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CHARACTERIZATION, RES JUDICATA AND THE LAWYERS' CLAUSE

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In December, 1944, Mr. Justice Jackson, in his Cardozo Lecture to the Association of the Bar of the City of New York,¹ observed that Article IV, Section 1 of the United States Constitution, the so-called "Full Faith and Credit Clause," was peculiarly a lawyers' clause. He found the clause to be more concerned with techniques of the law than with social and political considerations, but noted that the clause is relatively a neglected one, as to which history is obscure, precedents scarce, and, penetrating analysis and criticism lacking.²

The pertinency of these remarks had been pointed up principally by a few rather dramatic cases decided by the Supreme Court between 1935 and the time at which Mr. Justice Jackson spoke.³ Opinions handed down since that time, and most of the subsidiary literature provoked by these decisions, have emphasized the need for thoughtful analysis and judicial clarification of the full faith and credit problem, but have done little in response to Mr. Justice Jackson's conclud-

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1. The full text appears under the title "Full Faith and Credit—The Lawyer's Clause of the Constitution" in (1945) 45 Col. L. Rev. 1.
2. Jackson, *supra* note 1, at 2,3.
3. Particularly, *Yarborough v. Yarborough*, 290 U.S. 202 (1933); *Milwaukee County v. White Co.*, 296 U.S. 268 (1935); *Davis v. Davis*, 305 U.S. 32 (1938); *Pink v. AAA Highway Express, Inc.*, 314 U.S. 201 (1941); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Barber v. Barber*, 323 U.S. 77 (1944).

ing plea that we "not suffer this lawyers' clause to become the orphan clause."

It is apparent that there are wide areas of disagreement between the justices of the Supreme Court as to the meaning and application of the clause.⁴ In addition there is some evidence of vacillation in opinion by individual justices.⁵ The opinions contain vague references to principles of conflict of laws, *res judicata* and merger, which are so phrased as to make exact examination of the bases of decision almost impossible. Contrary to Mr. Justice Jackson's definition, the recent cases seem to show the court more concerned with the social and political implications of the clause than with legal techniques. The clause is not discussed in some cases where it might be applicable, and no explanation of its omission or inapplicability is given.⁶ The result is an impression of confusion and unpredictability that is, if nothing else, discouraging to those working in the field.

Here as for any series of court opinions, explanations

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4. In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), the justices divided 5 to 4, Jackson, J., concurring specially and Douglas and Black, J.J., writing separate dissenting opinions. In *Williams v. North Carolina*, 325 U.S. 226 (1945), the division was 6-3, Murphy, J., joined by Stone, C.J., and Jackson, J., concurring specially, and Rutledge and Black, J.J., writing dissenting opinions. In *Griffin v. Griffin*, 66 S.Ct. 556 (1946), the justices split 6-2-1, Black and Douglas, J.J., dissenting in part, and Frankfurter, J., dissenting entirely. In *Heiser v. Woodruff*, 66 S.Ct. 853 (1946), the court stood 6-2, but Rutledge, J., concurred only in the result. In *Morris v. Jones*, 67 S.Ct. 451 (1947), the division was 6-3.
 5. Length of opinions and difference in nature of the causes makes this difficult to establish. However, compare the late Justice Stone's argument for the superior interests of the second state in *Yarborough v. Yarborough*, 290 U.S. 202 (1933), and denying effect to equally significant interests in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943). Also compare Justice Frankfurter's dissent in *Morris v. Jones*, 67 S.Ct. 451 (1947), with his concurrence with the majority in *Magnolia v. Hunt*, supra; Justice Douglas writing for the court in *Morris v. Jones*, supra, but joining Justice Black's dissent in the *Magnolia* case, supra (Justice Douglas' own dissent in the latter case is not inconsistent with his opinion in *Morris v. Jones*, supra); Justice Rutledge dissenting in *Williams v. North Carolina*, 325 U.S. 226 (1945), and joining the dissent of Justice Frankfurter in *Morris v. Jones*, supra.
 6. This is most apt to happen, of course, in cases not carried to the U.S. Supreme Court. Cf. Jackson, supra note 1, at 3, and cases cited. See *Bretsky v. Lehigh Valley R.R.*, 156 F.(2d) 594 (C.C.A. 2d, 1946).

can be manufactured wholesale.⁷ It is not the purpose of this paper to add one more set of rationalizations for some or all of the recent full faith and credit decisions. Its object, rather, is to inquire into the nature of the legal problems which exist in any case involving Article IV, Section 1, and to mark out such threads of consistency as may be present. Constitution and statute being so unspecific, and constitutional and legislative history having proved so unproductive of meaning,⁸ it is believed it may be helpful, in a case actually or potentially affected by the clause, to direct attention first to the nature of the entire case in terms of conflict of laws. The Constitution and statute then may be examined to determine what changes in conflict of laws have been regarded as necessary or desirable.⁹

Patently, the draftsmen of the Constitution meant *something* when they incorporated Article IV, Section 1 into their document, and the first Congress also meant something when it adopted the full faith and credit statute.¹⁰ The drafts-

