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Brainerd Currie, "Full Faith and Credit to Foreign Land Decrees," 21 University of Chicago Law Review 620 (1953).

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FULL FAITH AND CREDIT TO FOREIGN LAND DECREES*

BRAINERD CURRIE†

I

IT IS NOT EASY TO JUSTIFY the appearance, at this late date, of another paper on the effect to be given foreign land decrees. Legal analysis has made substantial progress since Langdell wrote, in 1883, that "a decree in chancery has not in itself (*i.e.*, independently of what may be done under it) any legal operation whatever. . . ."¹ Nearly thirty-five years ago, Professor Willard Barbour, of the University of Michigan, published a classic article on this precise subject,² in which he concluded that [i]f the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land. . . .³

Four years earlier, Professor Walter Wheeler Cook, of the University of Chicago, had prepared the way for such a conclusion by his critical analysis of the maxim that equity acts in personam.⁴ Shortly after the appearance of Professor Barbour's article, the subject was fully reconsidered by Professor (now Judge) Herbert F. Goodrich,⁵ and by Professor Ernest G. Lorenzen,⁶ with results which confirmed and fortified Professor Barbour's thesis. Given so much intensive study of the subject by competent scholars, and such a degree of unanimity among them, one may justly inquire what purpose is to be served by further discussion.

* This paper was prepared as the basis for a shorter oral presentation of the subject before the Round Table on Equity at the Annual Meeting of the Association of American Law Schools, held at Chicago, December 28-30, 1953.

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¹ Langdell, *A Summary of Equity Pleading* 35 n. 4 (at p. 37) (2d ed., 1883).

² Barbour, *The Extra-Territorial Effect of the Equitable Decree*, 17 Mich. L. Rev. 527 (1919).

³ *Ibid.*, at 532-33.

⁴ Cook, *The Powers of Courts of Equity*, 15 Col. L. Rev. 37, 106, 228 (1915).

⁵ Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230 (1920).

⁶ Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 Yale L. J. 591 (1925). The foundation of this article was an address delivered before the Round Table on Public Law at the 1924 meeting of the Association of American Law Schools.

The answer lies in the fact that, a generation after it was advanced, Professor Barbour's thesis stands neither accepted nor convincingly refuted. It was not received without criticism when it first appeared,⁷ and since that time divers reasons have been advanced by various authorities for rejecting it in whole or in part. The decision in *Fall v. Eastin*⁸ still stands as the presumptively definitive negation of the thesis so far as full faith and credit is concerned. State courts still, from time to time, reject with varying emotions the plea that a degree of finality should be accorded foreign decrees relating to local land.⁹ The courts have, in fact, generally ignored Professor Barbour and the other commentators. Nor is this simply another instance of the futility which was once a notorious attribute of academic attempts to influence the course of legal development;¹⁰ the most recent law review article on this subject cites not one of the basic studies referred to in the preceding paragraph.¹¹

These circumstances suggest not only a justification for one more inquiry into the subject, but also the limits of such an inquiry. Surely it should not be necessary to reiterate the details of the case which was made a generation ago. But one may be concerned with the efficacy of legal scholarship as well as with that of judgments. It is disconcerting to realize that one of the better products of our system of legal criticism can fall on deaf ears, or be turned aside by scattered and diverse reservations. It seems worth while, therefore, to recall briefly the essentials of Professor Barbour's argument; to ask whether there was any weakness in that argument which would account for the generally cool reception which it has been accorded; to see whether anything can be added to the force of the argument; to re-examine the specific objections which have been urged against it; and to observe the tendencies which are discoverable in decisions of the state courts. If this can be done without adding to the existing confusion, some lawyer may some day be assisted in the preparation of a petition for certiorari which will lead to a really definitive disposition of the question.

⁷ See Pound, *The Progress of the Law, 1918-1919: Equity*, 33 Harv. L. Rev. 420, 423-25 (1920).

⁸ 215 U.S. 1 (1909).

⁹ E.g., *McRary v. McRary*, 228 N.C. 714, 47 S.E. 27 (1948), and *Clouse v. Clouse*, 185 Tenn. 666, 207 S.W. 2d 576 (1948).

¹⁰ Cf. Cardozo, *Introduction to Selected Readings on the Law of Contracts* (Association of American Law Schools, 1931).

¹¹ Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 Dick. L. Rev. 293 (1950).

