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INTERSTATE FEDERALISM: EFFECT OF FULL FAITH AND CREDIT TO JUDGMENTS

*Jean A. Mortland**

I. INTRODUCTION

Federalism usually is considered in the context of state-federal relations.[1] Few writers address relations between and among states, which also is an important aspect of federalism. This article takes up the neglected topic of interstate federalism by analyzing the effect of the full faith and credit clause upon enforcement of foreign judgments and upon relationships between and among states.

The development of the application of the full faith and credit clause to enforce judgments is considered in Part II which discusses the basic principle that a judgment must be recognized and enforced by every state, even where the public policy of the enforcing state is violated. The article then describes three exceptions to the basic rule—first, that questions as to the title of land are determined by courts of the situs which may reject a foreign state determination; second, that the enforcing state may bar enforcement of a foreign judgment by its statute of limitations; and, third, that the enforceability of a probate decree depends on presence of property, or of a locally appointed personal representative, in the rendering state. Part II concludes by describing those areas that remain uncertain: the enforceability under the full faith and credit clause of modifiable decrees, custody decrees, injunctions against foreign suits, and penalty judgments, and the collateral estoppel effect of a foreign judgment.

Part III considers the purpose of the full faith and credit clause by focusing on three cases dealing with the res judicata effect of workers' compensation awards.[2] The discussion reflects two views as to the purpose of the full faith and credit clause—to give deference to the rendering state or to achieve finality by nationalizing res judicata—and concludes that there is uncertainty as to which is primary.

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1. *See* Brandes, *When Constitutions Collide: A Study in Federalism in the Criminal Law Context*, 18 U. BALT. L. REV. 55 (1988); Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DE PAUL L. REV. 345 (1990); Pannier, *Justifying Federalism*, 16 WM. MITCHELL L. REV. 613 (1990); Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990); White, *Recovering Coterminous Power Theory*, 14 NOVA L. REV. 155 (1989).

2. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Industrial Comm'n v. McCartin, 330 U.S. 622 (1947); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

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Part IV concludes that even though a money judgment clearly is enforceable, enforcement of a foreign judgment is not required in cases involving title to land and where statutes of limitations conflict. There also are instances where the desirability of enforcement is an open question. The most recent decision of the United States Supreme Court indicates the lack of a clear conceptualization of the purpose of the clause.[3] The conclusion of Part IV is that nationalizing res judicata is paramount.

II. Applications of the Full Faith and Credit Clause

The full faith and credit clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[4] At the Constitutional Convention of 1787, the drafters of the Constitution adopted the clause nearly verbatim from the Articles of Confederation.[5] At the time of the drafting of the Articles of Confederation in 1777, the thirteen states wanted to retain their independence and sovereignty while still fulfilling their obligations to their sister states.[6] The states were well aware that failure to recognize the acts of their sister states would not further the life of the confederation.[7] Further, the drafters of the Articles may have been aware of the English common law practice of enforcing certain foreign judgments.[8] Justice Story later speculated that the purpose of the full faith and credit clause was "to give each State a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all."[9] The history of the interpretation of the reach of the full faith and credit clause reflects, however, considerable confusion over the extent to which the judgment of a sister state truly is enforceable.

A. Limitation on the Right to Reject a Foreign Judgment

No outside power can require a sovereign nation to recognize or

3. *Thomas*, 448 U.S. at 261.

4. U.S. Const. art. IV, § 1.

5. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 3 (1945).

6. Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 U. Ill. L. Rev. 1, 3 (1944).

7. Sumner, *The Full-Faith-And-Credit Clause—Its History and Purpose*, 34 Or. L. Rev. 224, 229 (1955).

8. *Id.*

9. 2 J. Story, Commentaries on the Constitution of the United States 190 (5th ed. 1891).

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enforce the judgment of another nation.[10] There is, however, a generally followed principle of comity by which nations recognize many foreign judgments.[11] Does this same principle of comity apply to states within a nation? In particular, to what extent does the full faith and credit clause require a state to enforce a judgment rendered in a sister state?

Early cases reflected conflicting decisions with several holding that a judgment from another state was only prima facie evidence of a debt.[12] The first decision by the Supreme Court, however, held that the sister state judgment has conclusive effect.[13]

> The act declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken. If in such Court it has the faith and credit of evidence of the highest nature, viz. *record evidence*, it must have the same faith and credit in every other Court . . . .
>
> . . . .
>
> Were the construction contended for by the Plaintiff in error to prevail, that judgments of the state Courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.[14]

Later cases held that, while the enforcing state may not retry the merits of a judgment rendered in another state, it may require an action to reduce the foreign judgment to a domestic judgment,[15] and it may bar enforcement by applying a statute of limitations different from that of the rendering state.[16]

The opinions in *Fauntleroy v. Lum,*[17] upon which most contemporary full faith and credit jurisprudence is based, make it apparent that,

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10. Hilton v. Guyot, 159 U.S. 113 (1895); Miller v. Hall, 1 Dall. 229, 232 (Pa. 1788).

11. *Hilton,* 159 U.S. at 164; *see id.* at 166-69 (discussing the various situations in which courts will recognize foreign judgments).

12. Nadelman, *Full Faith and Credit to Judgments and Public Acts,* 56 MICH. L. REV. 33, 62-69 (1957). There is little in the records of the Constitutional Convention or ratification to indicate the intent of the framers. However, Nadelman finds evidence in statutes of some of the colonies to support an intent of national res judicata. *Id.* at 34-53.

13. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813).

14. *Id.* at 484-85.

15. M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

16. Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866).

17. 210 U.S. 230 (1908).

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despite the early cases, the notion of full faith and credit was not well established in the early part of the twentieth century. In *Fauntleroy*, a Missouri court had rendered a judgment on a futures contract entered into in Mississippi between two Mississippi residents, despite the fact that the contract was criminal and unenforceable in Mississippi.[18] The Mississippi courts denied enforcement on the grounds that the underlying acts were against the public policy of Mississippi and that its courts were powerless to enforce the contract.[19] The United States Supreme Court reversed.[20]

The Court held that the judgment, conclusive in Missouri, was conclusive also in Mississippi under the full faith and credit clause.[21] Because Mississippi courts had the power to enforce plaintiff's action in debt, they were not permitted to inquire into the merits of the judgment.[22] The dissent, joined by three justices, took the position that the full faith and credit clause "was not to confer any new power, but simply to make obligatory that duty which, when the Constitution was adopted rested . . . in comity alone."[23] Under the rules of comity:

> [N]o sovereignty was or is under the slightest moral obligation to give effect to a judgment of a court of another sovereignty, when to do so would compel the State in which the judgment was sought to be executed to enforce an illegal and prohibited contract, when both the contract and all the acts done in connection with its performance had taken place in the latter State.[24]

The Missouri court, by rendering judgment on the futures contract, almost certainly had denied full faith and credit to Mississippi law, probably due to a mistaken belief that the arbitration was binding under Mississippi law.[25] The case should have been decided on the basis of Mississippi law because Missouri's only connection with the case was as the forum.[26] The Court, by requiring enforcement even of a

18. *Id.* at 233-34.
19. *Id.* at 234.
20. *Id.* at 238.
21. *Id.* at 237.
22. *See id.* at 238.
23. *Id.* at 242 (White, J., dissenting)
24. *Id.* at 241 (White, J., dissenting).
25. *Id.* at 238.
26. Full faith and credit in choice of law is a subject for another article, but at the time *Fauntleroy* was decided, the general choice of law rule for contracts was that a contract is controlled by the law of the place where the contract is made. *See* RESTATEMENT OF CONFLICT OF LAWS § 332 (1934). In 1918, ten years after *Fauntleroy*, the Court held that a state could not apply its own law to a contract made in another state. New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918). This seemed to enshrine place of the contract as a constitutional requirement, but a few years later, in a case with very similar facts, the Court distinguished *Dodge*, indicating retreat. Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922). Twenty-two years after *Fauntleroy*,

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judgment granted in violation of the enforcing state's law, has nationalized res judicata. A person has one opportunity to litigate an issue, and then is bound by the result in all states. The effect is to limit the sovereignty of the enforcing state while enhancing the sovereignty of the rendering state.

The rule of *Fauntleroy* was restated, this time in an 8-0 decision, in *Treinies v. Sunshine Mining Co.*[27] In a battle over ownership of mining stock, actions were brought in both Idaho and Washington. The Washington court, in administering the estate, reached a decision first and ruled that the property belonged to the petitioner.[28] Its decision included a finding that it had exclusive jurisdiction because the dispute arose in a probate proceeding.[29] The Idaho trial court's decree for respondent was appealed.[30] The Idaho Supreme Court remanded and the trial court entered a final decree for the respondent.[31] A petition for certiorari from the Idaho Supreme Court decision was denied; no review of the second trial court decision was sought.[32] The defendant then filed another suit in Washington, alleging the invalidity of the Idaho decree.[33] The mining company filed an interpleader in the federal district court in Idaho.[34] The federal courts, culminating with the Supreme Court, upheld the Idaho decree.[35]

The United States Supreme Court held that the Idaho court properly considered the effect of the Washington decree and that the Idaho decision to deny full faith and credit also was proper because the Washington court had no further jurisdiction after a decree of distribution.[36] It was proper for the Idaho court to consider whether the Wash-

the Supreme Court held that the due process clause prevents a state from applying its own law where it has no contacts with the transaction other than being the forum. Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (full faith and credit was not an issue because the foreign state was Mexico). In 1939 the Court explicitly held that an *interested* state may use its own law even though the law of another state purports to control the transaction. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939) (employment relationship in a workers compensation context). Nevertheless, the Court has never allowed a state to use its own law when its only contact with the case is as the forum.

27. 308 U.S. 66 (1939). This is the leading case. Other cases, before and after *Treinies*, have held the same way. *See* Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins., 455 U.S. 691 (1982); Durfee v. Duke, 375 U.S. 106 (1963); Suttor v. Leib, 343 U.S. 402 (1952); Morris v. Jones, 329 U.S. 545 (1947); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Dimock v. Revere Copper Co., 117 U.S. 559 (1886).

28. *Treinies*, 308 U.S. at 68.

29. *Id.* at 69-70.

30. Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1087 (1936).

31. *Treinies*, 308 U.S. at 69.

32. *Id.*

33. *Id.* at 70.

34. *Id.*

35. *Id.* at 76-78.

36. *Id.* at 78.