7. Most of the cases referred to in the notes immediately preceding have been widely reviewed and commented upon. The divorce cases, as might be expected, have fomented the largest amount of comment. See Lorenzen, "Haddock v. Haddock Overruled" (1943) 52 Yale L.J. 341; Cook, "Is Haddock v. Haddock Overruled?" (1943) 18 Ind. L.J. 165; Powell, "And Repent at Leisure" (1945) 58 Harv. L. Rev. 930; Corwin, "Out-Haddock Haddock" (1945) 93 U. of Pa. L. Rev. 341. See also Wolkin, "Workmen's Compensation Award" (1944) 92 U. of Pa. L. Rev. 401; Cheatham, "Res Judicata and the Full Faith and Credit Clause" (1944) 44 Col. L. Rev. 330.
8. Cf. Justice Jackson's comments on the history of the clause and the full faith and credit statutes in his speech cited *supra* note 1, at 3 ff. See Justice Frankfurter's summary of history in *Williams v. North Carolina*, 325 U.S. 226 (1945); and the remarks of Corwin, *supra* note 7, at 346. In general see Costigan, "The History of the Adoption of §1 of Art. IV, of the U.S. Constitution" (1904) 4 Col. L. Rev. 470; Radin, "The Authenticated Full Faith and Credit Clause, Its History" (1944) 39 Ill. L. Rev. 1.
9. It may well be asked what difference such an approach will make. Are not the results reached likely to be very much the same? The answer is that the search for precedent is made more meaningful and it becomes less necessary to become involved in predicting personal preferences and beliefs of judges. Cf. Jackson, *supra* note 1, at 16: "I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character . . ."; and at 28: "Certainly the personal preferences of the Justices among the conflicting state policies is not a permissible basis of determining which shall prevail in a case."
10. Rev. Stat. §905 (1875), 28 U.S.C. §687 (1940). Cf. Moore & Oglebay, "The Supreme Court and Full Faith and Credit" (1943) 29 Va. L. Rev. 557 at 558 ff.

men knew there were common law rules for dealing with "foreign" law or that such rules would be developed as the necessity arose. Since the Constitution preserved the separate legal systems of the several states, it also was known that these rules would operate. In view of the general desire to prevent such state "nationalism" as would be inimical to the success of the new Federation, it is only reasonable to assume that what was sought was to assure adoption of *generous* rules for dealing with the law of "sister states". However, because of early confusion in the common law applicable to this general problem,¹¹ decisions involving the full faith and credit clause developed largely from unsupported intuitions of Supreme Court judges, little or no effort being made to correlate results with, or to distinguish them from, those which would have been reached without the direction of the Constitution. In view of the infrequency of reference to the clause until modern times, and the relatively unstabilized condition of the "law" of the clause, it is not inappropriate to reconsider the question of the credit to be accorded to judgments^{11a} in this manner. The result may be to discover that many controversial cases can be disposed of on principles of general acceptance without injecting issues of "policy" or a judge's philosophy of government.

I

Congress has only twice elected to act under its authority to implement the Constitutional mandate¹² that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. The first statute, enacted in 1790¹³ provides a method of authenticating records and judicial proceedings and then

11. Cf. Jackson, *supra* note 1, at 6. See also, arguments of counsel, particularly for Plaintiffs in Error, in *Hilton v. Guyot*, 159 U.S. 113,123 (1895).
- 11a. The full faith and credit law of judgments is singled out for separate analysis because Congress has marked it for special attention and because most of the controversy reflected in recent decisions has fallen in this area.
12. U.S. Const. Art. IV, §1: "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."
13. Rev. Stat. §905 (1875), 28 U.S.C. §687 (1940).

provides that records and judicial proceedings so authenticated "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." The second statute, enacted in 1804¹⁴ is not relevant to this discussion.

What is the effect of this statute? Mr. Justice Jackson and others have suggested that it involves questions of conflict of laws.¹⁵ This would seem to be indisputable. The real problem is in what way does it involve the conflict of laws, or perhaps better, what effect does it have on a state's conflict of laws rules? It is suggested that the statute concerns itself not with the traditional problems of conflict of laws in the sense of selecting a rule from that body of precedent (such as "the law of the place of making of a contract governs the validity of the contract"), but rather that it relates solely to questions which are preliminary to and implicit in the applications of more familiar rules of conflict of laws, the so-called questions of characterization or qualification.¹⁶ In other words the statute supplies to the courts of the United States not their rules of conflict of laws of connection to the law of a sister state, but instead answers certain questions as to their conflict of laws rules of characterization.

14. Rev. Stat. §906 (1875), 28 U.S.C. §688 (1940). This act has to do with authentication of non-judicial records.
15. See Jackson, *supra* note 1, at 2; Cheatham, *supra* note 7. Justice Jackson, at page 30 of the same article also observes: "But while the American law of conflicts is a somewhat parallel and contemporaneous development with the law of full faith and credit, they are also quite independent evolutions, are based on contrary assumptions, and at times support conflicting results."
16. It can be demonstrated that, in any conflict of laws case problems of characterization or qualification are more significant to the actual decision than the selection of the conflict of laws rule, as such. Characterization, broadly speaking, involves decision of the questions, usually overlooked, of what law shall be referred to by the forum for assistance in evaluating the legal relations at issue in a given case, and in light of those decisions, definition of terms and qualitative appraisal of the rules of connection and of the law to which reference is made. In other words the meaning of a rule of law, and the way in which and the purpose for which it is applied is much more significant than the rule itself. See Cook, "Logical & Legal Bases of Conflict of Laws" (1942) c. VIII; Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws" (1941) 50 Yale L.J. 743.

II

At the outset it is necessary to keep in mind that the "case" itself is separate from the judgment that figures as part of the case. This is clear where, an action having been filed, the defendant pleads previous adjudication and introduces a properly authenticated judgment of another state in evidence. The "case" then is that set out in the plaintiff's brief and consists of "foreign" or out-of-state elements as well as local elements. The judgment is another "foreign" element injected into the case by the defendant.