II

Barbour begins, somewhat in the tradition of Cook, by paying his respects to the circumscribing effect of the maxim that equity acts in personam. "When a judge sitting in equity today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke."¹² Then, having in mind the fact that the full faith and credit clause does not foreclose an inquiry into the jurisdiction of the issuing court, he turns his attention to the meaning of "jurisdiction" as applied to courts of equity. Given a court which has been invested with general jurisdiction by its sovereign, the question of jurisdiction in a particular instance becomes one of the effectiveness of the judgment. Effectiveness means *de facto* power to produce the desired result—not merely in terms of power to compel the defendant to perform an act, but also in terms of the consequences which the appropriate foreign sovereign will attach to the act when performed.¹³

This is a strangely modest conception, seemingly ill-suited to the breadth of the thesis.¹⁴ It may be doubted that the author would have accepted the proposition, if squarely confronted with it, that a state can escape the compulsion of the full faith and credit clause with respect to the decree of a sister state by the simple expedient of altering its rule on the validity of a deed executed pursuant to the order of a foreign court. Just as the jurisdiction to render the decree cannot be destroyed by the defendant's contumacy or by his evasion of process of enforcement,¹⁵ so it cannot be destroyed, under a constitutional system of full faith and credit, by another state's simple determination not to recognize it.¹⁶ The jurisdiction rests on the fact that the defendant has been duly summoned and given a fair opportunity to make his defense; the conclusiveness of the decree flows, as Professor Barbour argues, from the fact that it is a final determination of his obligation—an obligation which can scarcely be ex-

¹² Barbour, *op. cit.* *supra* note 2, at 528.

¹³ *Ibid.*, at 530-32.

¹⁴ "If the law of the country where the land is situate will not permit nor enable the defendant to perform the order of the court, no decree should be rendered; indeed it is doubtful if jurisdiction exists. But if the law of the situs of the land recognizes a deed made under compulsion of a decree as a valid conveyance, the decree is an effective judgment and jurisdiction unquestionably exists." *Ibid.*, at 532.

¹⁵ *Ibid.*

¹⁶ The American Law Institute affirms the jurisdiction of a court to require a conveyance of foreign land without any reservations based on the attitude of the state of situs. *Rest., Conflict of Laws* § 97, comment a (1934).

tinguished by nonperformance.¹⁷ This is the core of the argument. The author perhaps felt that his modest conception of jurisdiction was safe enough in view of the universal recognition of deeds executed under the compulsion of foreign courts.

Again he makes a substantial concession to critics of his thesis when he says that a decree relating to foreign land "may perhaps be attacked upon the ground that its enforcement would violate some fundamental policy of the state where the land is situate."¹⁸ The cases both before and since 1919 cast doubt on the necessity of this concession where the full faith and credit clause is applicable. It seems sufficient to say at this point that, under that clause, the substantiality of a state's policy objections to the recognition of a sister state's judgment is a matter to be finally determined by the United States Supreme Court. At any rate, as Professor Barbour notes, such a policy should not be confused with jurisdiction.¹⁹ He might have made the same point precisely with respect to a hypothetical rule denying the validity of deeds executed under the compulsion of a foreign decree.

After analyzing five of the leading cases on the question—three of them tending to support his thesis²⁰ and two against him²¹—Professor Barbour turns to a consideration of the principal objections to treating the foreign decree as the basis for a new decree at the situs. The first, founded on the "notion" that an equity decree for the doing of an act cannot create a binding obligation, he characterizes as "the last survival of an old dogma which is today shorn of most of its force."²² Not only have the principles of *res judicata* been applied to domestic equity decrees; it is well established that a decree for money will support an action at law in another state; and the cases on foreign decrees for alimony show that this result is required by the full faith and credit clause.²³ Thus *some* equity decrees, at any rate, create obligations. The attempt to distinguish other decrees on the ground that they purport only to order the doing of an act must fail; it is based on mere form, and applies equally to decrees for the payment of money. Moreover, courts have no difficulty in recognizing the obligation

¹⁷ Barbour, *op. cit.* supra note 2, at 532.

¹⁸ *Ibid.*, at 533.

¹⁹ *Ibid.*

²⁰ *Burnley v. Stevenson*, 24 Ohio St. 474 (1873); *Dunlap v. Byers*, 110 Mich. 109, 67 N.E. 1067 (1896); *Mallette v. Scheerer*, 164 Wis. 415, 160 N.W. 182 (1916).

²¹ *Fall v. Eastin*, 215 U.S. 1 (1909); *Bullock v. Bullock*, 52 N.J. Eq. 561, 30 Atl. 676 (1894).