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ington court had jurisdiction and the parties were free to seek review of the Idaho trial court's decision in an Idaho appellate court.[37] The Idaho court decided the controlling issue—that the Washington decree was not entitled to full faith and credit—and its decision was entitled to full faith and credit.[38]

The rule set forth in *Treinies* has not always been followed by state courts, particularly when the law of the enforcing state is at odds with that of the rendering state.[39] The enforcing state's reluctance to recognize a judgment sometimes is based on the belief that the rendering court failed to consider the judgments of the court from which it now seeks cooperation. The Supreme Court of Arizona has said, "[w]e note that appellants do not ask us to merely give full faith and credit to the Idaho judgment. Instead, we are asked to give it greater credit than the prior Arizona judgments. We do not think the full faith and credit clause requires such a conclusion."[40] This posture misses the fact that the second court was, or would have been had the parties raised the issue, the only court considering the matter of full faith and credit to the first judgment. If there is ever to be finality, the holding on that issue must be given full faith and credit.

Professor Ginsburg suggests that the first court should not be required to adhere to the second judgment when the Supreme Court has denied certiorari to the second judgment.[41] She reasons that the unsuccessful party has fully satisfied the federal policy behind requiring diligent pursuit of a claim for recognition of the first judgment.[42] Ginsburg's position, however, fails to give proper recognition to the need to put an end to litigation. A denial of certiorari has the effect of depriving the second judgment of finality.

B. *Exceptions*

It is noteworthy that most of the exceptions to literal application of the full faith and credit clause arise in cases where the relief sought is non-monetary or where money judgments are affected only collaterally. Full faith and credit to money judgments can be given only by enforcing them, and the "same full faith and credit . . . as they have by law or usage in the courts . . . from which they are taken"[43] clearly

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37. *Id.* at 77-78.

38. *Id.* at 76.

39. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments,* 82 HARV. L. REV. 798, 811-19 (1969).

40. Porter v. Porter, 101 Ariz. 131, 135, 416 P.2d 564, 568 (1966).

41. Ginsburg, *supra* note 39, at 803-06.

42. *Id.*

43. 28 U.S.C. § 1738 (1987).

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requires enforcement. There is less certainty as to what full faith and credit requires with respect to other types of relief.

1. Title to Land

The major exception to the full faith and credit rule arises from decisions that purport to affect title to land. The Supreme Court has not deemed the clause inapplicable, but rather has held that only the state where the land is located has jurisdiction to determine title. As a result, any decree from another state, rendered without jurisdiction, is void.[44] Three cases set forth the contours of the title to land exception of the full faith and credit clause.

Clarke v. Clarke[45] concerned Connecticut land owned by a woman living in South Carolina before her death; her estate was being administered in South Carolina.[46] Her will gave her property to her husband and two daughters.[47] The problem arose when one daughter died before the estate was distributed.[48] The South Carolina court held that the will worked an equitable conversion because it indicated an intent to sell the realty and distribute the proceeds.[49] The court thereupon ordered distribution of the deceased daughter's share under the law of South Carolina to her father and sister equally.[50] When the father sought that distribution in Connecticut, the Connecticut court refused to accept the South Carolina decision and ordered distribution to the sister alone under Connecticut law.[51]

The Supreme Court affirmed the Connecticut decision, holding that South Carolina had no power to determine title to Connecticut land.[52] The courts of South Carolina could construe the decedent's will as it applied to South Carolina property, but if the Connecticut property was real estate it was not amenable to South Carolina jurisdiction.[53] The South Carolina court could not even bind the parties. Because the living sister was a minor, represented by a guardian ad litem[54] who did not have authority outside South Carolina, her interests

44. Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900).

45. 178 U.S. 186 (1900).

46. *Id.* at 187. The decedent owned property in South Carolina and Connecticut.

47. *Id.*

48. *Id.*

49. *Id.* at 188.

50. *Id.*

51. *Id.* at 190.

52. *Id.* at 194-95.

53. *Id.* at 193.

54. A guardian ad litem is a "special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward, or unborn person in that particular litigation." BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

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in Connecticut land could not be represented.[55]

Fall v. Eastin[56] reasserted the holding of *Clarke* in the context of a divorce. The divorce was granted in Washington and the husband, owner of land in Nebraska, was ordered to convey the land to the wife. He failed to do so and the court appointed a commissioner, who executed the deed on the husband's behalf.[57] The husband then transferred the land to a third party.[58] The wife brought an action to quiet title in Nebraska, alleging that she owned the land by the commissioner's deed and that the transferee knew of the commissioner's deed and so was not a good faith purchaser.[59] The United States Supreme Court affirmed the Nebraska courts which held that the commissioner's deed had no effect.[60]

The Court rejected the wife's argument that *Fauntleroy*, which had been decided since *Clarke,* required Nebraska to give full faith and credit to the Washington decree and deed.[61] "[H]owever plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res,* cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established."[62] The Court recognized that a deed executed by the husband would have been effective even though under compulsion of the decree, but found the master's deed ineffective.[63]

55. *Clarke,* 178 U.S. at 193. The Court has never directly addressed the question whether such a decree binds parties who are sui juris. In Fall v. Eastin, 215 U.S. 1 (1909), while holding that a commissioner's deed to Nebraska land was executed without jurisdiction over the land, the Court recognized that the rendering court had jurisdiction to order a conveyance. *Id.* at 14. In Riley v. New York Trust Co., 315 U.S. 343 (1942), the Court stated: "So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem;* so far as it affects *personalty* beyond the state, it is *in personam* . . . ." *Id.* at 353 (emphasis added). The statement implies that a court cannot bind even the parties as to title to realty, but the case dealt with stock, so the Court was not thinking about the problems of realty. There seems to be no good reason to allow persons who had a full opportunity to litigate the issue a second chance elsewhere, but this issue is not resolved in the state courts, as will be shown below.

56. 215 U.S. 1 (1909).

57. *Id.* at 3.

58. *Id.* at 4.

59. *Id.* at 5.

60. *Id.* at 6, 14.

61. *Id.* at 10. Justice Harlan and Justice Brewer dissented without opinion. Justice Holmes concurred on the ground that the Nebraska court held only that the decree could not affect the conscience of the purchaser; he did not see a constitutional issue in that holding. *Id.* at 14-15 (Holmes, J., concurring).

62. *Id.* at 11.

63. *Id.* at 14. The *Fall* plaintiff's choice of remedy may have affected the decision. The Court stated that "[p]laintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply." *Id.* at 12. The reference would be to the requirement of a suit to domesticate a foreign judgment. The plaintiff, in her quiet title action, was asking for direct enforcement of the commissioner's deed. *Id.* at 3-4; *See generally* Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U. Chi. L.

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The Supreme Court's most recent land case involving full faith and credit is *Durfee v. Duke*.[64] The issue before the Court was title to land on the Missouri River which depended on whether a shift in the river's course was caused by avulsion or accretion.[65] The answer to that question determined whether the land was located in Nebraska, where the action was brought initially, or in Missouri, where the losing party brought a second action. The Court held that the Nebraska decision—that the shift was by avulsion and the land was in Nebraska—was entitled to full faith and credit.[66] The question of jurisdiction over the land was fully litigated and the decision binding on the parties.[67]

Durfee is peculiar in that the determination of the location of the land and, thus, jurisdiction, was based upon the same facts that decided the substantive question of title. If the jurisdictional decision was not entitled to full faith and credit, no state court could make a final decision in the case because the jurisdictional question always would be open to challenge on the factual question of location of the land. The Court, however, stated that "[t]he Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."[68]

State court decisions are not uniform on the question of title to land. The courts seem to agree that, while no state has direct power to affect title to land in another state, a court may bind the parties by an equitable decree ordering conveyance of land in another state.[69] There is considerably less agreement about the effect of a decree that purports to affect title directly and does not order any action. Some courts hold that since the foreign court had no jurisdiction over the land, any findings are made without jurisdiction and have no binding effect.[70] Other courts will bind those who are parties to the foreign action by the findings of fact and the holdings as to their rights and duties as to each other.[71]

Reflective of disparate approaches is *Rozan v. Rozan*[72] which be-

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REV. 620 (1954).

64. 375 U.S. 106 (1963).

65. *Id.* at 107-08.

66. *Id.* at 109.

67. *Id.* at 109.

68. *Id.* at 107-08.

69. *See* Annotation, *Res Judicata or Collateral Estoppel Effect, in State Where Real Property Is Located, of Foreign Decree Dealing with Such Property*, 32 A.L.R.3d 1330, §§ 3-4 (1970).

70. *Id.* § 3.

71. *Id.* § 4.

72. 49 Cal. 2d 322, 317 P.2d 11 (1957); *partially enforced*, 129 N.W.2d 694 (N.D. 1964).

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gan as a divorce action in California. The court decided that North Dakota realty owned by the husband was acquired with community funds and thus was community property.[73] The court further decided that the wife was entitled to sixty-five percent of the property, which had been transferred fraudulently by the husband to his nephew.[74] The Supreme Court of California affirmed the decision, but modified the decree to make clear that California was not purporting to affect title to North Dakota land.[75] The original decree which awarded sixty-five percent of the property to the wife as her separate property was modified by the supreme court to state that:

> [E]ach and every one of the . . . North Dakota properties . . . were acquired with community property funds of plaintiff and Rozan; . . . that plaintiff is entitled to 65% of the aforementioned properties and of the rents, issues and profits thereof as against Rozan; that Rozan is entitled to 35% of the aforementioned properties and of the rents, issues and profits thereof as against plaintiff . . . .[76]

The court also stated that the nephew, who was not a party, could not be bound by the judgment.[77]

When the wife sued in North Dakota to enforce the California decree, the North Dakota court recognized the judgment to the extent that it found that the property was acquired with community funds, but refused to enforce that part of the judgment entitling the wife to sixty-five percent.[78] Since the California decree did not order the husband to convey his interest,[79] recognition of the finding as res judicata would be an acknowledgment of jurisdiction in the courts of another state to directly affect the title to North Dakota real property.[80] Therefore, the finding that the conveyance was fraudulent was not res judicata but should be tried by the law of North Dakota.[81]

Rozan creates uncertainty because the California court's careful attempt to assure that its decree would not be taken as an attempt to directly affect title to North Dakota land was ignored by the North Dakota court. While a trial would be required to give the nephew an opportunity to prove that he was a good faith purchaser, there is no reason to give the husband an opportunity to relitigate the issue of title.

73. *Id.* at 327, 317 P.2d at 14.
74. *Id.* at 328, 317 P.2d at 14.
75. *Id.* at 332, 317 P.2d at 16.
76. *Id.* at 332, 317 P.2d at 17.
77. *Id.* at 331, 317 P.2d at 16.
78. Rozan v. Rozan, 129 N.W.2d 694, 701 (N.D. 1964).
79. *Id.* Of course, he could not be ordered to convey because he no longer held title.
80. *Id.*
81. *Id.* at 706.