That the case is distinct from the judgment is equally true where the suit is "on the judgment" of a sister state notwithstanding the tendency to say that the original claim has been merged and thus destroyed by the judgment. The claim underlies the judgment and is in fact what plaintiff sues upon.¹⁷ For pleading purposes he presents the judgment as a shorthand statement of the claim and, *if accepted*, it operates as proof of the claim. But when the conclusiveness of the judgment is put at issue the very purpose of the suit is to determine whether the judgment does "prove" the claim.

The "case" having been filed and the judgment having been introduced either by plaintiff or defendant, under now traditional conflict of laws principles the first question for a court is "Is there a significant sister state (foreign) element in this case?"¹⁸ This question is one of characterization and is assumed to be answered by the forum's own law.¹⁹ In the usual conflict of laws case, the law of the forum may permit a court to answer this question in the negative, and

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17. *Boynton v. Ball*, 121 U.S. 457, 466 (1887); 2 Freeman, "Judgments" (5th ed. 1925) §550; Pirsig, "Merger by Judgment" (1944) 28 Minn. L. Rev. 420. Chief Justice Stone in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430,439 (1943) writes ". . . a cause of action merged in a judgment in one state is likewise merged in every other." This is an unfortunate use of language but is not contrary to the concept expressed here. Mr. Chief Justice Stone was discussing the "conclusiveness" of judgments and not the question of destruction of the original cause.
 18. Actually, the first question is "By reference to what law shall it be determined whether there is a significant foreign element present?" This question is of necessity answered, "By the law of the forum."
 19. Restatement, "Conflict of Laws" (1934) § 7(a), comment b; Lorenzen, *supra* note 16. See Cook, *op. cit. supra* note 16, c. VIII.

thereafter proceed to handle the case as one not involving conflict of laws.²⁰ If the case involves a sister state's judgment, however, the Constitution and statute supply the law (answer) of the forum which is "yes"—a sister state judgment is always to be considered if introduced. It is only "conditionally" significant, however, because as has been stated, whether it controls the case is the issue to be determined.²¹

The second problem of characterization becomes, "By reference to what law shall the precise significance of this 'conditionally significant' sister state element be determined?"²² Obviously it may make considerable difference as to the outcome of the case whether the law of the rendering state determines this question or whether the law of the forum decides it. Since this also is a preliminary question, the answer given, at least by implication, in an ordinary conflict of laws case is again, "By the law of the forum."²³ In the case with the judgment element in it, however, the forum cannot apply this usual rule, for the Constitution and statute step in to eliminate any discretion the law of the forum normally allows its courts, and the usual rule itself. Under Constitution and statute, the forum must determine the possible significance of the judgment not by its own law but by the law of the rendering state.²⁴

This is not the end of the characterization problem in

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20. Neither the full faith and credit clause, nor any other provision of the U.S. Const. has yet been interpreted as rigidly requiring recognition of sister state common or statute law. The recognition given such "foreign" law therefore still rests with conflict of laws principles of the forum.
 21. In the non-judgment type of conflict of laws case, a court would not examine "conditionally" significant elements, but would decide outright what elements are significant.
 22. The wording "by reference to" foreign law is employed by the writer as one way to avoid the difficulties inherent in the traditional conflict of laws concept that a court 'applies' foreign law on principles of comity. Whatever law is applied is the law of the forum, the real question being "to what law shall the forum make its rule for this case as nearly as possible homologous." Cf. Cook, *op cit.* supra note 16, cc. I,II; Restatement, "Conflict of Laws" (1934) §§6,7.
 23. Cf. authorities cited supra note 19.
 24. The question of whether there are exceptions to the mandate of the statute, discussed subsequently in connection with the effect of sister-state judgments as *res judicata*, could, of course, be introduced here. This has not been the level at which the courts have raised the question however.

a conflict of laws case involving a sister state judgment, but it is its core. For if the sister state "law" to which reference is made is that the claim now before the forum is conclusively established, or precluded, by the judgment, the case is, or at least would seem to be, settled. Nothing remains for the forum to do but enter its judgment accordingly. If, on the other hand, by the "law" of the sister state to which reference is made, the judgment would neither establish nor preclude an identical action brought before one of the rendering state's courts,²⁵ then the case reverts, as to the forum, to the condition of a case not involving a judgment. The forum is then free to apply its usual rules of conflict of laws, both of characterization and of connection.

Two more questions of characterization remain: "What is meant by the term 'law' of the rendering state," and "What is the law, as so defined?" The latter is a specific problem for a specific case, but the former, the meaning of "law" of the rendering state, is perhaps the most interesting problem of those here discussed, and its importance cannot be overlooked.

Professor Cheatham has suggested that recent decisions on the effect of Article IV, Section 1, and the statute on judgments give some evidence that the Supreme Court has fallen, or may fall, into difficulty over improper understanding (characterization) of the concept of "law" of the rendering state when it makes its search for the effect that must be given in one state to a judgment of another.²⁶ His suggestion is that the "law" of the rendering state as to its judgment may be (1) the domestic or non-conflict law of the rendering state; (2) the conflict of laws law of the rendering state applicable to the same case, thus introducing the problem of the *renvoi*; (3) the rendering state's conflict of laws rules for a similar but converse case involving a sister state's judgment thus raising a problem in reciprocity; or (4) a pronouncement by the rendering state made at the time the judgment was entered, as to what effect the judgment shall have in other states.

25. This assumes, for the moment, that the rendering state would not find its first judgment *res judicata* even if attacked for lack of jurisdiction. As to this see note 53, *infra*.