²² Barbour, *op. cit.* supra note 2, at 539.

²³ *Ibid.*, at 542.

of a decree other than one for the payment of money when domestic land is not involved. They freely order defendants to convey foreign land, with expressions of confidence that the court at the situs will or must treat the decree as conclusive; they respect foreign decrees enjoining the enforcement of domestic judgments; they enforce foreign decrees for the conveyance of land when the land is located elsewhere.²⁴ The inference is strong that the reason for withholding recognition lies not in the nature of the decree but in some conception of policy relating to local land.

A writer in the *Harvard Law Review*²⁵ who sounds remarkably like Professor Beale had performed the ingenious feat of reconciling *Burnley v. Stevenson* and *Dunlap v. Byers*, on the one hand, with *Bullock v. Bullock* and the Nebraska Supreme Court's decision in the *Fall* case²⁶ on the other. This was on the basis that the first two cases arose out of contract and partnership, while the other two were divorce cases, involving the division of property and security for alimony; and "if the decree is strictly *in personam* upon an antecedent obligation which is in issue, it is well settled that a decree is conclusive as to land lying in another state."²⁷ Professor Barbour's disposition of this interpretation is brief. He observes that it does violence to the decisions in *Burnley v. Stevenson* and *Dunlap v. Byers*²⁸ to explain them as proceeding on the original cause of action, since in each case the court believed it was enforcing the new obligation created by the decree. He adds that the distinction reduces to a mere play on words, since "[a] rule of evidence which makes a decree conclusive is in truth a rule of substantive law."²⁹ In view of the fact that the "antecedent obligation" requirement has caused a good deal of confusion in the discussions, it seems necessary at this point to interpolate a somewhat fuller consideration of its merits.

The most succinct formulation of the suggested distinction is that the foreign court in the contract and partnership cases "has attempted to create no new interest in the land, but rather . . . the decree is *in personam*

²⁴ *Ibid.*, at 543-44, citing among other cases *Dobson v. Pearce*, 12 N.Y. 156 (1854), and *Roblin v. Long*, 60 How. Pr. (N.Y.) 200 (1880).

²⁵ *Equitable Decree as a Cause of Action in Another State*, 21 Harv. L. Rev. 210 (1908).

²⁶ *Fall v. Fall*, 75 Neb. 120, 113 N.W. 175 (1907).

²⁷ 21 Harv. L. Rev. 210 (1908).

²⁸ Cited in note 20 *supra*.

²⁹ 17 Mich. L. Rev. 527, 545 (1919). This, perhaps, does not do full justice to the argument in support of the "antecedent obligation" requirement, since, according to that argument, the rule of evidence does not come into operation unless there is first a cause of action in which it can be applied. Cf. *Cook*, *The Powers of Courts of Equity*, 15 Col. L. Rev. 228, 245 n. 47 (1915).

to effectuate rights already existing by the law of the situs."³⁰ It is hard to know what emphasis is intended. All the decrees in question were "in personam," if any of them were. If the reference to the law of the situs means that the court which is asked to enforce the decree is free to inquire whether the foreign court correctly applied the law which was rightly applicable under the principles of conflict of laws, the position is obviously untenable as applied to money decrees, and no reason is apparent for treating other decrees differently. No principle of *res judicata* is more fundamental than that the conclusiveness of a judgment is not vitiated by errors committed by the rendering court.³¹ Just why a court with the defendant before it should have jurisdiction to *establish* (or "effectuate") an interest in foreign land based on an existing claim to the land as such, and not have jurisdiction to "create" an interest in the land in order to effectuate a personal right, it is not easy to understand. There is probably no instance in which jurisdiction has been conditioned by such a distinction.

In the final analysis, the suggested requirement of an "antecedent obligation" reduces to nothing more than the simple necessity that there be a remedy available in the state of the situs such that the plaintiff can invoke and rely on his foreign decree. The author of the suggestion laid stress on the necessity of a remedy as a reason for the requirement, and the matured view of Professor Beale confirms this interpretation.³² The thought was that since there is no procedure for suing on a judgment other than one for the payment of money, the plaintiff's only recourse is to sue on the original cause of action. If he can do that, the foreign decree will be treated as conclusive as to the issues; if there is no cause of action which the court at the situs will recognize, the decree is useless to him. "It is evidence, and evidence is useless without a cause of action."³³ Since the comment was written, there has come into general use a remedy which may well dispose of the objection—the declaratory judgment. But apart from this, it seems clear that a remedy has long been available, in the form of a bill to execute the decree, at least with respect to some decrees;³⁴ and if this is true, it

³⁰ 21 Harv. L. Rev. 210 (1908).

