedings of States refer only to judicial proceedings in the exercise of a purely State jurisdiction so that a judgment of a State court in the exercise of a federal jurisdiction does not attract the Full Faith and Credit obligation. But it could equally well be argued that, for the purposes of the Full Faith and Credit clauses, judicial proceedings are of States whenever they are

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108 Section 75 confers original jurisdiction "In all matters — (i) Arising under any treaty: (ii) Affecting consuls or other representatives of other countries: (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: (iv) Between States, or between residents of different States, or between a State and a resident of another State: (v) In which a Writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

109 The matters referred to in s76 are those: "(i) Arising under this Constitution, or involving its interpretation: (ii) Arising under any laws made by Parliament: (iii) Of Admiralty and maritime jurisdiction: (iv) Relating to the same subject-matter claimed under the laws of different States."

110 Sections 71 and 77.

111 Sections 71 and 77. The principal Acts conferring federal jurisdiction on State courts are the *Judiciary Act* 1903 (Cth) and the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

proceedings before courts constituted under State law, regardless of the source of their jurisdiction in a particular case.

The High Court of Australia has not yet had occasion to rule on which of these possible interpretations is to be preferred. Reference to the history of sections 51(xxv) and 118 is unlikely to assist in resolution of the question for the framers of these provisions apparently did not consider it. It was certainly not a question which had arisen in the United States because the United States Constitution does not allow for investiture of federal jurisdiction in State courts.

The second of the suggested interpretations of the Full Faith and Credit clauses in the Australian federal Constitution might be considered to be preferable on the ground that it conforms with the spirit of those clauses and, to borrow a phrase from the United States Supreme Court, "serves the value of federalism".[112] Judicial proceedings, it may be argued, are relevantly of States if they are judicial proceedings before any institution created under State law, regardless of the source of the jurisdiction exercised in a particular case. (That jurisdiction, it should be noted, might have derived not from an Act of a State parliament but from an Act of the Parliament of the United Kingdom.) The legislative power of the federal Parliament, it may also be argued, must surely extend to legislation regarding the recognition of judicial proceedings, throughout the Commonwealth, of all courts exercising a federal jurisdiction, and that, for that reason, section 51(xxv) ought to be construed as extending to legislation regarding judicial proceedings of State courts when they are exercising a federal jurisdiction. This argument, however, presupposes that section 51(xxv) is the only possible source of federal legislative competence to legislate on the recognition of judicial proceedings in the exercise of a federal jurisdiction. Later on, I argue that there are other possible bases for federal legislation of that kind.

What arguments then can be advanced in support of the view that, for the purposes of sections 51(xxv) and 118 of the Constitution, judicial proceedings of States do not encompass judicial proceedings before State courts exercising a federal jurisdiction? First it may be argued that judicial proceedings of States are, in the context of the relevant constitutional provisions, but a species of a genus which clearly encompasses only acts of institutions created under, and deriving their authority from, State law. Secondly, it may be argued that, in proposing sections 51(xxv) and 118, the framers of the Constitution could only have been concerned with acts in the exercise of public authority conferred under State law — or, more generally, under law other than enactments of the federal Parliament. Thirdly, it can be argued that it is unnecessary to construe either section 51(xxv) or section 118 of the Constitution as encompassing judicial proceedings before State courts when they are exercising a federal jurisdiction because, independently of section 51(xxv), the federal Parliament has power to legislate in respect of recognition of judicial proceedings in a federal jurisdiction, and because the Constitution implies that Full Faith and Credit shall be given throughout the Commonwealth to federal judicial proceedings.

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112 *University of Tennessee v Elliott* above n90 at 798.

Assuming that the Full Faith and Credit clauses have no application to judicial proceedings in the exercise of a federal jurisdiction, the question then arises as to the law by which the estoppel effects of judgments in the exercise of such a jurisdiction are to be determined. For example, what law governs when a plea of estoppel is raised before a court exercising a federal jurisdiction in respect of a judgment of the same court or another court, again in the exercise of a federal jurisdiction? And what law governs when a plea of estoppel is raised before a court exercising a State jurisdiction in respect of a judgment of the same court or another court exercising a federal jurisdiction?