The husband had an opportunity to prove he did not act fraudulently; his nephew did not. If other courts follow the lead of North Dakota, it will be difficult to fashion a decree involving title to foreign realty to avoid relitigation.

An earlier North Dakota case, while distinguishable, takes a more constructive approach. *In re Reynolds' Will*[82] dealt with North Dakota land held in a California testamentary trust.[83] The estate, including the land, was given in trust for the testator's son for his life, then two-thirds to his issue and one-third to a North Dakota charity, or if, as it happened, the son died without issue, all to the charity.[84] The California probate court, at the time of the testator's death, had ordered distribution to the trust with the two-thirds remainder to be distributed to those named in the son's will if he died without issue.[85] The two-thirds to the charity was void under the California mortmain statute.[86] The charity was not a party to the probate proceeding. When the son died, the trustee filed accountings in the California court. The charity, a party to the accountings, accepted and gave receipts for one-third of the California assets before claiming all of the North Dakota realty under the terms of the will.[87] In a suit filed in North Dakota, the charity argued that the validity of the will as to North Dakota land was controlled by the law of North Dakota, which did not invalidate the gift.[88] The North Dakota court, holding that the charity was limited to one-third, did not vest the California court with jurisdiction to determine the validity of the will as to North Dakota land. Instead, it held that the charity was estopped to claim all of the land, reasoning that if the charity had made the claim early, its share of the land would have been set off against its share in the California assets, entitling it only to one-third of the total estate.[89] Waiting to make its claim until it had accepted its share of the California assets made that distribution impossible and estopped it from claiming more than one-third of the land.[90] Perhaps because the charity was a party to the California accounting and had accepted benefits, the court in *Reynolds*, contrary to the approach it later adopted in *Rozan*, separated the issue of direct effect on title from the issue of rights between the parties.

A case more representative of state approaches is *In re Estate of*

82. 85 N.W.2d 553 (N.D. 1957).
83. *Id.* at 555.
84. *Id.* at 555.
85. *Id.* at 555-56.
86. *Id.* at 556.
87. *Id.* at 556-57.
88. *Id.*
89. *Id.* at 557-58.
90. *Id.*

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Mack,[91] which also arose from a divorce action. The court in Missouri awarded to the wife joint tenancy property located in Iowa.[92] The decree did not order the husband to convey his interest and he had not done so when the wife, since remarried, died.[93] The former husband sought title to the land, asserting that because the Missouri decree was ineffective to transfer his interest, title was still in joint tenancy at his former wife's death and the property was entirely his as the survivor.[94] The Iowa court rejected his argument.[95]

The court acknowledged that some courts recognize the validity of decrees ordering the conveyance of land and refuse to recognize a foreign decree that purports to transfer the title without an order.[96] The court stated that the better reasoned opinions, however, have recognized the decree whenever the foreign court had personal jurisdiction over the parties and adjudicated their rights and responsibilities in regard to the res.[97] "A contrary thesis can only be justified on the ground that granting recognition to the foreign adjudication would violate some fundamental policy of the state where the land is located."[98] The court, having previously recognized an exception with respect to devolution of title on death, found no reason to refuse recognition of the land provisions of a foreign divorce decree.[99] Even though its decision was based upon principles of comity, the *Mack* court recognized that the full faith and credit clause might require the same result.[100]

2. Statutes of Limitations

Another important exception to the rule of full faith and credit allows the enforcing state to apply its own statute of limitations to bar an enforcement action even though the judgment is still enforceable in the rendering state.[101] This result seems contrary to the language of the

91. 373 N.W.2d 97 (Iowa 1985).

92. *Id.* at 98. The decree specifically provided: "The Court sets off to the petitioner . . . the farm located in Cedar County, Iowa . . . to be the petitioner's separate property . . . ."

93. *Id.*

94. *Id.*

95. *Id.* at 100.

96. *Id.* at 99.

97. *Id.* at 99-100.

98. *Id.* at 100.

99. *Id.*

100. *Id.* The court discussed other state court cases holding that, regardless of the form of the decree, the rendering court had decided the rights and obligations of the parties before it and that decision was entitled to full faith and credit. See, e.g., Miller v. Miller, 109 Misc. 2d 982, 984, 441 N.Y.S.2d 339, 341 (1981); Barber v. Barber, 51 Cal. 2d 244, 247, 331 P.2d 628, 630-31 (1958).

101. Watkins v. Conway, 385 U.S. 188 (1966); Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839). Justice Frankfurter, dissenting in *Lamb*, stated that the reverse is also true, i.e.,

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full faith and credit implementing statute which provides that judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."[102]

Watkins v. Conway[103] is particularly bothersome, because it allows a state to bar a sister state's judgment by applying a limitation shorter than that for a domestic judgment. The United States Supreme Court in *Watkins* rejected an equal protection argument, reasoning that a revival of the Florida judgment would start the clock running on the Georgia limitation.[104] The Court stated that "[i]f the appellant held a judgment from a State which did not consider its judgments to become dormant, so that no revival proceeding could be brought, we would be faced with a different case."[105] However, the Florida statute of limitations was longer than the Georgia statute and the judgment had not yet become dormant in Florida.[106] The Court did not consider whether Florida would revive a judgment before it became dormant.

The Supreme Court, in *Union National Bank v. Lamb*,[107] held that, when a judgment has been revived in the rendering state, the enforcing state must use the new date if the revival has the effect of creating a new judgment. The Court stated, however, that the enforcing state may use the original date if the revival has the effect of simply extending the statute of limitation on the original judgment.[108] Determining the effect on the statute of a revival is not always easy. The

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the enforcing state may recognize the judgment even though it is barred in the rendering state. 337 U.S. at 46 (Frankfurter, J., dissenting) (citing Roche v. McDonald, 275 U.S. 449 (1928)). However, *Roche* does not support Justice Frankfurter's statement. In *Roche*, the plaintiff sued in Oregon to enforce a Washington judgment that was barred in Washington. The defendant demurred and then defaulted after the demurrer was denied. Thus the issue of enforceability was not raised in Oregon. The Court held that it could not be raised in Washington and that a state cannot refuse recognition to a foreign judgment because it fails to apply properly the law of the state in which recognition is sought. *Roche*, 275 U.S. at 452 (citing Fauntleroy v. Lum, 210 U.S. 230, 236 (1908)). The defendant should have raised the Washington statute of limitations in the Oregon action.

Justice Frankfurter's statement in *Lamb* raises a different issue. When a state denies recognition to a judgment still enforceable in the rendering state, the question is whether it is denying the plaintiff the relief he obtained in another state and, if so, whether that denial is justified by the forum's view of judicial economy. When a court enforces a judgment barred in the other state, the question is whether it may give the judgment greater effect than it has in the state where rendered. *See infra* notes 222-38 and accompanying text.

102. 28 U.S.C. § 1738 (1987).

103. 385 U.S. 188 (1966) (per curiam).

104. *Id.* at 189-90.

105. *Id.* at 191 n.4.

106. *Id.* at 190 n.2.

107. 337 U.S. 38 (1949).

108. *Id.* at 43-44; *see also supra* note 101 (discussing Justice Frankfurter's dissent in *Lamb*).

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statute in *Lamb*, for example, was less than clear on this issue. The majority quoted one provision: " 'A revived judgment must be entered within 20 years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment.' "[109] The majority also cited a Colorado case holding that a revived judgment has the effect of a new one.[110]

Justice Frankfurter quoted a different provision of the statute: " '[F]rom and after twenty years from the entry of final judgment in any court of this state, the same shall be considered as satisfied in full, unless revived as provided by law.' "[111] Justice Frankfurter construed this provision as an extension of the statute of limitation on the old judgment.[112] The distinction between a new judgment and a revived judgment seems to make the cases more complicated without serving any discernable policy purpose. Whether the judgment is enforceable in the rendering state is a much simpler question to answer. The opinion in *Watkins*, requiring only revival of the foreign judgment, could lead one to conclude that the distinction is no longer controlling, but it is not a holding and state courts have not interpreted it that way.

An examination of some state court cases illustrates the complications that arise when courts attempt to distinguish between new and revived judgments. *Carter v. Carter*[113] considered application of the Virginia statute of limitation to a judgment for child support issued by a Florida court in 1964 and revived in 1977. Virginia law allows twenty years to enforce a judgment and ten years to bring an action to domesticate a foreign judgment.[114] This child support enforcement action was brought in 1981.[115] The court found, without any citation to authority, that under Florida law the relevant date was the date of the original judgment, thus barring the action.[116] The apparent result is that the date of revival is meaningless. The court rejected the argument that the Virginia statute discriminates against foreign judgments in violation of the equal protection clause, reasoning that holders of domestic judgments and holders of foreign judgments are not similarly situated, thus negating the requirement of equal treatment.

The *Carter* court's assertion that the equal protection clause is not violated is untenable. A domesticated judgment is treated as a Virginia

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109. *Id.* at 44 n.11 (quoting 1 COLO. STAT. ANN., ch. 6, Rule 54(h) (1935)).
110. *Id.* at 44 (citing La Fitte v. Salisbury, 43 Colo. 248, 95 P. 1065 (1908)).
111. *Id.* at 47 n.2 (Frankfurter, J., dissenting) (quoting 3 COLO. STAT. ANN., ch. 93, § 2 (1935)).
112. *Id.* at 47 (Frankfurter, J., dissenting).
113. 232 Va. 166, 349 S.E.2d 95 (1986).
114. 2 VA. CODE ANN. §§ 8.01-251,-252 (1990).
115. 232 VA. at 169, 349 S.E.2d at 97.
116. *Id.* at 170, 349 S.E.2d at 97.

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judgment. The foreign creditor thus has twenty years from the date of domestication to bring an action to enforce the judgment, a longer period of time than that afforded to the domestic creditor.[117] The purpose of the ten year limit was to protect defendants from stale claims and give them the opportunity to challenge the jurisdiction of the foreign court.[118] Regardless of its purpose, the effect of the ten year statute is to discriminate against the foreign judgment.[119] Reliance on the reasoning of the United States Supreme Court in *Conway* is inappropriate here because, unlike the Georgia statute which measures from the date of latest revival,[120] the Virginia statute measured from the date of the original judgment and so is discriminatory.[121]

First of Denver Mortgage Investors v. Riggs[122] involved an action on a 1977 Colorado judgment registered in Oklahoma in the same year. No writ of execution was ever issued in Oklahoma.[123] The creditor refiled the judgment in 1982, more than five years after it was rendered in Colorado.[124] Oklahoma law makes a judgment dormant unless execution is issued within five years after it is rendered; it does not provide for revival.[125] The Uniform Enforcement of Foreign Judgments Act, as enacted in Oklahoma, provides that "[a] judgment so filed has the same effect . . . as a judgment [of Oklahoma] . . . and may be enforced or satisfied in like manner."[126] The court held that the combination of the dormancy statute and the Uniform Act requires a domesticated judgment to be treated as an Oklahoma judgment and that, to prevent dormancy, an execution must issue within five years of the rendition, not registration, of the judgment.[127] The effect of this holding is to prevent the judgment creditor who learns too late about debtor-owned property in Oklahoma from enforcing the judgment against that property unless the judgment can be revived and take on the effect of a

117. *Id.* at 171-72, 349 S.E.2d at 97-98.