³¹ *Milliken v. Meyer*, 311 U.S. 457 (1940); *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

³² 2 Beale, *Conflict of Laws* § 449.1 (1935). Cf. 1 *ibid.* § 97.10.

³³ 21 Harv. L. Rev. 210 (1908).

³⁴ An early dictum from the New Jersey court itself seems to concede the existence of a remedy: "The only effect of a foreign judgment is, that it entitles the plaintiff to a new decree, not to the process of the court of another state." *Davis v. Headley*, 22 N.J. Eq. 115, 121 (1871). And see *Cook*, *The Powers of Courts of Equity*, 15 Col. L. Rev. 228, 244 (1915): "[T]he truth seems to [be that] . . . such equitable actions in other jurisdictions may be brought on some

must follow that the objection that no *procedure*—no form of action—exists for enforcement must fail. It will not do, at this point, to go back to the conception that an antecedent obligation is a condition of jurisdiction in the foreign court, and use that conception as a test of the availability of a remedy on the decree. Professor Cook does us a disservice if he suggests such a course.³⁵ To say that an antecedent obligation is required because there is no remedy on the decree, and then to say that there is a remedy on the decree only where there is an antecedent obligation, because such an obligation is required, is to reason in a hopeless circle. There is no reason for such a limitation on the remedy. As Professor Cook maintains, there is nothing inherent in the nature of an equity decree for the doing of an act to prevent a court from treating it as giving rise to an equitable cause of action for specific performance.³⁶ The reason Professor Beale assigns for the nonexistence of a cause of action on the decree which orders the doing of an act is this: "If there were any action it seems to be in the court of equity; and a court of equity never opens its doors freely to foreign rights. . . . It cannot therefore blindly enforce the decree of another state. . . ."³⁷ A number of observations might be made on this reasoning.

though not on all decrees. . . . Wherever such relief seems necessary . . . it seems to be the law, as far as authorities can be found, that if the decree for the conveyance of land is based upon a contract, express trust, or other consensual relationship of the parties which gives rise, independently of the decree, to equitable interests for the enforcement of which the decree is entered, a bill in equity will lie in other jurisdictions upon the decree itself, if it has not been obeyed, as a substantive cause of action." The authorities cited in support of the proposition are not as satisfactory as might be wished. The strongest is *Roblin v. Long*, 60 How. Pr. (N.Y.) 200 (1880). Two of them are the very cases which the commentator in 21 Harv. L. Rev. 210 (1908) is attempting to explain as proceeding on the original cause of action [*Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896), and *Burnley v. Stevenson*, 24 Ohio St. 474 (1873)]. *Vaught v. Meador*, 99 Va. 569, 39 S.E. 225 (1901), is an instance of optimistic prediction by the court rendering the judgment as to the reception which will be given it by the courts at the situs. But by the same token, these authorities do not establish that the proposition is limited to decrees based on consensual relations giving rise, independently of the decree, to equitable interests. At a later point in this paper I shall offer additional evidence of the availability of the bill to execute the decree.

³⁵ Cook, *op. cit.* supra note 34.

³⁶ Cook, *op. cit.* supra note 34, at 244. The limitation was perhaps suggested to Professor Cook by judicial enumerations of the situations in which it is appropriate for a court of equity to decree conveyance of foreign land, such as Chief Justice Marshall's well-known reference to cases "of fraud, of trust, or of contract." *Massie v. Watts*, 6 Cranch (U.S.) 148, 160 (1810). Such expressions, however, mean no more than that the court will not act unless the case is properly one for equitable cognizance. 1 Wharton, *Conflict of Laws* § 289a (3d ed., 1905); Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 236 (1920); Goodrich, *Conflict of Laws* 217-18 (3d ed., 1949). They do not express a limitation on the jurisdiction of the court in the conflict of laws sense, and there is no reason why they should be taken as a limitation on the availability of a remedy on the decree.

³⁷ 2 Beale, *Conflict of Laws* § 449.1 (1935).