A partial answer to these questions is provided by section 79 of the *Judiciary Act* 1903 (Cth). This provides that:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory, in all cases to which they are applicable.[113]

The effect of this section is, presumably, that when a plea of estoppel is raised before a court of federal jurisdiction in respect of a judgment in a federal cause, the plea is to be determined according to the law of the State or Territory in which that court sits. That law will invariably be the common law which is uniform throughout Australia.

There may be cases in which there is a further question, namely whether the judgment in respect of which the estoppel plea is raised is to be regarded as a foreign judgment and, as such, one the estoppel effects of which are to be adjudged with reference to the special common law rules applying to those judgments.[114] The case could, for example, be one in which the court of rendition was the Federal Court of Australia and the court before which the estoppel plea is raised is a State court exercising a federal jurisdiction. Or the case could be one in which the court of rendition was a State court exercising a federal jurisdiction and the court before which the estoppel plea is raised is a court of another State, again exercising a federal jurisdiction. In cases such as these it would surely be absurd to regard the judgment of the court of rendition as a foreign judgment. Within the Australian federal system, courts exercising federal jurisdiction must rather be regarded as belonging to the same judicial system in that they all derive their jurisdiction from the same governmental source.

But what of the case where the judgment in respect of which the estoppel plea is raised was that of a court exercising a federal jurisdiction and where the court before which the plea is raised is exercising a State jurisdiction? Section 79 of the *Judiciary Act* 1903 (Cth) does not apply in such a case because its directive as to the law to be applied operates only when the court seized of a matter is a court exercising a federal jurisdiction. Clearly the State court must, in this case, adjudge the estoppel plea according to the law of the State. But again there is the question of the status of the judgment. Is it to be re-

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113 See also *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), s11.

114 See Part 2 above.

garded as a foreign judgment merely because the court rendering it derived its jurisdiction from a source different from that of the State court?

Within a federal system like Australia's it would, in my view, be quite wrong to regard courts exercising a federal jurisdiction as foreign courts vis-a-vis courts exercising a State jurisdiction. Under the Australian federal system, federal and State judicial systems are integrated to a much higher degree than they are in the United States.[115] That integration has been facilitated by the constitutional provision for investiture of federal jurisdiction in courts of States. It has been facilitated also by federal-State co-operative arrangements, most recently by complementary federal-State legislation for cross-vesting of federal, State and Territory jurisdictions in the superior courts of the federal, State and Territory levels of government.[116] Under the cross-vesting scheme, federal and State courts will, on many occasions, be exercising in the one cause jurisdiction derived from both federal and State sources.

Arguments in support of the proposition that judgments of all courts of the bodies politic forming the Australian federation should be regarded by those courts as domestic rather than foreign judgments are strengthened by United States judicial precedents. Even before the United States Supreme Court pronounced on the question, courts of the States of that federation had accepted that judgments of the federal courts were not to be regarded as foreign judgments and, for estoppel purposes, were to be treated as judgments of domestic tribunals.[117] In the first case in which the United States Supreme Court had occasion to consider the matter, the Court had no hesitation in declaring that a judgment of a federal court had the same effect, for estoppel purposes, as that of a judgment of a State court rendered under similar circumstances.[118]

For a time, it was accepted that the estoppel effects of judgments of federal courts in relation to proceedings before State courts were to be determined with reference to local State law, on the supposition that the judgment in question had been rendered by a court of the State. But later the United States Supreme Court began to fashion special estoppel principles applying to judgments of federal courts.[119] One commentator has suggested that the United States precedents now point towards a general rule that:

> A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.[120]

It will be noticed that this suggested general rule adopts essentially the same formula for determination of pleas of estoppel by *res judicata* and issue

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115 The United States Constitution does not allow for the investiture of federal jurisdiction in State courts.

116 See *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and State Acts of the same name.

117 Degnan, R E, "Federalized Res Judicata" (1976) 85 *Yale LJ* 741 at 744–5.

118 *Dupasseur v Rochereau* 88 US (21 Wall) 130 (1874). This and later cases are dealt with in Degnan, above n117.