118. *Id.* at 173, 349 S.E.2d at 99.

119. *Id.* at 175, 349 S.E.2d at 100 (Russell, J. dissenting).

120. *Conway,* 385 U.S. at 189; 6 GA. CODE ANN. § 9-3-20 (Supp. 1990).

121. *Carter,* 232 Va. at 173, 349 S.E.2d at 100 (Russell, J. dissenting); 2 VA. CODE ANN. § 8.01-252 (1990).

122. 692 P.2d 1358 (Okla. 1985).

123. *Id.* at 1359.

124. *Id.*

125. OKLA. STAT. ANN. tit. 12, § 735 (West 1981).

126. *Id.* § 721 (West 1988); UNIF. ENF. FOR. JUDG. A. 13 U.L.A. 149 (1964). The act's provision in section 2 that registration gives the judgment the same effect as a judgment of the state of registration is contrary to the full faith and credit clause and the enabling statute, which require the same effect as the rendering state. The act, in section 6, expressly preserves the creditor's right to enforce his judgment by an action rather than registration, so the creditor may have taken the wrong route here.

127. 692 P.2d at 1363.

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new judgment in the rendering state. The effect also is to allow the judgment debtor to sell concealed or after-acquired property and use the proceeds to buy property in a state like Oklahoma where it can be shielded from the judgment creditor.

The plaintiff in *Ames v. Ames*[128] received a divorce under California law and initiated child support proceedings in California under the Uniform Reciprocal Enforcement of Support Act when she discovered that her former husband was living in Florida. A judgment in her favor was rendered in Florida in 1962.[129] After making fourteen child support payments, the defendant moved to Oregon in 1966.[130] In 1969, a Florida court dismissed the case on the mistaken ground that the case had been dismissed in California.[131] The plaintiff learned in 1976 that the defendant was living in Oregon. She petitioned in 1979 for registration of the 1962 Florida order of support. The Oregon court held that the 1969 dismissal had the effect of relieving the defendant of future obligations; therefore, the 1979 reinstatement was void under Florida law and, presumably, subject to collateral attack in Florida.[132] Because Oregon's ten year statute of limitations begins to run when each payment is due, enforcement of any payments due before 1969 would be barred.[133] This plaintiff was saved, however, by the Oregon court's application of Oregon's tolling statute, which suspends the statute of limitations if the defendant flees Oregon or conceals himself in Oregon.[134] The Oregon court held that since the defendant concealed himself in Oregon, the statute of limitations was tolled from the time he disappeared until the plaintiff learned the location of his whereabouts in 1976. As a result, the judgment for payments due before 1969 could be enforced.[135]

In summary, the United States Supreme Court cases dealing with the issue of use by an enforcing state of its own statute of limitations to avoid enforcement of a foreign judgment are unsatisfactory and result in problems in the state courts. The Court consistently states conclusions without reference to the statutory language, and avoids discussion of the policy reasons which could justify a refusal to apply the statute as written. While the enforcing state has a legitimate interest in keeping its courts free for current litigation, the issues in an action to en-

128. 60 Or. App. 50, 652 P.2d 1280 (1982).
129. *Id.* at 52, 652 P.2d at 1282.
130. *Id.*
131. *Id.*
132. *Id.* at 56, 652 P.2d at 1284.
133. *Id.* at 56-57, 652 P.2d at 1284.
134. *Id.* at 57, 652 P.2d at 1284-85.
135. *Id.* at 58, 652 P.2d at 1285.

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force a judgment usually are simple and require only modest expenditures of the enforcing court's resources. In fact, the need to deal with the question of revival versus new judgment takes more of the court's time than would routine enforcement. More importantly, the full faith and credit clause and its enabling statute require judgments to be given the same effect in enforcing states as in the rendering state.[136] No exception is made for situations where the applicable statutes of limitations differ in length. The statute should be interpreted to require enforcement of any judgment enforceable in the rendering state.

3. Probate

The full faith and credit clause probably has been least effective in the area of probate, where concepts of jurisdiction have narrowed its effect. This narrowing arises in large part from the fiction of the personal representative, an artificial being who derives existence from the appointing court and thus is limited in power to the geographical boundaries of the appointing state. The problem created by the fiction of the personal representative is illustrated by the reasoning of the court in *Knoop v. Anderson.*[137] In *Knoop,* a tort action was brought under Iowa's long-arm statute against the administratrix of the estate of the owner of a car that injured the plaintiff, an Iowa resident, in Iowa. The decedent, owner of the car, was a resident of South Dakota, where his estate was being administered.[138] The Iowa court, on its own motion, set a hearing on the question of whether it had jurisdiction over the administratrix. It concluded that it did not, finding that an administratrix cannot be sued outside the state of appointment.[139] Personal service upon the administratrix while in the forum state is ineffective because the administratrix is not in the forum state in her capacity as administratrix.[140] The Iowa court stated: "Even where a resident of one state is appointed executor of an estate in another state, suit cannot be brought against him in the state of his residence on a claim owing by the decedent."[141] Even a voluntary appearance by the administratrix does not confer jurisdiction.[142] The Iowa court cited a South Dakota court, saying: " 'The duties of representatives are exclusive and inde-

136. The statute provides in part that "judicial proceedings . . . [properly] authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1966).

137. 71 F. Supp. 832 (N.D. Iowa 1947).

138. *Id.* at 834.

139. *Id.* 838-52.

140. *Id.* at 852.

141. *Id.* at 845.

142. *Id.*

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pendent within the jurisdiction of their appointments even though the same individual is the appointed representative of an estate in two or more states.' "[143]

The problems associated with enforcement of foreign judgments arising from probate proceedings have lessened substantially as courts have accepted jurisdiction over actions brought both by and against foreign personal representatives. The long-arm statutes conferring jurisdiction on the basis of the decedent's actions have been upheld by almost all courts,[144] and the Uniform Probate Code (UPC) provides for jurisdiction on that basis.[145] Jurisdiction generally has been allowed without benefit of a long-arm statute,[146] but, in *Feltman v. Coulter,*[147] the Arizona Supreme Court denied jurisdiction over a foreign personal representative. In *Pantano v. United Medical Laboratories,*[148] the Ninth Circuit denied a foreign personal representative the right to sue.

The concept of limited existence for a personal representative can produce bizarre effects. In ancillary administrations, there is no privity between the administrators, although there may be between executors.[149] A creditor of the estate who successfully sues one administrator may have to sue again if he needs to recover his judgment from another administrator. Res judicata does not apply because the second administrator was not a party to the action, nor was he in privity with a party.[150] On the other hand, if the creditor is unsuccessful against one administrator, he cannot sue the other.[151] If one administrator sues and

143. *Id.* at 852 (quoting American Sur. Co. v. Western Sur. Co., 71 S.D. 126, 129, 22 N.W.2d 429, 431 (1946)). Even though the personal representative is somewhat protected, protection comes at a cost in that the personal representative generally may not bring an action outside the state of appointment. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 354 (1971). The exceptions are failure of the defendant to object; possession by the personal representative of a negotiable instrument, share certificate, or negotiable document of title that is the basis of the claim; a finding that the suit is in the best interests of the estate and will not prejudice local creditors; and a local law permitting the suit. The personal representative may also sue on a claim acquired after his appointment. *Id.* § 355. These exceptions indicate that the real problem is not the limited existence of the artificial person.

144. E. SCOLES & P. HAY, CONFLICT OF LAWS § 8.24 & n.2 (1982).

145. Unif. Probate Code § 4-302, 8 U.L.A. 425 (1983).

146. *See, e.g.,* Saporita v. Litner, 371 Mass. 607, 358 N.E.2d 809 (1976).

147. 111 Ariz. 295, 528 P.2d 821 (1974) (refusing to stay an action pending decision in an Illinois case because the personal representative of an Arizona estate could not be bound and a judgment against her would not be given full faith and credit).

148. 456 F.2d 1248 (9th Cir. 1972) (applying Oregon law to dismiss a wrongful death action brought by a Nebraska special administrator).

149. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 353 comment a (1971). This is because executors derive their power from the deceased while the administrator has only the power given by the law of the appointing state. Hill v. Tucker, 54 U.S. (13 How.) 458 (1851).

150. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 356.

151. *Id.* § 357.

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loses, another administrator is not bound by the judgment.[152] The losing party is protected only to the extent that when one administrator has recovered a judgment the other cannot sue.[153] The foregoing results because the losing party is an actual party to the suit, and so is bound by any decision, while the estate is represented by multiple parties who do not bind each other.[154] The UPC has changed these results; an adjudication in any jurisdiction is as binding over the local personal representative as if he were a party to the adjudication.[155]

The legislature of Kansas tried to cut through this maze by providing for universal, or nearly universal, administration.[156] Unfortunately, the Supreme Court of Kansas, in *In re Estate of De Lano,*[157] held that the Kansas statute was ineffective to give a local administrator power over property located in other states.[158] The basis for the holding was that the situs of the property conferred jurisdiction in rem and that no other state could have jurisdiction.[159] The result in *De Lano* was probably correct, because the decedent died before the effective date of the statute.[160] Additionally, there were parallel administrations in Kansas and Missouri until the Kansas administrator was ordered to collect the Missouri assets.[161] The Kansas Supreme Court correctly held that full faith and credit was due the Missouri probate because the probate was commenced before the Kansas court made any claim to the assets.[162] It also held that the statute was unconstitutional. This reasoning is questionable because appointment of a universal administrator is a judicial action and should be entitled to full faith and credit. The United States Supreme Court never has held that the situs of personalty creates ex-

152. *Id.* § 353.

153. *Id.* § 352.

154. The reporter's notes to both sections 353 and 356 of Restatement (Second) of Conflict of Laws state that the rule "may lead to unjust and inconvenient results and is stated only because of what is thought to be compelling, although comparatively ancient, authority." However, a recent case, in refusing a motion by an Indiana administrator to quash an Illinois action, stated that "there is no privity between a decedent's domiciliary and ancillary estates, and a judgment against the representative of one of the decedent's estates is not binding on the decedent's other estates or representatives." Wisemantle v. Hull Enters., 103 Ill. App. 3d 878, 881-82, 432 N.E.2d 613, 616 (1981) (citation omitted).