For one thing, the argument would apply equally to decrees ordering the doing of an act and to decrees for the payment of money; yet it is firmly established that a remedy is available on money decrees. For another, a constitutional command of full faith and credit gives a different connotation to the recognition of decrees of sister states from that suggested by such words as "blindly," however the situation may have appeared to an English chancellor. But apart from such observations, the point is that the suggested reason for the nonexistence of a remedy on the decree has nothing to do with whether the decree is founded on an antecedent consensual relation or not; the force of the reason applies equally to decrees founded on "fraud, or trust, or contract" and to decrees dividing the property of divorced spouses. The necessary conclusion seems to be that, if there was a procedure known to the law whereby a bill could be brought for the execution of a foreign decree, it must have been generally available; and some reason must be found for refusing to give relief on the foreign decree other than the lack of a suitable form of action.

If it is difficult to find justification in legal history or theory for the position that the existence of an antecedent obligation is determinative of the question of recognition, it is impossible to find it in pragmatic considerations. The chief practical effect of such a requirement would be to withhold recognition from decrees entered in divorce proceedings; but those are among the very proceedings in which recognition is most imperative. In the ordinary case of fraud, trust, or contract the plaintiff can bring his action at the situs of the land, though he is not required to undergo the possible inconvenience of doing so. But since an action for divorce must be brought at the domicile of one of the parties, the rights of the spouses in land located elsewhere must be adjudicated away from the situs if multiplicity of litigation is to be avoided. Thus the effect of the suggested requirement would be to give recognition where it is needed least and to withhold it where it is needed most.³⁸

Professor Barbour's final argument with respect to this entire line of objection to the recognition of foreign decrees is that the same considera-

³⁸ Assuming for the moment the soundness of the suggestion that an "antecedent obligation" is required, it is interesting to consider how large a measure of support is thus given to the Barbour thesis. If the decree is to be conclusive when it is based on such an obligation, and if it is conceded, as it must be, that the decree cannot be collaterally attacked on the ground that the obligation did not exist by the law of the situs, the problem is largely solved, and solved in favor of finality and conclusiveness. If so much is conceded, there can be little left in the objection that for policy reasons or "in the nature of things" the courts of the situs must retain exclusive control of rights in land. A foreign court decreeing specific performance of an alleged oral contract for the sale of local land, against all manner of defenses on the merits, has at least as much opportunity of interfering with local policy as has a foreign court dividing the property of husband and wife in a divorce decree.

tions of policy which underlie the doctrines of *res judicata* as applied to judgments at law apply with undiminished force to decrees in equity, and should produce the same results. Concluding that the foreign decree does create an obligation, that there is a remedy on the decree, and that the underlying cause of action cannot be inquired into collaterally, he concludes that "[i]t is the anxious fear that the State may be deprived of control over its own land which leads to the denial of power in the foreign court. If this fear is not justifiable the last objection will be removed."³⁹ The discussion turns, therefore, to the second of the two principal objections.

Professor Barbour's treatment here is swift and powerful. He has no quarrel with the formulas, perennially reiterated in the cases, to the effect that real estate is exclusively subject to the laws and jurisdiction of the state in which it is located. They are truisms, expressing rules for the choice of governing law, or the fact of physical control, or the power to prescribe regulations, or the power to bind absent defendants. Such matters are not involved in the problem at hand. But the "mechanical iteration" of such statements, and "[n]ervous emphasis on the word 'title,'"⁴⁰ have led to the unwarranted deduction that no foreign court can apply the law of the situs to a state of facts and thereby determine a personal obligation. It is not contended that the foreign decree operates *ex proprio vigore* to affect title to domestic land, nor that the courts at the situs should issue process on the foreign decree; "all that is contended is that the courts of the situs should recognize such a decree as a final determination of a personal obligation to convey, an obligation analogous to that arising from a valid contract. It should be accepted as a valid cause of action in the jurisdiction of the situs, and if suit be brought upon it and personal jurisdiction obtained of the person bound, a new decree should be rendered. . . ."⁴¹ The question, then, is whether any sound policy of the situs state will be violated by acceptance of the foreign decree. Here Barbour delivers his coup de grâce, making the most of an idea which Cook had advanced with the tentativeness of footnote and question mark.⁴² Without

³⁹ Barbour, *op. cit. supra* note 2, at 547.

⁴⁰ *Ibid.*, at 548.

⁴¹ *Ibid.* In the qualifying clause, "if . . . personal jurisdiction [be] obtained of the person bound . . .," there appears to be another unnecessary concession. With *Hart v. Sansom*, 110 U.S. 151 (1884), out of the way (see Barbour, *op. cit. supra* note 2, at 537), it should be clear that the decree is enforceable at the situs on proper notice whether the court there has jurisdiction of the defendant or not. Cf. Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 246 (1920).