119 See eg *Blonder-Tongue Laboratories Inc v University of Illinois Foundation* 402 US 313 (1971); *Parklane Hosiery Co v Shore* 439 US 322 (1979).

120 Above n117 at 773.

estoppel as is implicit in section 18 of Australia's *Recognition Act*. This formula is that the estoppel effects of the judgment are to be determined, not according to the law of the legal system to which the court receiving the judgment belongs, but rather according to the law of the legal system to which the court of rendition belongs.

In a federal system like Australia's it is clearly desirable that State and Territory courts exercising a non-federal jurisdiction should apply uniform principles in determining the estoppel effects of judgments in the exercise of a federal jurisdiction, and that courts exercising a federal jurisdiction should apply uniform principles in determining the estoppel effects of judgments of all courts of the federation. Section 18 of the *Recognition Act* obliges all courts of the federation to apply the same rule in relation to the judgments of State and Territory courts. Those judgments must be accorded the same estoppel effects as is accorded to them under the law of the State or Territory of rendition. Section 18 may not, however, apply to judgments of State courts rendered in the exercise of a federal jurisdiction.[121] If it does not, the estoppel effects of such judgments, and also judgments of a federal court, will fall to be determined according to the law of the State or Territory in which the court before which the estoppel plea is raised happens to sit. This law may possibly differ from that of the forum in which judgment was rendered. The common law operating in the latter forum may, for example, have been altered by statute.

The federal Parliament probably has the power to enact legislation, binding all courts of the federation, on the estoppel effects of judgments rendered in the exercise of a federal jurisdiction. Its powers to invest federal jurisdiction[122] and its express incidental power[123] are probably sufficient to support legislation of this kind. Arguably the same powers permit enactment of legislation, which binds courts exercising a purely State jurisdiction, as to the estoppel effects of any judgment rendered in the exercise of a federal jurisdiction. There can certainly be no doubt about the competence of the federal Parliament to prescribe the estoppel effects of decisions of federal administrative tribunals created in exercise of the legislative powers conferred by section 51 of the Constitution. Any such legislation would necessarily bind courts of States.

The parliaments of the States plainly lack authority to enact legislation on the estoppel effects of judgments rendered in the exercise of a federal jurisdiction even when the judgment is rendered by a court of the State. When, by reason of section 79 of the *Judiciary Act* 1903, a State court is compelled to apply State law in determining the effects of a judgment rendered in the exercise of a federal jurisdiction, its obligation to do so arises not from State law but from federal law. In cases in which section 79 does not apply, the source of a State court's obligation to adjudge the estoppel effects of a judgment in a federal cause as if it were a judgment of a court of that State is less clear. Arguably it is an implied constitutional obligation or an obligation under federal common law.

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121 See p333 above.
122 Constitution ss71, 76, 77.
123 Constitution s51(xxxix).

6. *Australian Legislation on Foreign Judgments*

In 1991 the Parliament of the Commonwealth of Australia enacted a *Foreign Judgments Act*, presumably in reliance on the external affairs power conferred by section 51(xxix) of the federal Constitution. Subject to transitional provisions, this Act supplants State and Territory legislation on enforcement of foreign judgments.[124] It is modelled on the *Foreign Judgments (Reciprocal Enforcement) Act* 1954 of the Australian Capital Territory, which in turn was modelled on the United Kingdom's *Foreign Judgments (Reciprocal Enforcement Act* 1933.

Although the federal Act is concerned primarily with enforcement of certain foreign judgments by their registration in courts of the States and Territories, like the ACT and United Kingdom Acts, it includes a section on the recognition of those judgments. The section, section 12 provides as follows:

> 12. (1) Subject to this section, a judgment to which Part 2 applies, or would have applied if it were a money judgment, must, whether or not it is, or can be, registered, be recognised in any Australian court as conclusive between the parties to it in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings.
>
> (2) This section does not apply to:
>
> (a) a judgment that has been registered, the registration of which has been set aside under subparagraph 7(2)(a)(iv), (v), (vi), (vii) or (xi); or
>
> (b) a judgment (whether registrable or not) that has not been registered, the registration of which would, if it were registered, have been set aside under one or more of those subparagraphs.
>
> (3) Nothing in this section prevents any Australian court from recognising a judgment as conclusive of any matter of law or fact decided in the judgment if that judgment would be recognised as conclusive under the common law.