26. Cheatham, "Res Judicata and the Full Faith and Credit Clause" (1944) 44 Col. L. Rev. 330,337.

Since these possibilities seem to be statistically exhaustive, they merit examination both in light of the thesis of this paper and of decisions of the Supreme Court subsequent to the case on which Professor Cheatham founded his remarks.

The first possibility, that the "law" to which reference must be made is the domestic or non-conflict law of the rendering state, is not only the likeliest possibility, but in fact is the only acceptable one.²⁷ The Supreme Court has now stated this rather emphatically.²⁸ As to the rendering state, the judgment is a domestic element, if for no other reason, because a court is incapable of rendering any other sort of judgment.²⁹ In the first instance the reference to the sister-state judgment is made to determine *whether* the foreign court has already decided this very case. Only non-conflict law can be of assistance here.

As to the second possibility, it may be disposed of summarily. The complexity of the renvoi doctrine is met when a court (of State A), having before it a conflict of laws case, selects a rule of conflict of laws of connection which causes it to "refer" to the law of another state (State B). Upon making the reference, however, it is found that a court of State B, if it were hearing an identical case (assuming it had jurisdiction) would select a different conflict of laws rule of connection, its rule either occasioning reference to the law of State A, or to that of a third state.³⁰ State A, if it also adopts as its own this law of State B might find itself playing what has been termed inter-national (or inter-state) lawn tennis.³¹

The renvoi problem cannot arise, however, when the

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27. Prof Cheatham also recognized this. See *Id.* at 339,340.
 28. *Morris v. Jones*, 67 S.Ct. 451,456 (1947). Cf. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).
 29. Cf. Cook, *op. cit.*, *supra* note 16, cc. I,II,III.
 30. See Lorenzen, "The Renvoi Theory" (1910) 10 Col. L. Rev. 190, 327, "The Renvoi Doctrine in the Conflict of Laws" (1918) 27 Yale L.J. 509; Schreiber, "The Doctrine of the Renvoi in Anglo-American Law" (1917) 31 Harv. L. Rev. 523; Note, (1945) 31 Iowa L. Rev 130; Cook, "Logical and Legal Bases of Conflict of Laws" (1942) c. IX.
 31. See *In re Tallmadge*, 109 Misc. 696, 181 N.Y.S. 336 (1919). It should be noted that characterization by the law of one state, followed by re-characterization under the different rule of another state produces a result much like renvoi, but that it is not the same thing.

reference is made not to learn *how* the second state would decide this very case, but rather *if* it has decided it. Furthermore if an identical case were presented to the rendering state, it might not be a conflict of laws case at all. The judgment which is the "foreign" element in a sister state, is a local element in the rendering state and there might be no other "foreign" elements. But to the extent that the identical case when presented to the courts of the rendering state is "like" a conflict of laws case, the applicable rule is that the effect of the judgment is to be determined by the law of the rendering state itself.³² Both states are thus connected to the same state law, and there is no renvoi.

As to the third "possibility", the doctrine of reciprocity comes into play only when a state has a conflict of laws rule that connects it to another body of law, but as a matter of policy its courts will not recognize or adopt the "foreign" law thus referred to unless in a similar, but *converse* case, the courts of the foreign state would give similar recognition to the law of the forum.³³ As to the recognition here described for sister state judgments, reciprocity is simply not involved. The law developed in the rendering state for determining how it shall regard its own judgments would not include determination of how it would treat foreign judgments. In any event, the recognition of foreign judgments which the reciprocity doctrine avoids, is compelled by the full faith and credit statute which applies with equal force to the courts of every state.

As to the fourth possibility, that the rendering state may prescribe in a judgment the effect it shall have in other states, the problem is more difficult, being in fact, dual in nature. It is one question whether a court may prescribe the extent to which its judgment shall conclude or preclude litigation in a sister state, and a wholly different one whether a court's express or implied limitation of the effect of its judgment shall be accepted.

That a court should attempt to prescribe its judgment's

32. This rule is, of course, not supplied by Art. IV, §1, but by the state's own law of *res judicata*. It conforms to the relevant conflict of laws rule, however. Cf. Restatement, "Conflict of Laws" (1934) §450.

33. In other words, recognition is withheld unless the second state, if it had before it a similar case involving a judgment of the enquiring state, would give credit to such judgment.

entire effect in other states seems both unlikely and unwise. Theories of territorial limitations on the jurisdiction of judicial bodies^{34a} are too firmly imbedded in our legal system to be lightly discarded. At best, a statement that a judgment shall have certain positive effect (i.e. shall be *res judicata*) outside the borders of the rendering state would amount to an expression of hope that the courts of other states, and ultimately the United States Supreme Court, will take the same view of the judgment's effect.

Some evidence that the Supreme Court will take account of the intent of the rendering court as to the effect of its judgment in other states does appear in recent decisions,^{34b} but for the present at least, it is believed that such language should be confined to the second facet of this problem, that of whether effect shall be given to a court's limitations of its judgment. That a court may *expressly* limit its judgment so that it will not be *res judicata* as to certain matters is clear under the recent decision of *Wisconsin v. McCartin*.^{34c} It can be argued that a judgment also is not *res judicata* as to matters which, because of the nature of the action, were not, or could not be, considered.³⁵ In any event, an

34a. Cf. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), at 440: "For Texas is without power to give extra territorial effect to its laws." Also *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); Restatement, "Conflict of Laws" (1934) §1; Story, "Commentaries on the Conflict of Laws" (1834) §7.