⁴² Cook, *op. cit. supra* note 34, at 128-29, notes 56 and 57.

exception, the courts recognize the validity of a deed executed under the compulsion of a foreign decree. But if the decree did not deal rightfully and constitutionally with the title to the land it would be voidable for duress. Recognition of the deed necessarily involves acceptance of the decree. Whatever intrusion on the state's exclusive control is implied in the recognition of the decree is accomplished through the recognition of the deed. A policy so easily evaded, so dependent on the success of the defendant in eluding the enforcement process of the foreign court, is a formal, lifeless thing, and the truth must be that foreign judicial proceedings of this type pose no real threat to the legitimate interest of the situs state.

This argument stands unanswered. Before Professor Barbour's article appeared, a few courts had taken note of similar attempts to show the inconsistency of persistent refusal to recognize foreign decrees while recognizing the validity of deeds executed under their compulsion, and had weakly explained that when such a deed is recognized "it is the conveyance, not the decree, which affects the title to domestic land."⁴³ Nothing remained to be said along that line, however, after Professor Barbour's comment: "This artless explanation must excite eternal wonder."⁴⁴ So long as the argument remains unanswered, no objection to the recognition of foreign equity decrees, founded on the proposition that such recognition would violate the interest of the situs state in control of its land, can rest on a secure rational basis. This will remain true though commentators ignore Professor Barbour, and repeat uncritically the "artless explanation"; neither can we escape the fundamental inconsistency of the position, having failed to explain it away, by taking refuge in the attitude that further inquiry is foreclosed by authority.⁴⁵

I am inclined to believe that the full significance of this telling argument was not appreciated by Professor Barbour himself. Although his thesis is that full faith and credit ought to be given to the foreign decree, and although he indicates elsewhere that the doctrine of *Fauntleroy v. Lum*⁴⁶ should apply to decrees in equity,⁴⁷ he seems to address this particular argument to the state courts, in an effort to persuade them that recognition of foreign decrees would expose them to no new or additional

⁴³ See Barbour, *op. cit.* supra note 2, cases cited on 549 n. 100.

⁴⁴ *Ibid.*

⁴⁵ See Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 Dick. L. Rev. 293, 294-95 (1950).

⁴⁶ 210 U.S. 230 (1908).

⁴⁷ Barbour, *op. cit.* supra note 2, at 545.

threat to their control. Perhaps in this he is influenced by his assumption, already discussed, that the binding force of the decree is rooted in the voluntary act of the situs state in acknowledging the validity of the deed. On that premise, the state might find a way out of the dilemma, if it chose to overturn established precedents, by refusing to recognize deeds executed under the compulsion of a foreign court. But the argument cuts deeper than this. The practice of recognizing the deed not only exposes the logical inconsistency of refusing recognition to the decree, demonstrating that the states may safely recognize decrees as well; it also establishes that the state of the situs has no legitimate and substantial basis for refusing, on grounds of its own interests and policy, to recognize such foreign decrees. This is of major importance with respect to the application of the full faith and credit clause. The Supreme Court has served clear notice that, when the command of that clause is resisted, it will brush aside mere protestations of policy and will make its own judgment as to the seriousness of the supposed intrusion.⁴⁸ A state might change its law, and thereafter refuse to acknowledge the validity of deeds executed under the compulsion of foreign decrees, and the whole history of its judicial practice would still stand to establish that it has no just ground, under the Constitution, for apprehension that its interests will be subverted by such deeds or decrees.

In the preceding paragraph it was assumed that a state is free to change its rule on the validity of deeds executed under the compulsion of a foreign decree. (It should be noted that the assumption was made only for convenience of statement, by way of relating the conclusion to Professor Barbour's discussion, and that it was by no means essential to the conclusion, which was that the practice of recognizing the validity of such deeds demonstrates the insubstantiality of the policy claims of the state of situs.) But the very statement of such an assumption should be nearly enough to establish its unsoundness. Freedom for the courts of the situs state to disregard a deed executed (in compliance with the formal requirements of that state) in obedience to the decree of a foreign court having jurisdiction of the defendant would make a complete mockery of a jurisdiction which was solemnly affirmed by Chief Justice Marshall nearly a century and a half ago,⁴⁹ and which has hardly been doubted since. To be

⁴⁸ "[The] purpose [of the full faith and credit clause] ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged." Stone, J., in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935). See also *Hughes v. Fetter*, 341 U.S. 609 (1951).