155. Unif. Probate Court § 4-401, 8 U.L.A. 427 (1983).

156. KAN. STAT. ANN. § 59-303 (1955) (repealed 1959). The statute provided that, "[t]he courts of Kansas shall have exclusive jurisdiction to determine the devolution of property by will or descent of all persons who are residents of Kansas at the time of death as to real property located in Kansas and tangible or intangible personal property wherever located." *Id.*

157. 181 Kan. 729, 315 P.2d 611 (1957).

158. *Id.* at 742, 315 P.2d at 621.

159. *Id.*

160. *Id.* at 731, 315 P.2d at 613-14.

161. *Id.* at 731-32, 315 P.2d at 614.

162. *Id.* at 752, 315 P.2d at 628.

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clusive jurisdiction, but it has held that the power of a receiver of an insolvent corporation must be recognized by other states.[163] There is no reason to treat the representative of a deceased person differently.[164]

The UPC has alleviated some of the problems surrounding enforcement of judgments in probate proceedings by allowing a foreign personal representative to act, so long as no domiciliary personal representative has been appointed, by filing a copy of his appointment with the appropriate court.[165] The UPC also gives the domiciliary personal representative priority for appointment as the ancillary personal representative.[166] Additionally, the UPC makes the foreign personal representative subject to the jurisdiction of the court "to the same extent that his decedent was subject to jurisdiction immediately prior to death."[167] Finally, the UPC makes an adjudication against any personal representative in any jurisdiction binding on the local personal representative as if he were a party to the adjudication."[168]

C. *Uncertain Areas*

The law is unsettled on the enforceability in a foreign court of modifiable decrees, custody decrees, injunctions against foreign suits, and penalty judgments, and on the collateral estoppel effects of judgments. The current status of these issues is discussed in this section.

1. Modifiable Decrees

Neither the full faith and credit clause nor its implementing statute[169] says anything about finality, but there is a general understanding that only a final judgment or decree is entitled to full faith and credit.[170] The courts generally have found that judgments subject to modification in the state of rendition are not entitled to full faith and credit.[171] The Supreme Court has not decided this precise question,[172]

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163. Converse v. Hamilton, 224 U.S. 243 (1912).

164. *See* Currie, *The Multiple Personality Of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L REV. 429, 435-38 (1966).

165. UNIF. PROBATE CODE §§ 4-204 to -206, 8 U.L.A. 422-24 (1983).

166. *Id.* § 3-203, 8 U.L.A. 239.

167. *Id.* § 4-302, 8 U.L.A. 426.

168. *Id.* § 4-401, 8 U.L.A. 427.

169. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1987).

170. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971).

171. *Id.* § 109 comment c.

172. *But see* Barber v. Barber, 323 U.S. 77 (1944). The concurring opinion states:

> Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.

Id. at 87 (Jackson, J., concurring).

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but it has held that, if a modifiable decree is enforced in another state, the defendant must be given the same opportunity to seek modification that would have existed in the rendering state.[173]

The state courts have handled the issue of the modifiable decree in varying ways. Some have refused enforcement.[174] The California Supreme Court set the example for discretionary enforcement in *Worthley v. Worthley.*[175] In *Worthley,* the court enforced a New Jersey support decree that was both retroactively and prospectively modifiable.[176] It held that while the full faith and credit clause did not require enforcement, the decree should be enforced in California when it was a more convenient forum than the rendering state.[177] It remanded the case for a trial on the issue of modification and stated that either party could litigate that issue.

In contrast, the Illinois Supreme Court, in *Light v. Light,*[178] held that a Missouri support order was entitled to full faith and credit.

> Policy considerations argue strongly that such decrees are entitled to full faith and credit. . . .
>
> Strong as are the considerations of policy, the argument that derives from the language of the constitution itself is at least as strong. . . .
>
> The practical problems that might arise in the enforcement of a decree subject to modification by the courts of more than one forum are no more difficult under the full-faith-and-credit clause than they are when foreign judgments are given full effect as a matter of comity.[179]

2. Custody

The United States Supreme Court has never decided squarely whether a custody decree is entitled to full faith and credit. In *Halvey v. Halvey,*[180] the Court held that the forum has at least as much leeway as the rendering state to modify a modifiable custody decree. In *May v. Anderson,*[181] the Court held that a custody decree rendered without personal jurisdiction over one parent could not be binding on that parent and the state where that parent is located is not required to give

173. Griffin v. Griffin, 327 U.S. 220, 232-34 (1946).

174. *E.g.,* Page v. Page, 189 Mass. 85, 75 N.E. 92 (1905); Catlett v. Catlett, 412 P.2d 942 (Okla. 1966).

175. 44 Cal. 2d 465, 283 P.2d 19 (1955).

176. *Id.* at 474, 238 P.2d at 25.

177. *Id.* at 473-74, 283 P.2d at 24-25.

178. 12 Ill. 2d 502, 147 N.E.2d 34 (1957).

179. *Id.* at 510-11, 147 N.E.2d at 39-40.

180. 330 U.S. 610 (1947); *see also* Ford v. Ford, 371 U.S. 187 (1962) (full faith and credit not applicable to judgments which are not res judicata); Kovacs v. Brewer, 356 U.S. 604 (1958) (dealing with the effects of changed circumstances).

181. 345 U.S. 528 (1953) (plurality opinion).

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full faith and credit to the decree.[182]

State courts differ as to whether a custody decree is entitled to full faith and credit when the court lacks jurisdiction over one of the parents. Most are inclined to grant full faith and credit, subject to the right to modify the decree upon a showing of changed circumstances.[183] However, in looking for changed circumstances, the courts frequently reexamine the merits of the original decree.[184] In *Borys v. Borys,*[185] the Supreme Court of New Jersey denied full faith and credit to a Florida decree on the grounds that "[c]ustody judgments are inherently ephemeral decisions about continuing relationships which are subject to constantly changing conditions,"[186] and that "local interests outweighed the need for uniform treatment of the decree."[187] The court emphasized, however, that it could choose to recognize the decree to protect the child's interests, and that it could decline jurisdiction.[188] The latter would be appropriate when the child is present in the forum as a result of child snatching or disobedience of the custody order of a sister state.[189] The *Borys* court was willing to undertake a new inquiry because the children had been in New Jersey for three years and the disruptive potential of removing them was patent.[190]

The problem with the *Borys* result is that the status of the child remains unsettled because the dissatisfied parent has a good chance of getting a different result by taking the child to another state and bringing an action there. With increased public awareness of child snatching, and the understanding that a parent who is before the court can be more persuasive than the absent parent, some courts began to give a greater full faith and credit effect to custody decrees. In *Ferreira v. Ferreira,*[191] the Supreme Court of California held that it would give full faith and credit to an Idaho decree granting custody to the mother.

182. Because the case went to the Court on the holding of the Ohio court that full faith and credit was required, the direct holding was that it was not. However, the language of the plurality opinion indicates that due process would prevent enforcement of the decree even by comity because the rendering court had no jurisdiction over the mother. *Id.* at 533-34. Justice Frankfurter's concurrence, necessary to make the majority, is based solely on lack of a requirement of full faith and credit. *Id.* at 535 (Frankfurter, J., concurring). Therefore, the question of enforcement by comity is left open. The dissent argued that the jurisdictional question was not raised on the record. *Id.* at 542 (Minton, J., dissenting).

183. *See* Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees,* 73 YALE L.J. 134, 143-44 (1963).

184. *Id.* at 143.

185. 76 N.J. 103, 386 A.2d 372 (1978) (per curiam).

186. *Id.* at 124, 386 A.2d at 376.

187. *Id.* at 123-24, 386 A.2d at 376.

188. *Id.* at 124-25, 386 A.2d at 377.

189. *Id.* at 125, 386 A.2d at 377.

190. *Id.* at 126-27, 386 A.2d at 378.

191. 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

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The father who had the child in California had no standing to seek modification except where there was an allegation and proof that enforcing the original decree would endanger the health and safety of the child.[192] Because such an allegation was made, the court granted the petitioning parent temporary custody, and ordered a stay of the forum proceeding to give the rendering state an opportunity to consider modification. The court also retained jurisdiction until the modification proceeding was complete.[193]

The Uniform Child Custody Jurisdiction Act (UCCJA),[194] now enacted in all states and the District of Columbia,[195] is designed to give one state full responsibility for the custody of a child.[196] The UCCJA sets out factors to be used to determine which state has jurisdiction and requires other states to defer to that state.[197] The UCCJA also provides for changes in jurisdiction if the original state no longer has appreciable ties with the child and the family.[198] The purpose of the UCCJA is to confer decision-making responsibility in the court that has the most information about the situation of the child and the parents.[199]

It is not clear that the jurisdictional provisions of the UCCJA meet the constitutional requirements of the full faith and credit clause as set forth in *May v. Anderson*.[200] The UCCJA, by allowing jurisdiction in a state where only one parent is located,[201] does not meet the standard of the plurality opinion in *May*, which stated that the rendering state cannot bind a parent who personally is not before it.[202]

Congress, exercising its power under the full faith and credit clause, has made the jurisdictional and substantive provisions of the Parental Kidnaping Prevention Act (PKPA) the standard for recognition of foreign custody orders.[203] The statute provides:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the

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192. *Id.* at 842, 512 P.2d at 316, 109 Cal. Rptr. at 92.

193. *Id.* at 843, 512 P.2d at 317, 109 Cal. Rptr. at 93; *see also In re* Marriage of Saucido, 538 P.2d 1219 (Wash. 1975) (using unclean hands doctrine to deny jurisdiction to a parent who had brought the child to Washington in violation of a guardianship order of Arizona).

194. 9 pt. 1 U.L.A. 115 (1968).

195. *Id.* at §§ 115-16.

196. *Id.* § 1, at 123-24.

197. *Id.* § 3, at 143-44.

198. *Id.*

199. *Id.* § 1, at 123-24.

200. 345 U.S. 528 (1953).

201. 9 U.L.A. at § 143.

202. 345 U.S. at 534.

203. 28 U.S.C. § 1738A (1980).

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provisions of this section by a court of another State.[204]

The phrase, "provisions of this section," refers to the provisions of the PKPA, but strong preference is given to the home state of the child by allowing jurisdiction based on the best interest of the child only when no state has jurisdiction as the home state of the child.[205]

The United States Supreme Court in *Thompson v. Thompson*[206] held that the PKPA does not provide a federal cause of action to determine which of two conflicting state custody decrees is valid.[207] This holding is consistent with evolving full faith and credit principles, and seems to be workable.