34b. See dissenting opinion of Black, J. in the *Magnolia* case, supra note 34a, at 451: "Did Texas intend the award of its Industrial Accident Board against the insurer to bar the right granted the employee by the Louisiana Workmen's Compensation Law to collect from his employer for the same injury the difference between the compensation allowed by Texas and the more generous compensation allowed by Louisiana?"; and the opinion of the court in *Wisconsin v. McCartin*, decided March 31, 1947 67 S.Ct. 886 (1942): "If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, the decision in the *Magnolia Petroleum Co.* case would be controlling here. . . . But there is nothing in the statute or in the decisions thereunder to indicate that it was designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment."

34c. Decided March 31, 1947. 67 S.Ct. 886 (1947).

35. Cf. note 51 *infra*. *Wisconsin v. McCartin*, supra note 34c, may indicate that the rule of *Magnolia Petroleum Co. v. Hunt*, supra note 34a, is to be sharply limited and perhaps indirectly over-ruled for it attributes to the *Magnolia* case a finding that that case did not necessarily embrace. In referring to the *Magnolia* decision, Justice Murphy, writing for the court says: "The court there found that the compensation award under the Texas Work-

indication by a court that its judgment does not extend to certain matters does not represent an attempt to give extra-territorial effect to a states' laws or judicial decisions in the sense that has long been regarded as objectionable and impracticable,³⁶ for this is only an advance statement of what the local law of a state is as to the judgment rendered, made by the court best qualified to define it.

Thus we are left as we began, with a fairly clear indication that Constitution and statute direct that in referring to sister state law to determine the effect of a judgment of such sister state, the "law" referred to is the domestic or non-conflict law of the rendering state. As to this, there are, of course, two questions to be answered: (1) What *domestic* (non-conflict of laws) law declares the effect of judgments within a state? (2) If the effect of a judgment under the law of the rendering state is somehow at odds with conceptions of justice of the inquiring state, can the command of the Constitution and statute be subverted or ignored in furtherance of the latter's policy?

The answer to (1) is: The law of *res judicata* of the rendering state.^{36a} The answer to (2), because of the terms of the statute, would appear to be even more concise: No.³⁷ Nonetheless it is on this latter point that the court is most violently in disagreement.³⁸

men's Compensation Law was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state." Compare this with the statement of Stone, J., writing for the majority in the *Magnolia* case, 320 U.S. 430 at 440: "But whether the Texas award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extra-territorial effect to its laws." To be noted also is that Justice Murphy joined with Justice Douglas in dissenting in the latter case.

36. See note 34a, *supra*.

36a. The term "*res judicata*" is here used in its broadest sense. Cf. Restatement, "*Judgments*" (1942) Intro. Com. to §41.

37. "The very purpose of the constitutional provision and the federal statute, however, was to end the old state freedom in conflict of laws, and to deny to the second state, Louisiana, the privilege to determine for itself whether to give effect to the judgment of another state, Texas." Cheatham, "*Res Judicata and the Full Faith and Credit Clause*" (1944) 44 Col. L. Rev. 330,336. Moore & Oglebay, "*The Supreme Court and Full Faith and Credit*" (1943) 29 Va. L.R. 557,615.

38. See cases cited *supra* note 4; Stone, J., dissenting in *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

A final purpose of this article is to suggest that proper examination, and decision, of the problem of *res judicata* would render much of the controversy over local policy and interests both out of place and unnecessary.

Another recent case, *Morris v. Jones*,³⁹ furnishes an illustration of the importance of making a specific finding of the law of *res judicata* of the rendering state prior to and independently of questions of policy. In this case plaintiff sought to introduce a duly authenticated copy of a Missouri judgment as proof of claim in Illinois proceedings against the Illinois statutory liquidator of Chicago Lloyds, the unincorporated defendant in the Missouri action.⁴⁰ The Missouri action had been begun prior to the appointment of the liquidator, but was carried to judgment notwithstanding an order of the Illinois Court staying all proceedings against Chicago Lloyds and providing for filing of claims with the liquidator. Plaintiff had notice of this order and the Missouri Court was advised of it at the time the Chicago Lloyds attorney, on direction of the liquidator, withdrew from the Missouri case. The Supreme Court of Illinois denied credit to the Missouri decree on the grounds that it was Missouri's responsibility to give credit to the Illinois decree and that, in any event, the judgment could not be enforced against assets in the hands of the Illinois liquidator.

The United States Supreme Court, in a 6-3 decision reversed the Illinois Court, ruling that cases holding that a court appointing a receiver or statutory liquidator draws to itself exclusive control of proof of claims were erroneous, that the Missouri action was not abated by the Illinois decree, and that there was no lack of privity between Chicago Lloyds and the liquidator or any difference in the cause of action because of the technical difference in defendants. The Missouri judgment therefore was entitled to full faith and credit. Justice Douglas, who wrote the opinion of the court stated:

"It is no more important that the suit on this underlying claim could not have been maintained in Illinois after the liquidator had been appointed than the fact that a statute

39. 67 S.Ct. 451 (1947).

40. The Missouri action was for malicious prosecution and false arrest.

of limitations of the State of the forum might have barred it And the Missouri judgment may not be defeated by virtue of the fact that under other circumstances petitioner might not have been able to obtain it in Missouri or to have received any benefit from it there, as, for example, if a liquidator had been appointed for the debtor in Missouri prior to judgment. The full faith and credit to which a judgment is entitled is the credit which it has in the State from which it is taken, not the credit that under other circumstances and conditions it might have had. Moreover, the question whether a judgment is entitled to full faith and credit does not depend on the presence of reciprocal engagements between the States.