The judgments to which Part 2 (Reciprocal Enforcement of Judgements) of the *Foreign Judgments Act* 1991 applies are enforceable money judgments of certain foreign courts, specified by regulation, that are final and conclusive.[125] Enforceable money judgments are defined in section 3(1) of the Act to exclude judgments under which an amount of money is payable, in respect of "taxes or other charges of a similar nature" or "a fine or other penalty". Enforceable money judgments include, however, judgments under which money

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124 *Foreign Judgments (Reciprocal Enforcement) Act* 1973 (NSW); *Reciprocal Enforcement of Judgments Act* 1959 (Qld); *Foreign Judgments Act* 1971 (SA); *Foreign Judgments (Reciprocal Enforcement) Act* 1963 (Tas); *Foreign Judgments Act* 1962 (Vic); *Foreign Judgments (Reciprocal Enforcement) Ordinance* 1965 (WA); *Foreign Judgments (Reciprocal Enforcement) Ordinance* 1954 (ACT); *Foreign Judgments (Reciprocal Enforcement) Ordinance* 1955 (NT); *Foreign Judgments (Reciprocal Enforcement) Ordinance* 1977 (Christmas Island); *Reciprocal Enforcement of Judgments Ordinance* 1921 (S'pore) as amended by *Reciprocal Enforcement of Judgments (Amendment) Ordinance* 1963 (Cocos (Keeling) Islands); *Foreign Judgments (Reciprocal Enforcement) Ordinance* 1978 (Norfolk Island).

125 Section 5(4).

is payable in respect of New Zealand tax and money which is recoverable as Papua New Guinea income tax.

The judgments to which section 12(2)(a) refers are judgments rendered in actions in personam,[126] the registration of which has been set aside for any one of the following reasons:

(i) "the courts of the country of the original court had no jurisdiction in the circumstances of the case";

(ii) "the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process has been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear";

(iii) "the judgment was obtained by fraud";

(iv) "the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court";

(v) "the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy".

Section 12(1) of the *Foreign Judgments Act* 1991 (Cth) is in much the same terms as section 8(1) of the United Kingdom *Foreign Judgments (Reciprocal Enforcement) Act* 1933.

The drafting of section 8(1) in the latter Act has been criticised[127] and there have been some differences of judicial opinion as to its effects. Section 12(1) of the Australian Act clearly operates only in relation to judgments of those foreign courts covered by the Act and regulations thereunder. But it operates in relation to some judgments which do not qualify for registration and enforcement under the Act for the reason that no sum of money is payable thereunder. Under the sub-section a foreign judgment may have estoppel effects if it was one in a cause in which a sum of money might have been adjudged to be payable. In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*,[128] Lord Reid took the view that the sub-section in the United Kingdom Act is not applicable to judgments for defendants, since no money can possibly be payable under such judgments. The majority did not, however, accept that interpretation of the sub-section. In their view the sub-section could apply in cases in which the judgment was for the defendant.

In the same case, Lord Reid also expressed doubts about whether the sub-section applies to "judgments on status and family matters and in rem".[129] He

126 Section 3(1) excludes certain actions from the category of actions in personam, including matrimonial proceedings, proceedings in connection with the administration of estates of deceased persons, bankruptcy or insolvency, winding up of companies, mental health or the guardianship of children.

127 Dicey and Morris describe it as "tortuously drafted": above n9 at 488. See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 617 (hereinafter *Black-Clawson*) per Lord Reid; *Maples v Maples* [1988] Fam 14 at 20–1.