Whether the promulgation of the PKPA will solve the problem of enforcement of child custody orders is doubtful. Responsibility for child custody, if retained in a single state, could reduce problems substantially, but the issue of jurisdiction over an absent parent raised in *May* cannot be resolved by statute. It might be argued that the PKPA, enacted under the enabling power of the full faith and credit clause, trumps the due process clause as a result of the compelling need to have a single state with exclusive jurisdiction. In spite of any judicial resolution of this issue, the emotion inherent in custody cases will continue to result in renewed efforts at custody by dissatisfied parents.

3. Injunction of Foreign Suit

The United States Supreme Court has held that a state may bind the parties by injunction of suit in another state,[208] but it has not decided the effect of such an injunction when the foreign suit proceeds to judgment. As a result, some state courts have held that an injunction is not entitled to full faith and credit.[209] *James v. Grand Trunk Western Railroad*[210] is an example of the extreme result that follows from such a holding. A Michigan plaintiff who sued the railroad in Illinois for an accident that occurred in Michigan was enjoined by a Michigan court from proceeding with the Illinois action.[211] The Illinois court not only refused to respect the injunction, but issued a counter injunction ordering the defendant not to seek enforcement of the Michigan injunction.[212] Affirmance by the Supreme Court of Illinois may have reflected

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204. *Id.* § 1738A(a).
205. *Id.* § 1738A(c)(2)(D)(i).
206. 484 U.S. 174 (1988).
207. *Id.* at 187.
208. Cole v. Cunningham, 133 U.S. 107, 134 (1890).
209. Ginsburg, *supra* note 39, at 823-24.
210. 14 Ill. 2d 356, 152 N.E.2d 858 (1958).
211. *Id.* at 358, 152 N.E.2d at 859.
212. *Id.* at 372, 152 N.E.2d at 867.

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disapproval of the defendant's use of the extraordinary remedy of injunction rather than the ordinary one of moving to dismiss on the ground of inconvenient forum. Secondly, the court's ruling may have reflected the belief that seeking extraordinary relief expressed a lack of respect for the right of Illinois courts to determine their own jurisdiction.[213]

The effect of a judgment obtained in violation of a foreign injunction also is uncertain. In *Joffe v. Joffe*,[214] a New Jersey superior court enjoined a wife from pursuing a New York separation action. New Jersey was the marital domicile; the wife and child were living in New York while the husband was still in New Jersey.[215] The wife ignored the injunction and continued the New York action.[216] The husband was held to have made a general appearance by the New York court which granted the wife's request for separation, child custody, and support for herself and the child.[217] The New Jersey Superior Court found the wife guilty of contempt; its decision was affirmed by the New Jersey Supreme Court.[218] In the meantime, the wife had obtained two support arrears adjudications from New York and sought to collect them in the federal district court in New Jersey, which stayed the proceeding pending decision of the contempt case.[219] The wife's appeal of the stay was before the federal court of appeals when the New Jersey court held the stay proper.[220] The New Jersey court, while not openly denying full faith and credit to the New York judgment, produced that effect because the wife would be in contempt every time she tried to enforce an arrears judgment.[221]

An Illinois court, in *Keck v. Keck*,[222] reached a different conclusion on the effect of a judgment obtained in violation of a foreign injunction. In *Keck*, a husband filed a divorce action in Illinois.[223] When his wife counter-claimed for separate maintenance, he moved to Nevada where soon after he filed a divorce action.[224] The Illinois court enjoined his proceeding with the Nevada action, but he ignored the

213. *Id.* at 371, 152 N.E.2d at 862.
214. 50 N.J. 265, 234 A.2d 232 (1967), *cert. denied*, 390 U.S. 1039 (1968).
215. *Id.* at 267, 234 A.2d at 233.
216. *Id.* at 266, 234 A.2d at 232.
217. *Id.* at 266, 234 A.2d at 233.
218. *Id.* at 267, 234 A.2d at 237.
219. Joffe v. Joffe, 384 F.2d 632, 633 (3d Cir. 1969), *cert. denied*, 390 U.S. 1039 (1968).
220. *Id.*
221. *See* Ginsburg, *supra* note 39, at 827.
222. 8 Ill. App. 3d 277, 290 N.E.2d 385 (1972).
223. *Id.* at 278, 290 N.E.2d at 387.
224. *Id.* at 279, 290 N.E.2d at 387.

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injunction and ultimately obtained a divorce.[225] He then filed a motion to dismiss the Illinois action on the ground that the marriage had been dissolved. The Illinois court denied the motion, holding that his divorce decree was invalid because he violated the injunction.[226] An Illinois appellate court reversed, holding that the injunction operated on the husband, not on the Nevada court whose decision, therefore, was entitled to full faith and credit.[227]

Ginsburg would appear to argue that the nonsuit injunction should be given full faith and credit by the court whose action was enjoined.[228] This position seems to be consistent with the United States Supreme Court's interpretation of the full faith and credit clause, and with the language of the clause and its implementing statute. A decision by a court with the parties before it is a proper forum for litigation. Foreign courts should recognize the nonsuit injunction for what it is—an order to a party which is not intended to, and does not, interfere with another court's jurisdiction except as it decides rights between the parties. If the injunction is not recognized, however, the *Keck* result seems preferable to that of *Joffe*. Regardless of the circumstances under which it is obtained, the nonsuit injunction is a final judgment squarely within the mandate of the Supreme Court.

4. Tax Judgments and Penalties

"The Courts of no country execute the penal laws of another . . . ."[229] This statement, made in a case deciding that slaves taken in the capture of a pirate ship must be returned to their owner, has been lifted out of context to support holdings asserting that a state need not enforce another state's penal laws.[230] The concept has been extended further to include tax laws.[231] The United States Supreme Court, in *Wisconsin v. Pelican Insurance Co.*,[232] has indicated that penal judgments need not be enforced.[233] The holding, however, was based upon the Court's lack of original jurisdiction to enforce a penalty imposed by Wisconsin on a Louisiana insurer that did not comply with Wisconsin

225. *Id.*

226. *Id.* at 280, 290 N.E.2d at 388.

227. *Id.* at 282, 290 N.E.2d at 390.

228. Ginsburg, *supra* note 39, at 828; *see also* Comment, *Full Faith and Credit to Foreign Injunctions*, 26 U. Chi. L. Rev. 633, 635 (1959).

229. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, J.).

230. *See* Comment, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 195 (1932).

231. *Id.* at 215-19.

232. 127 U.S. 265 (1888).

233. *Id.* at 289-90.

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requirements.[234] In *Huntington v. Atrill,*[235] the Court narrowed the definition of a penal claim, enabling it to enforce what otherwise would have been a penal judgment.[236] The Court avoided any declaration that the judgment would be unenforceable if penal.

The Supreme Court, in *Milwaukee County v. M.E. White Co.,*[237] holding that a judgment for taxes is entitled to full faith and credit, stated: "[A] judgment is not to be denied full faith and credit . . . merely because it is for taxes."[238] Although the logic of *Milwaukee County* could be extended to judgments based on penal claims, later decisions do not adopt this approach. As a result, the older cases still may provide support for denying enforcement of penal claims.

A series of New Jersey cases sheds considerable light on the problem of enforcement of penal claims.[239] In *City of Philadelphia v. Smith,*[240] the New Jersey Supreme Court enforcing a tax judgment, held that the portion of a tax judgment imposing a civil penalty of one percent per month for unpaid taxes was not punishment, but, rather, compensation for the expense of collecting unpaid taxes. In *City of Philadelphia v. Austin,*[241] the same court held that a judgment for a $300 fine levied for non-payment of taxes is enforceable. The court apparently was influenced by the reduction of the penal claim to a judgment.[242] This significant change in status was said to have enhanced enforceability under the full faith and credit clause but was not the only reason for granting enforcement. The court said, "[a]lthough the reduction of the claim to a judgment might be sufficient by itself to remove the barrier of the penal exception, other reasons support enforcement of the judgment under the Full Faith and Credit Clause."[243] The court was influenced by the role of the penalty in a tax law designed to collect revenues and reasoned that the penalty may be necessary to compensate for collection costs.[244] The purpose of the penalty,

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234. *Id.* at 299-300.

235. 146 U.S. 657 (1892).

236. *Id.* at 683-84.

237. 296 U.S. 268 (1935).

238. *Id.* at 279.

239. The cases arose from a common scenario. Many New Jersey residents worked in Philadelphia for the federal government. These workers were subject to the Philadelphia Wage and Net Profits Tax Ordinance but failed to pay taxes due under it. The federal government withheld no wage taxes. The City of Philadelphia brought suits in Pennsylvania seeking payment of taxes and interest thereon. *E.g.,* City of Philadelphia v. Smith, 82 N.J. 429, 413 A.2d 952 (1980).

240. *Id.*

241. 86 N.J. 55, 429 A.2d 568 (1981). For a good discussion of the history of the penal judgment problem, see *id.* at 58-60, 429 A.2d at 569-70.

242. *Id.* at 63, 429 A.2d at 572.

243. *Id.* at 62, 429 A.2d at 571.

244. *Id.*

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said the court, is not to punish, "but to grant a civil remedy to the City in its role as tax collector."[245] The New Jersey Supreme Court found it unnecessary and inappropriate[246] to reject outright the penal exception in light of its recent reaffirmation by the United States Supreme Court.[247] The New Jersey court stated that, in the alternative, the penalty judgment could be enforced under principles of comity.[248]

Finally, in *City of Philadelphia v. Bauer,*[249] the New Jersey Supreme Court dealt with a legislative response to its earlier holdings. The statute in question provided that no judgment obtained for any employment wage tax, including penalties, may be enforced by sale of realty.[250] The court declared this statute invalid on the grounds that it violated the full faith and credit clause and said: "[A] state must accord full faith and credit to a judgment of a sister state. This is so even if the underlying cause of action in the original judgment would not necessarily be a valid cause of action in the state providing the forum for enforcement."[251] The court emphasized that the cause of action had merged into the judgment, which, as an obligation to pay money, is as enforceable as any debt.[252] The court reasoned that the statute would be applicable only by going behind the judgment, thus violating the purpose of the full faith and credit clause.[253] The court recognized that local law may determine the scope and nature of available remedies, but found that application of the statute would deny the only available remedy.[254] It also found, based upon legislative history and on the fact that no New Jersey government has a wage tax, that the statute was directed specifically at the Philadelphia tax.[255] The court said that "[a] state may not by subterfuge refuse to give full faith and credit to the judgment of a sister state."[256]

The court's language, if taken literally, would mean that it is

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245. *Id.*
246. *Id.* at 63, 429 A.2d at 572.
247. Nelson v. George, 399 U.S. 224, 229 (1970). A concurring opinion in *Austin* argued that *Nelson* is inapplicable as it applies to a criminal order, not a civil penalty. 85 N.J. at 67, 429 A.2d at 574 (Schreiber, J., concurring).
248. 85 N.J. at 63-64, 429 A.2d at 572-73.
249. 97 N.J. 372, 478 A.2d 773 (1984).
250. N.J. REV. STAT. § 2A:17-17 (1987).
251. 97 N.J. at 377, 478 A.2d at 776.
252. *Id.* at 377-78, 478 A.2d at 776.
253. *Id.* at 379, 478 A.2d at 777.
254. *Id.* at 381, 478 A.2d at 778.
255. *Id.* at 380, 478 A.2d at 777.
256. *Id.; see also* Boyer v. Korsunsky, Frank, Erickson Architects, Inc., 191 Ga. App. 549, 550, 382 S.E.2d 362, 364 (1989). The court enforced a Michigan consent judgment that provided for monthly payments and rejected the argument that the 12 percent statutory interest was a penalty and against Georgia public policy stating that, the full faith and credit clause controls even if it is a penalty.