Under Missouri law petitioner's judgment was a final determination of the nature and amount of his claim That determination is final and conclusive in all courts."⁴¹

Only after making the statements quoted and briefly reviewing the authorities on which they rest, does Justice Douglas devote attention to the issue of the asserted conflicting and superior interests of the State of Illinois. As to such asserted interests, he states: "The command is to give full faith and credit to *every* judgment of a sister state"⁴² (italics added) and again "The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ."⁴³ In other words if by the law of Missouri the judgment would be *res judicata* as to the trial in Missouri of a case identical to the one in Illinois, that result obtains also in other states, even though the exact case here presented in Illinois, could not for technical or jurisdictional reasons be presented to a Missouri court.

Exceptions under the full faith and credit clause have perhaps been more numerous than Justice Douglas inti-

41. 67 S.Ct. 451,456 (1947).

42. *Id.* at 457.

43. *Ibid.*

44. The question of why the Missouri Court wasn't required to give full faith and credit to the Illinois statute providing the method of liquidation, and to the stay proceedings order of the Illinois Court is interesting. Justice Douglas' answer is that "the place to raise that defense was in the Missouri proceedings." Another answer is that thus far statute law and non-final judgments have not been accorded the degree of credit marked out for final judgments. See Stone, J., in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430,437 (1943).

mates,⁴⁵ but his viewpoint and willingness to meet issues squarely, if somewhat sketchily, is refreshing.⁴⁶

The dissenting opinion in *Morris v. Jones* is more in keeping with traditional full faith and credit cases and serves to point up the advantage of employing the common law analysis as much as possible. Justice Frankfurter, with whom concurred Justices Rutledge and Black, briefly deals with the question of whether the liquidator is in privity with Chicago Lloyds, his discussion being in terms of asserted Illinois law⁴⁷ instead of the law of Missouri. He then devotes the greater part of his opinion to the issue of Illinois' right to pursue her own policies even when to do so means denying credit to judgments of a sister state.

If he is right, however, that "the Illinois liquidator was a stranger to the Missouri judgment and it cannot be invoked against him in Illinois,"⁴⁸ this lengthy development of the superiority of Illinois policy is wholly inappropriate, for a judgment is not *res judicata* against a stranger nor

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45. The largest class of "exceptions" has developed under the heading of lack of jurisdiction by the rendering court. Cf. *Griffin v. Griffin*, 66 S.Ct. 556 (1946); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Pink v. AAA Highway Express*, 314 U.S. 201 (1941); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Fall v. Eastin*, 215 U.S. 1 (1909); *Andrews v. Andrews*, 188 U.S. 14 (1903); *Bell v. Bell*, 181 U.S. 175 (1901); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Thompson v. Whitman*, 18 Wall. 457 (U.S. 1873). Other exceptions, which may or may not be substantial, are based on (1) denial of use of courts: *Anglo-American Provision Co. v. Davis Co.*, 191 U.S. 373 (1903). But cf. *Kenny v. Supreme Lodge*, 252 U.S. 411 (1907). (2) Judgments for penalty: *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). But query in view of *Milwaukee County v. White Co.*, 296 U.S. 268 (1935). (3) Fraud: *Levin v. Gladstein*, 142 N.C. 482, 55 S.E. 371 (1906); and compare dissenting opinion of Rutledge, J., in *Williams v. North Carolina*, supra at 254; *Riehle v. Margolies*, 279 U.S. 218 (1929); *Titus v. Wallick*, 306 U.S. 282 (1939). But cf. *Christmas v. Russell*, 5 Wall. 290 (U.S. 1866); *Heiser v. Woodruff*, 66 S.Ct. 853 (1946); Goodrich, "Five Years of Conflict of Laws" (1946 *Practicing Law Institute*), (1946) 32 Va. L. Rev. 295; 3 Freeman, "Judgments" (5th ed. 1925) §§1401-4. Other exceptions have been alleged, but most of these relate to the question of *res judicata*. See Notes (1943) 88 L. Ed. 389, (1941) 41 Col. L. Rev. 878; Moore & Oglebay, "The Supreme Court and Full Faith and Credit" (1943) 29 Va. L. Rev. 557.
46. As to the *res judicata* law of Missouri, Justice Douglas cites only 3 cases (67 S.Ct. 451,456); as to privity, one case, and that from the U.S. Sup. Ct. (Id. at 455).
47. Actually, Justice Frankfurter discusses only four U.S. Sup. Ct. decisions, and makes no reference to Illinois precedent. Id. at 461.
48. 67 S.Ct. 451,461 (1947).

as to a dissimilar subsequent action.⁴⁹ Illinois would be free to decide the case without reference to the judgment. Only if the dissenting judges were to concede that the majority is correct as to the effect of the Missouri judgment as res judicata does the discussion of policy become pertinent.

A very similar problem was presented to the Court in *Magnolia Petroleum Co. v. Hunt*.⁵⁰ In that case a Texas workmen's compensation award was introduced in bar of an action in Louisiana under that state's workmen's compensation law. The Supreme Court ruled that the Texas award precluded any award under the Louisiana statute. There are much graver doubts that by Texas law its workmen's compensation decision would be res judicata as to subsequent action seeking to take account of Louisiana law⁵¹ than that the Missouri court judgment was res judicata as to the claim presented in *Morris v. Jones*. Instead of meeting this issue, the dissenting opinions were, and, indeed, a large part of the majority opinion was, devoted to exchanging viewpoints on the question of subverting one state's policy to that of the other.