128 Id at 617.

129 Ibid.

entertained these doubts notwithstanding the broad definition of judgments in the definitional section of the Act.[130] His doubts were reiterated by Cumming-Bruce and Eveliegh LJJ in *Vervaeke v Smith*,[131] though the other member of the court, Sir John Arnold P, thought that the sub-section could apply to judgments on status.[132] In a subsequent case, *Maples v Maples*,[133] Latey J preferred the view of Lord Reid and accordingly held that a judgment of a rabbinical court in Israel, confirming a divorce granted by a Jewish religious court in London, was not entitled to recognition under the sub-section. In reaching this conclusion Latey J noted the wording of the sub-section, in particular "a judgment shall be recognised ... as conclusive between the parties thereto in all proceedings founded on the same cause of action ..." He pointed out that:

> A decree or judgment affecting marital status has a wider significance than solely to "the parties thereto". The state has an interest. So may others: children, for example. Nor is "cause of action" apt language for such proceedings.[134]

These comments might, of course, equally be made in relation to any foreign judgment in rem, and any foreign judgment in a cause which directly challenged the validity of some governmental act. The report of the Foreign Judgments (Reciprocal Enforcement) Committee[135] which preceded the United Kingdom Act of 1933, and likewise the international conventions negotiated before the enactment of the Act, do, however indicate that the recognition section was not intended to be limited to judgments in personam.[136]

Whether section 12(1) of the *Foreign Judgments Act* 1991 (Cth) alters in any way the common law relating to recognition of foreign judgments and the estoppel effects of such judgments is questionable. In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*[137] a majority of the House of Lords held that section 8(1) of the United Kingdom Act had not altered the common law rule, as enunciated in *Harris v Quine*,[138] that a judgment dismissing an action on the ground that it was time barred is not conclusive between the parties, since it is not a judgment on the merits.[139] In determining whether a judgment was conclusive for the purposes of the subsection, a court therefore needed to examine the judgment and the grounds for it to see what it decided — what was actually adjudicated.[140]

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130 "Judgment" is there defined (s1(2)) to mean "a judgment or order given or made by a Court in any civil proceedings, or judgment or order given or made by a Court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party ...". A similar definition of "judgment" appears in s3(1) of the Australian Act.

131 [1981] Fam 77 at 126–7.

132 Id at 126. The question was left open in the subsequent appeal to the House of Lords [1983] 1 AC 145.

133 Above n127.

134 Id at 21.

135 Cmd 4213, par 4 (1932).

136 Dicey and Morris, above n9 at 489.

137 Above n127 (Lord Diplock dissenting).

138 (1869) LR 4 QB 653.

139 Under the *Foreign Limitation Periods Act* 1984, s3 (UK) the result would be different: Dicey and Morris, above n9 at 433, 489.

140 *Black-Clawson* above n127 at 633, 650–1.

Section 12(2) of the *Foreign Judgments Act* 1991 (Cth) makes it clear that the obligation of recognition imposed by section 12(1), and all that recognition entails, does not apply in cases where registration of the judgment has been set aside or, had it been registered, could have been set aside, for various reasons. These reasons include lack of jurisdiction in the court rendering the judgment, non-appearance of the judgment debtor for want of sufficient notice of the proceedings, and fraud in obtaining the judgment. A further reason is that enforcement of the judgment would be contrary to public policy in the forum.

Section 8(3) of the United Kingdom Act, which is much the same as section 12(3) of the Australian Act, was inserted in the legislation *ex abundanti cautela*, it has been suggested, to ensure that sub-section (1) did not diminish the operation of the common law concerning recognition of foreign judgments.[141] While sub-section (1) appears to relate to cause of action estoppel, subsection (3) deals with issue estoppel as well as cause of action estoppel.[142]

7. *Merger of Cause of Action with Judgment*

It is a well established rule of common law that when a domestic court of competent jurisdiction has rendered a judgment which is final and conclusive, "the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence".[143] This rule was not, however, applied to foreign judgments.[144] The result was that a party in whose favour a foreign judgment was rendered could, instead of seeking enforcement of the judgment by action on the judgment, sue on the original cause of action, perhaps in the hope of obtaining a more satisfactory result. If, however, the latter course were pursued, the defendant might plead the foreign judgment as a defence and if that judgment qualified for recognition under the common law, the defence of estoppel *per res judicata* could defeat the action.