⁴⁹ *Massie v. Watts*, 6 Cranch (U.S.) 148 (1810).

sure, the Constitution does not say that full faith and credit shall be given to conveyances; but the only way to discredit the deed is to plead duress, and when the compulsion is identified as that of the decree of a court of competent jurisdiction, having power over the defendant, the plea can be sustained only if credit is refused to the decree. In this context the terms "in rem" and "in personam" have been bandied about with discouraging results, but it can hardly be maintained that the decree in this instance (when it does no more than address a command to the defendant, which the defendant obeys) operates otherwise than in personam.⁵⁰ It follows that full faith and credit requires recognition of the validity of the deed, and that there is no way of escape from the dilemma except by recognizing the decree where there is no deed.

III

I suspect that an argument like this one of Professor Barbour tends, by its very brilliance and simplicity, to defeat its own acceptance. People do not respond agreeably when they are told that they have long complacently followed inconsistent courses of action, nor are they readily separated from their faith in sonorous and seemingly self-evident formulas. Perhaps the argument is suspected of being a tour de force, which silences a less articulate opponent without really disproving his case. It is possible that a hypothetical judge might reason thus: Maybe it is logically inconsistent to recognize the deed and not the decree without a deed. But there must be wisdom in the books when they say that a state must retain the final voice in matters relating to its land. Perhaps the truth is that in the vast majority of cases it is a matter of indifference to our basic policy what the decision is—whether the vendor keeps the land or the

⁵⁰ I make this statement well knowing that a position very much like the one that "can hardly be maintained" was taken by Professor Walsh, *Treatise on Equity* 76 (1930); Professor Cook also characterized such decrees as "in rem," but without concluding that they are rendered without jurisdiction. Cook, *op. cit. supra* note 34, at 119-29. These two positions are considered in more detail below.

Perhaps the early view of Professor Schofield should be mentioned in this connection. According to that view, the English common-law rule of jurisdiction, that a court of one state has no jurisdiction to determine title to land in another, "derive[s] all [its] force and strength as between the states from [the federal constitution] . . . defining and limiting the reserved sovereignty of each state." While this rule is qualified by "the established but highly artificial, anomalous and purely historical English-chancery exception" formulated by Marshall in *Massie v. Watts*, the exception "admits of little, if any, judicial expansion and of no legislative expansion as between the states." Schofield, *Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision*, 10 *Ill. L. Rev.* 11, 18-19, 21, 29 (1915). This attitude is unfriendly toward the exercise of the jurisdiction in any case, and would proscribe it in all except the categories of "fraud, or trust, or contract." But I suspect few adherents would be found today for the proposition that the ancient injustice of *Livingston v. Jefferson*, 18 *Fed. Cas.* 660, No. 8,411 (C.C. Va., 1814), is enshrined in the Constitution.

purchaser gets it, whether it goes to the wife or is kept by the husband when there is a divorce; and because of this we tolerate the conveyance though it was not voluntary. But there may come a time when the decision will be a fateful one for our policy. Against such a possibility, it is prudent for us to avoid committing ourselves to the recognition of any virtue in a foreign decree, and thus to preserve our freedom of action. Besides, we have the orderliness of the system established by our recording statutes to think about.

The main thesis of this hypothetical reasoning proceeds on the fallacy that a state is free under the full faith and credit clause to disregard a conveyance ordered by the court of another state; nevertheless it is worth while to consider the attitude for a moment. Experience indicates that the fears of those who are concerned about the integrity of a state's control of its land are not to be overcome by the force of Professor Barbour's argument alone, however compelling its logic. The question then becomes: What can we say to quiet the "anxious fear" that the state may be deprived of control over its own land if it recognizes foreign decrees of the kind in question, beyond pointing out that the state has already surrendered the same degree of control by recognizing the validity of deeds made pursuant to such decrees?

It would be helpful to the consideration of this question if we could know more particularly the nature of the fears which are entertained. Unfortunately, the decisions seldom go into particulars. It is reasonable to suppose, however, that the unspecified fears reflect, to some extent, the passions which have moved governments, in both ancient and modern times, to place restrictions on the capacity of persons to own, or use, real property.⁵¹ The control of American states over their own land with respect to such restrictions is subject to important limitations under provisions of the Constitution other than the full faith and credit clause.⁵² Some such restrictions, however, are consistent with the Constitution, such as those upon the land-holding capacity of corporations.⁵³ Would the extension of full faith and credit to foreign decrees ordering conveyances of local land expose the policies expressed in such restrictions to erosion? The

⁵¹ Cf. 1 Powell, *Real Property* § 101 (1949), citing 1 Pollock & Maitland, *History of English Law* 460-66 (2d ed., 1905).