III

That full faith and credit may be denied a judgment notwithstanding that the judgment is res judicata by the

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49. 1 Freeman, "Judgments" (5th ed. 1925) §407; 2 id. §588; 3 id. §§1392, 1503; Restatement, "Conflict of Laws" (1934) §§70,73,93,94.
50. 320 U.S. 430 (1943).
51. The reasons for doubt, in the writer's opinion stem from the nature of a Workmen's Compensation award. By widely accepted principles, a Workmen's Compensation case cannot be regarded as a conflict of laws case (i.e., one in which foreign or sister-state law can be applied or adopted), even if deemed appropriate. Because of peculiarities in administration and theory, a Workmen's Compensation case is thought to be always domestic, in the sense that either local law is applied, or jurisdiction under the particular statute is declined. In other words, as to the state with whose court or board a claim is filed, the problem is treated as one of statutory interpretation (application) exclusively. See *Wisconsin v. McCartin*, 67 S.Ct. 886 (1947); Restatement, "Conflict of Laws" (1934) c. 9, topic 3, p. 485, Introductory Note; Dwan, "Workmen's Compensation and the Conflicts of Laws" (1927) 11 Minn. L. Rev. 329 (1935), 20 Minn. L. Rev. 19; Angell, "Recovery under Workmen's Compensation Acts for Injury Abroad" (1918) 31 Harv. L. Rev. 619. The familiar principle that a judgment is res judicata only as to matters actually or possibly litigated, therefore should operate. Cf. 3 Freeman, "Judgments" (5th ed. 1925) §1398; Restatement, "Conflict of Laws" (1934) §403; dissenting opinions of Justices Reed and Rutledge in *Angel v. Bullington*, 67 S.Ct. 657 (1947), at 662 and 667 respectively.

law of the state where it was rendered has been pointed out.⁵² One so-called exception justifying this, the one that has most often found judicial acceptance, relates to questions of the jurisdiction of the rendering state. It is believed that, with only slight variation, the analysis outlined above can be useful in evaluating this exception, and the subtleties now existing in its name.

In the first place, the question of whether the rendering state had jurisdiction is really only one facet of the characterization of the significance of a sister-state's judgment in terms of the law of the state in which the judgment was rendered. Under some circumstances a judgment may be *res judicata* as to the jurisdiction of the court rendering it as well as to other matters expressly or tactitly litigated.⁵³ But if the parties were justified in not appearing⁵⁴ or if the issue of jurisdiction of the subject matter actually was not litigated,⁵⁵ and the issue of jurisdiction is raised against the judgment, it may be found to be of no effect either in the rendering state or elsewhere.⁵⁶

52. Note 38 *supra*. Cf. note 45, *supra*.

53. *Jurisdiction of Person: Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917); *Baldwin v. Iowa St. Traveling Men's Ass'n.*, 283 U.S. 522 (1931); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). *Jurisdiction of subject matter: Davis v. Davis*, 305 U.S. 32 (1938); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Chicot Co. Draining Dist. v. Baxter St. Bank*, 308 U.S. 371 (1940); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940); Gavit, "Jurisdiction of the Subject Matter and *Res Judicata*" (1932) 80 U. of Pa. L. Rev. 386; Boskey and Braucher, "Jurisdiction and Collateral Attack" (1940) 40 Col. L. Rev. 1006; Green, "Res Judicata and Its Applicability to Judgments" (1944) 28 Minn. L. Rev. 77.

54. *McDonald v. Mabee*, 243 U.S. 90 (1917). Cf. *York v. Texas*, 137 U.S. 15 (1890); *Baldwin v. Iowa St. Traveling Men's Ass'n.*, 283 U.S. 522 (1931). But see, *Riehle v. Margolies*, 279 U.S. 218 (1929).

55. See *Valley v. Northern Fire and M. Ins. Co.*, 254 U.S. 348 (1920); *Kalb v. Feuerstein*, 308 U.S. 433 (1940); Restatement, "Judgments" (1942) §10. Considerable doubt as to this is raised by the authorities cited *supra* note 53. It has been held that where a court refuses to pass on the issue of jurisdiction, an award is subject to attack. *Bretsky v. Lehigh Valley R.R.*, 156 F.(2d) 594 (C.C.A. 2d, 1946), noted disapprovingly in (1946) 60 Harv. L. Rev. 305. It seems clear that where the issue of jurisdiction is expressly litigated and could have been made the basis of an appeal, the judgment is *res judicata*. *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

56. See cases cited under "jurisdiction" in note 45 *supra*. "Of course, if a tribunal has not jurisdiction to render a judgment valid by the tests of due process, it is without validity at home and is entitled to no credit abroad. To give conclusive effect to such a judgment

On the other hand, if by the law of the rendering state a judgment cannot be impeached for lack of jurisdiction, or for lack of other elements of *res judicata*, one would suppose that all that is left is for the inquiring court to enter its judgment in accordance with the sister-state's judgment. At least if it refused to do this, the inquiring court must find that the case falls in an area in which there is an exception based on a predominant policy or interest of the inquiring state. This is not all there is, however, to the problem of jurisdiction. The full faith and credit decisions involving judgments of divorce have injected a further complication which, under existing decisions, seems firmly established.