While there are modern judicial opinions which assume that the rule that a foreign judgment does not operate to merge the original cause of action is still a rule of common law,[145] doubts have been expressed as to whether it survives. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* Lord Wilberforce described it as a rule which maintained "a precarious foothold as a sub-rule in Dicey's Conflict of Laws, 7th edition, p. 996". If the rule survived at all, it was "an illogical survival".[146] The 11th edition of *Dicey and Morris Conflict of Laws* echoes this opinion.[147]

The rule cannot, of course, apply to those judgments of Australian State and Territory courts to which section 18 of the *Recognition Act* applies, for in those cases courts throughout the Commonwealth must accord the judgment the same faith and credit as is accorded to it in the State or Territory in which

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141 Id at 620, 651.
142 Id at 620.
143 *Blair v Curran* (1939) 62 CLR 464 at 532 per Dixon J.
144 Spencer Bower and Turner, above n1 at par 436.
145 For example, *Carl Zeiss* above n10 at 917 per Lord Reid, 938 per Lord Guest.
146 Id at 966.
147 Above n9 at 462. (The authors refer to the rule as "illogical and precarious".)

the judgment was rendered. On the other hand, the rule probably has not been affected by the United Kingdom's *Foreign Judgments (Reciprocal Enforcement) Act* 1933 or the Australian legislation based on that Act.

The legislation, it is true, makes it clear that no proceedings may be brought for recovery of any sum payable under a foreign judgment which is capable of being registered under the legislation, other than proceedings for registration.[148] But it does not expressly prohibit proceedings on the original cause of action.[149] The provision in the legislation on the recognition of foreign judgments[150] was not intended to alter the common law on that subject. It was intended rather to preserve it and it has been so construed by the House of Lords, though not specifically in relation to the non-merger rule.[151] The report of the Foreign Judgments (Reciprocal Enforcement) Committee 1932 which preceded the United Kingdom Act, and on which the Act is based, shows that the Committee considered that the non-merger rule would not be affected by the proposed section on recognition of foreign judgments. In fact sub-section (1) of the recognition section, as enacted (section 8), closely resembles the paragraph in the report in which the Committee described its understanding of the position at common law. The Committee stated that:

> Under English common law a foreign judgment (other than a judgment given in a criminal or fiscal matter), though it does not operate in England to merge the original cause of action, is, provided that certain reasonably well-defined conditions are satisfied, recognised as conclusive between the persons who were parties to the proceedings in the foreign court as regards the question therein adjudicated upon, and can be relied upon by any of the said parties or their privies, if further proceedings are brought in England by any other such party or his privy in respect of the same cause of action.[152]

In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*[153] Lord Reid read section 8(1) virtually in the same terms as this paragraph in the Committee's report.

Although the common law rule that a foreign judgment does not extinguish the original cause of action is "vouched by a number of decided cases",[154] it probably does not rank among those firmly entrenched rules of common law which are incapable of "repeal" save by legislative enactment. Applied to foreign judgments which qualify for recognition under the law of the forum, and which therefore attract the operation of the *res judicata* doctrine, the rule serves no useful purpose and is patently illogical. Applied to foreign judgments which do not qualify for recognition under the law of the forum the rule is unnecessary, for if a foreign judgment does not qualify for recognition,

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148 United Kingdom: s6; Cth: s10.

149 As does s34 of the *Civil Jurisdiction and Judgments Act* 1982 (UK).

150 See p336 above.

151 *Black-Clawson* above n127. See nn137–139 above.

152 Cmd 4213, par 4.

153 Above n127 at 618. Lord Reid declared that the successful plaintiff in the foreign suit could ignore the foreign judgment and sue in the forum (England) on the original right because the right did not merge in the foreign judgment. But he then went on to say that s8 of the United Kingdom Act of 1933 would effectively prevent suit on the original cause. See also at 624 per Viscount Dilhorne.

154 *Carl Zeiss* above n10 at 966 per Lord Wilberforce.

there can be no basis for a plea of estoppel in respect of that judgment. If a non-recognisable foreign judgment is incapable of giving rise to any estoppels under the law of the forum, there is simply no need for a rule which says that a foreign judgment never operates to merge the original cause of action. Merger of the original cause of action with a judgment thereon is surely but a consequence of recognition of the judgment and the attribution of certain legal consequences to the judgment in relation to parties to the cause adjudicated and parties to subsequent proceedings.