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ready to reject the penal exception entirely, since rejecting any judgment on the basis of penalty would require going behind the judgment. New Jersey's position is correct, as neither the full faith and credit clause nor its enabling statute excepts penal judgments.

5. Claim Preclusion

Whether a judgment should be given greater effect than it has in the state where rendered was the issue before the New York court in *Hart v. American Airlines.*[257] Several actions arose out of a plane crash in Kentucky.[258] The first case to reach judgment, filed in Texas, resulted in a plaintiff's victory.[259] New York plaintiffs then asked that the cases pending in New York be confined to the issue of damages, and that the Texas finding of negligence be applied upon a theory of collateral estoppel.[260] The New York court applied collateral estoppel, holding that the policies of limiting a party to one day in court and preventing inconsistent results are applicable to both foreign and domestic decisions.[261] The court's application of collateral estoppel is sensible. Giving the Texas judgment greater preclusive effect is consistent with the policy of respect for the rendering state,[262] and with the policy of putting an end to litigation.

The United States Supreme Court tacitly approved the *American Airlines* result in *Allen v. McCurry.*[263] The issue in *Allen* was whether a plaintiff in a Section 1983 action brought against police officers for unconstitutional search and seizure was bound by a state court exclusionary hearing finding that the search was not illegal.[264] The Supreme

257. 61 Misc. 2d 41, 304 N.Y.S.2d 810 (N.Y. Sup. Ct. 1969).

258. *Id.* at 41, 304 N.Y.S.2d at 811.

259. American Airlines v. U.S., 418 F.2d 180 (5th Cir. 1969).

260. 61 Misc. 2d at 42, 304 N.Y.S.2d at 811. Texas followed the historical rule that estoppel must be mutual. Under this rule collateral estoppel would be inapplicable because the New York plaintiffs could not be bound by the Texas action. New York, however, follows the modern rule of collateral estoppel which allows a nonparty in the prior action to estop a party in the prior action from relitigating any issue decided in the prior action when two requirements are met: (1) the issue must have been necessary to the prior decision, and (2) the party to be bound by estoppel must have had a full and fair opportunity to litigate the issue in the prior action. *Id.* at 43, 304 N.Y.S. at 812; *cf.* Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301 (1961) (supporting the retention of mutuality except in certain limited areas).

261. *Hart,* 61 Misc. 2d at 46, 304 N.Y.S.2d at 815. An earlier motion by a different plaintiff had been denied and the denial affirmed by the appellate division. 31 A.D.2d 896, 297 N.Y.S.2d 587 (1969). The *Hart* court distinguished that holding on the ground that the plaintiff was a nonresident of New York while the present plaintiffs were residents. 61 Misc. 2d at 43-44, 304 N.Y.S.2d at 813. This may be a rational basis for distinction under the full faith and credit clause, but it raises a problem of discrimination under the article IV privileges and immunities clause.

262. Currie, *Res Judicata: The Neglected Defense,* 45 U. CHI. L. REV. 317, 326-27 (1978).

263. 449 U.S. 90 (1980).

264. *Id.* at 91.

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Court determined that federal collateral estoppel rules were applicable and that the plaintiff was indeed bound.[265] It is noteworthy that the Court did not address the question of whether application of the state rules would collaterally estop the plaintiff. The omission indicates that the Court did not find the question important.

III. Purpose of the Full Faith and Credit Clause

Evaluation of the reach of the full faith and credit clause depends on understanding its purpose. Three workers' compensation cases shed light on the issue of purpose and suggest that the clause is intended to achieve unification of the states on a national level.

Magnolia Petroleum Co. v. Hunt[266] concerned the preclusive effect of a Texas workers' compensation award on an employee's right to compensation under the Louisiana workers' compensation statute.[267] The plaintiff, employed in Louisiana, was injured while working in Texas for the same employer.[268] After receiving a compensation award in Texas that became final according to the Texas statute, the plaintiff then brought an action in a Louisiana district court seeking compensation for his injury under Louisiana law.[269]

The United States Supreme Court held that the Texas award was final and entitled to full faith and credit, thus precluding an additional Louisiana award.[270] The Court assumed that there might be "exceptional cases in which the judgment of one state would not override the laws and policy of another," but found no such exception in the case of a money judgment.[271] The Court indicated that future exceptions are a remote possibility:

> These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which

265. *Id.* at 105.
266. 320 U.S. 430 (1943).
267. *Id.* at 432.
268. *Id.*
269. *Id.* at 433.
270. *Id.* at 441.
271. *Id.* at 438.

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> rights judicially established in any part are given nation-wide application. Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.[272]

Four justices dissented. Justice Douglas, joined by Justice Murphy, argued that the Texas award did not purport to adjudicate the rights of the employee under Louisiana law and was not res judicata as to that law.[273] Justice Black, joined by Justices Douglas, Murphy, and Rutledge, additionally found it significant that the proceeding in Texas was against the insurer only and the award was limited to a release of the insurer from further liability.[274] The employer's liability was not in issue.[275]

Industrial Commission v. McCartin[276] reached the Supreme Court four years after *Magnolia Petroleum*. The case involved an Illinois employee of an Illinois employer injured while working in Wisconsin. In order to avoid the expense and delay of litigation, the employer and employee entered into a settlement contract which fixed compensation at the amount to which the employee was entitled under the Illinois Workmen's Compensation Act.[277] The settlement agreement became, in legal effect, an award after it was approved by one of the commissioners of the Illinois Industrial Commission.[278] One of the stated provisions of the agreement stipulated: "[t]his settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin."[279] The Supreme Court held that Wisconsin could grant a supplemental award because the Illinois award was not intended to be final and conclusive of all the employee's rights.[280]

The Supreme Court in *McCartin* distinguished *Magnolia Petroleum* by noting that there was nothing in the Illinois statute to indicate that it was exclusive and would preclude any recovery proceedings brought in a different state during the course of employment in Illinois.[281] The Court also based its decision on the fact that the settlement agreement stated that the agreement did not affect the employee's

272. *Id.* at 439-40 (citations omitted).
273. *Id.* at 447-51 (Douglas, J., dissenting).
274. *Id.* at 453 (Black, J. dissenting).
275. *Id.*
276. 330 U.S. 622 (1947).
277. *Id.* at 624.
278. *Id.* at 628.
279. *Id.* at 629.
280. *Id.* at 630.
281. *Id.*

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rights under Wisconsin law.[282] The Court did not cite the Texas statute, which provides that employees "shall have no right of action against their employer or against any agent, servant or employée of said employer for damages for personal injuries . . . but such employées . . . shall look for compensation solely to the association [the insurer]."[283] In a comparable vein, the Illinois statute provides: " 'No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act . . . .' "[284] The statutes do not appear to be distinguishable.

The Supreme Court in *McCartin* lost sight of the concept of the full faith and credit clause as a nationalizing provision. If the clause truly is to nationalize judgments, the Court's inquiry should have been into the res judicata effect of the Illinois award, not the effect on other states that was intended by Illinois. An award final in Illinois should be final in all states. The Court's suggestion that the award was not really final may be the basis for finding it was res judicata only as to rights in Illinois. The Court's emphasis on the effect intended by Illinois, however, clearly undermines the unifying purpose of the full faith and credit clause.

Thomas v. Washington Gas Light Co.[285] further confuses the issue. A District of Columbia employee of a District of Columbia employer was injured in Virginia and received a workers' compensation award in Virginia.[286] The employee then applied for and received a supplemental award in the District of Columbia.[287] The Supreme Court upheld the supplemental award in a decision lacking a majority.[288] The multiplicity of opinions in *Thomas* reflects considerable confusion about the purpose of the full faith and credit clause.

The plurality opinion written by Justice Stevens and joined by Justices Brennan, Stewart, and Blackmun, discussed *Magnolia Petroleum* and *McCartin*.[289] Justice Stevens noted the discrepancy in the two

282. *Id.* at 627-28.

283. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 435 (1943) (quoting TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967)).

284. 330 U.S. at 627 (quoting Illinois Workmen's Compensation Act § 6, ILL. REV. STAT. ch. 48, para. 138-72 (1943)). The Texas statute, more than its Illinois counterpart, seems directed to exclusivity of worker's compensation over common law rather than to exclusivity over another state's workers' compensation law.

285. 448 U.S. 261 (1980) (plurality opinion).

286. *Id.* at 263-64.

287. *Id.* at 265-66.

288. *Id.* at 265.

289. *Id.* at 267-69.

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holdings. Under *Magnolia Petroleum*, a state may determine the extraterritorial effect of its judgments only indirectly, by prescribing the effects within the state.[290] Under *McCartin*, on the other hand, a state may, by drafting or construing its legislation in "unmistakable language," directly determine the extraterritorial effects of its judgments.[291] *McCartin's* reference to "unmistakable language," according to Justice Stevens:

> represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions. The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.[292]

Justice Stevens concluded that *Magnolia Petroleum* should be overruled because it effected a dramatic change in previous practices.[293] He noted also that most courts followed *McCartin*, so the values underlying stare decisis would be disserved by attempting to revive *Magnolia Petroleum* or to preserve the uneasy coexistence of the two holdings.[294]

Justice Stevens then considered the interests of the states in question and noted that while Virginia had a valid interest in limiting potential liability of companies that transact business within its borders, both states had a valid interest in the welfare of the employee. Additionally, Virginia was said to have an interest in having its formal determinations of contested issues respected by other sovereigns.[295] Justice Stevens determined, however, that because the claim originally could have been made in either state, Virginia's interest in limiting employer liability was not of controlling importance.[296] The interest of both states in the welfare of the employee would be served by allowing

290. *Id.* at 270.

291. *Id.*

292. *Id.* at 271-72 (footnote omitted) (quoting Sherrer v. Sherrer, 331 U.S. 343, 355 (1947)).