It was once the rule of the United States Supreme Court that courts of the state of so-called "matrimonial domicile" need not give full faith and credit to a divorce valid in the state where it was rendered.⁵⁷ This concept has been overruled,⁵⁸ but in its place a new and somewhat similar exception, at least as to its result, has arisen. Notwithstanding that the requirement of jurisdiction is satisfied so that the parties must be conceded to be validly divorced in the state rendering the divorce judgment, the inquiring state need not give credit to the judgment if, by *its own* evaluation of the jurisdictional fact of domicile, it finds the rendering state lacked jurisdiction.⁵⁹ In other words, although "domicil" has the same *general* meaning and significance under the law of both states, their courts properly may disagree as to a finding of the facts on which domicile is based—that is, as to where a particular person is actually domiciled. In these cases as in others, Constitution and statute would seem to direct determination (characterization) of the possible significance of a judgment by the law of the state in which the judgment was rendered, but apparently by the device of making a different finding of jurisdictional facts (where the circumstances make this reasonably possible) the inquiring court may avoid giving credit to an otherwise valid sister-state judgment. Supreme Court sanction of this practice

would in itself be a denial of due process." Jackson, "Full Faith and Credit—The Lawyers' Clause" (1945) 45 Col. L. Rev. 1, 8. Query in view of note 53 *supra*.

57. *Haddock v. Haddock*, 201 U.S. 562 (1906).

58. *Williams v. North Carolina*, 317 U.S. 287 (1942).

59. *Williams v. North Carolina*, 325 U.S. 226 (1945).

has the same net effect as authorizing a refusal of credit because of differing policies or interests of the inquiring state.⁶⁰

So far, this subtle exception has been limited to cases involving divorce judgments. In view of the tendency to cite the divorce opinions in non-divorce cases,⁶¹ however, it is possible that the exception may have a larger area of operation than generally is assumed. For example, when a state court is asked to enforce the tax judgment of a sister-state, the state in which the judgment is introduced might evade the requirement of credit set out in *Milwaukee County v. White Co.*⁶² by disagreeing with the rendering state's finding as to the jurisdictional fact (e.g. domicile)⁶³ on which liability for the tax was based. Similarly, giving full faith and credit to a judgment based on substituted service against an absent domiciliary of the rendering state, as is required by *Milliken v. Meyer*,⁶⁴ might be avoided by the device of a finding by the court in the second state, that the defendant had not, by the standards of the latter state, in fact been domiciled in the rendering state at the time process was issued.⁶⁵

Although it is unlikely in view of the latest decisions on the subject,⁶⁶ it is also possible that a valid judgment against a foreign corporation might be denied credit if the state in which the judgment is sued upon finds that the corporation was not in fact "doing business" in the rendering state. And although even more unlikely, it is possible that giving the credit required by *Magnolia Petroleum Co. v. Hunt*⁶⁷ for the workmen's compensation award of a sister state, might be circumvented by a different finding as to

60. Cf. Rutledge, J., dissenting in *Williams v. North Carolina*, id at 244. See *Cohen v. Cohen*, 64 N.E.(2d) 689 (Mass. 1946). But cf. *Shea v. Shea*, 60 N.Y.S.(2d) 823 (App. Div., 2d Dept. 1946).

61. See, e.g., use of *Williams v. North Carolina*, 317 U.S. 287 (1942) in opinions in *Magnolia Petroleum v. Hunt*, 320 U.S. 430 (1943).

62. 296 U.S. 268 (1935).

63. Dramatic illustration of the possibility of such disagreement is afforded by the well known Dorrance litigation. In re Dorrance's Estate, 309 P. 151, 163 Atl. 303 (1932), cert. denied sub. nom. Dorrance v. Pa., 288 U.S. 617 (1933); In re Dorrance's Estate, 115 N.J. Eq. 268, 170 Atl. 601 (1934), cert. denied sub. nom. Dorrance v. Martin, 298 U.S. 678 (1936).

64. 311 U.S. 457 (1940).

65. Cf. *McDonald v. Mabee*, 243 U.S. 90 (1917); *Cooper v. Newell*, 173 U.S. 555 (1899).

66. *International Shoe Co. v. Washington*, 66 S.Ct. 154 (1945).

67. 320 U.S. 430 (1943).

the facts upon which the awarding state found jurisdiction under its laws.

In view of the number and vigor of the dissenting opinions to this new jurisdictional doctrine⁶⁸ no extension of the sort here suggested should be made without the benefit of full research and argument. It may be that, rather than enlarged, the jurisdictional concept of the divorce cases will be narrowed or eliminated.

IV

One more comment is necessary to conclude this discussion of the United States conflict of laws of judgments. When a judgment is found to be *res judicata* by the law of the rendering state, the only way to avoid acceptance of this finding is to deny that Constitution and statute have the effect here set out as to characterization, or to dilute their mandate with exceptions favoring the policy of the inquiring state. But suppose the law of the rendering state is that the case is not concluded by the judgment, either because the case has not in fact once been litigated or because the cause of action or parties are not the same.⁶⁹

Presumably, the inquiring court now "starts over" on the case, treating it just as it would if (as indeed has been determined) there is no judgment to consider. Although it is believed that this is what should happen, it is nonetheless possible that the full faith and credit clause may be held to command not only that the law of *res judicata* of the rendering state shall be observed, but also that the Supreme Court may "discover" or create some new and more comprehensive *res judicata* law. It may be that this has in fact subtly taken place.⁷⁰ If so, this also should be frankly recognized so that lawyers handling full faith and credit cases can brief and argue the point, and other judges can consider it. The Supreme Court will thereby obtain the benefits of the kind of research and comment in marking out the effect and implications of Article IV, Section 1, which Justice Jackson found so unfortunately lacking.

68. See, e.g. *Williams v. North Carolina*, 325 U.S. 226 (1945); *Griffin v. Griffin*, 66 S.Ct. 556 (1946).

69. Note 49 *supra*.

70. Cf. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Angel v. Bullington*, 67 S.Ct. 657 (1947). *Wisconsin v. McCartin*, — S.Ct. — (1947) may indicate a reversal of this tendency, however. See *supra* note 34d.