293. *Id.* at 273-74.

294. *Id.* at 273-77.

295. *Id.* at 277. As the dissent recognizes, limiting employer liability and ensuring employee welfare are interests justifying a choice of law, not a refusal to recognize a judgment. *Id.* at 292-93 (Rehnquist, J., dissenting). The cases cited by the Court in support of its opinion are choice-of-law cases. *Id.* at 277-79.

296. *Id.* at 279-80.

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the higher award.[297] The key issue, therefore, was "whether Virginia's interest in the integrity of its tribunal's determinations foreclose[d] a second proceeding."[298]

Justice Stevens answered that question in the negative, concluding that Virginia's interest was not controlling due to the nature of the proceedings.[299] The Commission that made the award determined the employee's rights under the Virginia statute, but it could not, and did not purport to, determine his rights under any other statute.[300] Since full faith and credit cannot be given to a determination that the Commission had no power to make, the District of Columbia was free to determine the employee's rights under its own law.[301]

Justice White, joined by Chief Justice Burger and Justice Powell, wrote a concurring opinion expressing concern about the scope of the plurality's rationale and fear that it would extend to other kinds of actions.[302] Although the plurality opinion could by its facts be limited to administrative decisions, Justice White presumed that the holding would apply also to an appeal of an administrative decision, thus extending the holding to court actions.[303]

Justice White's concurrence is noteworthy in the clarity of its discussion of the full faith and credit clause. He stated:

> The plurality criticizes the *McCartin* case for vesting in the State the power to determine the extraterritorial effect of its own laws and judgments, yet it seems that its opinion is subject to the same objection. . . .
>
> . . . .
>
> One purpose of the Full Faith and Credit Clause is to bring an end

297. *Id.* at 280.
298. *Id.*
299. *Id.* at 283.
300. *Id.*
301. *Id.* at 282-83.
302. *Id.* at 286-87 (White, J., concurring).
303. *Id.* at 286. Of course, the appeal would be on the basis of what the agency had the power to decide. The court on appeal would have no more power to choose another state's law than the agency did. Justice White also saw no difference between a statute that states a forum-favoring choice-of-law rule and a common-law doctrine doing the same thing. Again, the question is one of power. The statutory choice-of-law rule is no different from the common-law rule, but that is not what the Court had before it. The statute creating the Virginia Industrial Commission did not give it power to administer any other state's law. If it found Virginia law applicable it was required to use Virginia law regardless of whether any other state's law also might be applicable. If it found Virginia law inapplicable it had no power to hear the case. That is different from a court, which does have power to choose law. *Id.* The difference is not really between an administrative agency and a court; *Magnolia Petroleum* found the agency award entitled to full faith and credit, 320 U.S. at 443, as recognized by the plurality in *Thomas*. 448 U.S. at 281. The difference is power. A state could limit its courts to hearing only cases arising under that state's law, and the courts would then have no more power to make a choice of law than the agency had here. *See* Sterk, *Full Faith and Credit, More or Less, to Judgments*, 69 GEO. L.J. 1329, 1351-59 (1981).

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to litigation. . . . The plurality's opinion is at odds with this principle of finality. . . .

Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force.[304]

Justice Rehnquist's dissent described *Thomas* well:

In choosing between two admittedly inconsistent precedents, six of us agree that the latter decision, *McCartin,* is analytically indefensible. The remaining three Members of the Court concede that it "rest[s] on questionable foundations." Nevertheless, when the smoke clears, it is *Magnolia* rather than *McCartin* that the plurality suggests should be overruled.[305]

He also criticized the plurality for underrating Virginia's interest in finality of its adjudications,[306] and argued that if adjudications are not final, Virginia's efforts and expense are wasted when the employee obtains a duplicative remedy in another state.[307] Both the Commonwealth of Virginia and the employer had expended resources for the benefit of the petitioner.[308] Seeing that these expenditures are not wasted lies at the heart of differences in constitutional treatment between judgments and statutes.[309] Justice Rehnquist's emphasis on the interest of Virginia in having its judgment enforced indicates that he and those who join with him have not fully recognized the nationalizing purpose of the full faith and credit clause. Justice Rehnquist emphasized that the employee voluntarily chose to claim in Virginia and should be bound by the Virginia result. Any overreaching or coercion, he stated, can be dealt with by allowing vacation of the award:

The Full Faith and Credit Clause did not allot to this Court the task of "balancing" interests where the "public Acts, Records, and judicial Proceedings" of a State were involved. It simply directed that they be given the "Full Faith and Credit" that the Court today denies to those of Virginia.[310]

304. *Thomas,* 448 U.S. at 287-89 (White, J., concurring) (citations omitted). In spite of his understanding of the purpose of the full faith and credit clause, Justice White would not overrule either *Magnolia Petroleum* or *McCartin.* He finds *Magnolia Petroleum* of greater soundness, but accepts *McCartin* because it has been widely interpreted as limiting *Magnolia Petroleum.* Further, the decision in *McCartin* is not applicable outside the workers' compensation area. Justice White agrees that *McCartin* controlled the result in *Thomas* because the Virginia statute lacks the "unmistakable language" required by *McCartin. Id.* at 288-90.

305. *Id.* at 290 (Rehnquist, J., dissenting) (citations omitted) (quoting *id.* at 289 (White, J., concurring)).

306. *Id.* at 293.

307. *Id.*

308. *Id.*

309. *Id.* at 293-94.

310. *Id.* at 296.

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It is unfortunate that the United States Supreme Court in *Thomas* failed to take advantage of an opportunity to reaffirm the principle of nationalizing res judicata and to reconcile *Magnolia Petroleum* and *McCartin. Magnolia Petroleum* stated and applied the nationalizing principle.[311] *McCartin* recognized that workers' compensation cases might be different,[312] but did not articulate that difference well. The plurality in *Thomas* saw the difference, but did not recognize its significance. Workers' compensation claims are administered by a board that does not have power to make a choice of law. Additionally, a workers' compensation award does not purport to be full compensation for injury. These principles mean that full faith and credit can be given to the determination of the claimant's rights under the law of one state while allowing another state to make a supplemental award. The Commission's decision in *Thomas* did not purport to determine anything more than the employee's rights under the law it administered, and did not purport to grant a conclusive award. As a result, the second state, by making a supplemental award, is not denying full faith and credit to the Commission's judgment. The strongest reason for recognizing the distinction is set forth by the plurality:

> Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case. And indeed, it is not always the injured worker who institutes the claim.[313]

The concurring opinion in *Thomas* expressed concern that the plurality's reasoning could be extended to enable a plaintiff in an ordinary tort action to obtain judgments in two states. This concern is unrealistic because the plurality emphasized that "the critical difference between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards."[314] A judgment of damages in a tort suit be-

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311. 320 U.S. at 438.

312. 330 U.S. at 630.

313. *Thomas*, 448 U.S. at 284. Justice Rehnquist rejected this reason. *Id.* at 293-94 (Rehnquist, J., dissenting). However, it was a factor in Justice Black's dissenting opinion in *Magnolia Petroleum*, 320 U.S. at 454 (Black, J.,dissenting), *see also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, § 9.3A, at 554-55 (3d ed. 1986) (suggesting that the award does not purport to be full compensation—the worker's choice of forum is likely to be uninformed and the second award is supplemental, not duplicative); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 171-77 (1949) (arguing that the inability of the worker to raise the choice-of-law question and the strong interest of the second state justify a supplemental award).

314. *Thomas*, 448 U.S. at 281-82.

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tween adversary parties is a "true" judgment in that it is a precise determination of the value of harm suffered and a final determination of the parties' rights.

The Supreme Court today is different from the Court sitting at the time of *Thomas*, and the reach which might be accorded to the full faith and credit clause by today's Court is unknown.[315] One can be hopeful, however, that the serious problem reflected in the Court's previous discussions of the full faith and credit clause—the lack of a clear conceptualization of its purpose and reach—will be rectified in the future.

IV. Conclusion

An understanding of the purpose of the full faith and credit clause is crucial to making sense of decisions in the problem areas addressed in this article. If the purpose of the clause is deference to the rendering state, then it is acceptable to make exceptions where the interest of the enforcing state outweighs the need for deference. If, on the other hand, the purpose is to nationalize fifty states for res judicata purposes, no exception is proper except in matters involving title to land, where the question is jurisdiction of the rendering court rather than recognition of the judgment. The history of full faith and credit litigation supports nationalization as the primary purpose:

> Public policy . . . dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.[316]

The needs of the nation also support nationalization as a primary purpose. If judgments do not have finality nationwide, parties are encouraged to litigate in every state having jurisdiction, producing greater overcrowding in already overcrowded courts.[317]

The history of full faith and credit litigation also suggests that the primary purpose of the clause is putting an end to litigation. A fair opportunity to litigate an issue is sufficient to bind the litigant to the result in the state rendering the judgment or decree and in any state

315. Four justices—Stewart and Brennan from the plurality and Burger and Powell from the concurrence—are no longer on the Court. Justices O'Connor, Scalia, Kennedy, and Souter have not written on the issue of the full faith and credit clause.

316. Durfee v. Duke, 375 U.S. 106, 111-12 (1963) (quoting Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931).

317. *See* Sterk, *supra* note 303, at 1345.

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enforcing it. A modifiable decree could be modified in another state, but any modification would be based upon the validity of the decree as rendered.

Not all of the problems discussed in this comment fit neatly into res judicata analysis. Barring enforcement of a judgment as a result of application of the forum's statute of limitations may put an end to litigation, but not in the way contemplated by the full faith and credit clause because it does not give the judgment the same faith and credit it would have in the state where rendered. That, of course, is the other side of the clause. A person who obtains relief should not find it denied to him or her because the judgment must be enforced in another state. The relationship between the full faith and credit clause and collateral estoppel is not so clear. Creating a collateral estoppel effect for a judgment that would not have the effect in the rendering state plainly is not to give the same faith and credit as would be given in the rendering state. The result, nevertheless, is an end to litigation.

Recognition of the purpose of the full faith and credit clause also enhances the position of those who urge enforceability of foreign judgments affecting title to land. Even though the United States Supreme Court has held that jurisdiction lies only in the situs of the land, there seems to be no good reason to allow a person two opportunities to litigate a question of title to land unless something in the suit affects a real interest of the situs state. Normally, a state has no concern with who owns land. Its interests in the land are fully protected by regulation of land use and by procedures for protecting title.

Enforcement also should be required in probate proceedings. A personal representative should have the same powers and disabilities as the decedent—no more and no fewer. Any judgment or decree meeting the requirement of fair opportunity to litigate should be enforceable by or against the estate.

In short, the full faith and credit clause should be interpreted to make one nation of fifty states for the purpose of finality of judgments.

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