⁵² *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (the treaty power); *Buchanan v. Warley*, 245 U.S. 60 (1917) (the due process clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (the equal protection clause). Cf. *Oyama v. California*, 332 U.S. 633, 647, 650 (1948) (equal protection, supremacy of federal law); *Paul v. Virginia*, 8 Wall. (U.S.) 168, 180 (1869), and *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551, No. 3,230 (E.D. Pa., 1823) (privileges and immunities of state citizenship).

⁵³ *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945).

policies and the statutes take a wide variety of forms,⁵⁴ and perhaps it is dangerous to generalize about them. It would seem, however, that the problem involved is one of administration of the policy; statutes of this type involve their own problems of drafting, interpretation, and machinery. What happens when a voluntary conveyance is made to a corporation incapable of taking? A conveyance made in obedience to a foreign decree presents no different question. A foreign decree which has not been obeyed merely establishes, as between the parties, that the plaintiff is entitled to a conveyance. The freedom of the state of the situs to enforce its restrictive policy against the plaintiff after he has successfully demanded recognition of his right to a conveyance under the foreign decree remains unimpaired. For example, the administration of the North Dakota policy involved in the *Asbury Hospital* case⁵⁵ would in no way be jeopardized by the recognition of foreign decrees. The statute in North Dakota merely required corporations to dispose of land within its coverage within ten years from the enactment of the statute, or, in the case of after-acquired land, from the date of acquisition. Where the corporation is disabled to take title the problem is no greater. There is eminent authority to the effect that only the state may challenge the unauthorized acquisition.⁵⁶ Thus the disabling statute becomes irrelevant in private litigation, domestic or foreign. Its policy comes into play only when the state invokes it in escheat or other appropriate proceedings. Even if there are exceptions to this rule,⁵⁷ the essential operation of the state's policy is unimpaired. Suppose, for example, a state should hold that, as a corollary of its statute denying to foreign corporations the right to acquire domestic land, such a corporation as purchaser is not entitled to specific performance of a contract to convey. A foreign court having personal jurisdiction of the vendor, misapplying or failing to apply this law of the situs, orders a conveyance. In an action at the situs based on the decree the vendor would be precluded from reopening the question of the corporation's capacity, under Professor Barbour's thesis and mine. Thus a result would be brought about which would normally not have been possible in an original action at the situs.⁵⁸

⁵⁴ 1 Powell, op. cit. supra note 51, at § 148.

⁵⁵ 326 U.S. 207 (1945).

⁵⁶ 1 Powell, op. cit. supra note 51, § 148, and cases cited in note 46 supra.

⁵⁷ Cf. *Lord v. Shultz*, 115 Neb. 33, 211 N.W. 210 (1926).

⁵⁸ If this in itself is thought to be an intrusion on the integrity of the state's policy, it should be recalled that a foreign judgment against the vendor for damages for breach of his contract to convey would unquestionably be entitled to full faith and credit at the situs. So would a decree of specific performance against a corporate purchaser. The degree of intrusion on the policy of the situs state would be about the same in all three cases.

But the corporation would be ill-advised to seek such a Pyrrhic victory. Whether or not it is unqualifiedly true that only the state may invoke the disabling statute, it is true that the state may always invoke it. Not having been a party to either the foreign action or the domestic action based on the foreign decree, the state is not affected by the principles of *res judicata*. Whenever it is so disposed it may institute escheat proceedings, just as if the conveyance to the corporation had come about in some other way. It seems a reasonably safe conclusion that the full application of the principles of *res judicata* to foreign decrees directing the conveyance of local land poses no real threat to a valid policy of the situs state respecting the capacity of persons to acquire, hold, or use land.

As a practical matter, policy questions of this order have not been a problem in the cases which have dealt with the recognition to be accorded foreign decrees relating to local land.⁵⁹ When the specific content of the concern for local policy and local control can be discerned at all, it turns out to be (1) an understandable reaction against a particularly irksome error of law on the part of the foreign court; or (2) mere pride of local law, manifested in unwillingness to bring about a result which could not regularly have been achieved by an action in the local courts in the first instance; or (3) a not very clearly articulated apprehension that recognition would inject uncertainties or anomalies into the local system of recording land transactions.

The New Mexico case of *Fire Association v. Patton*⁶⁰ is an instructive illustration of the first type of concern. There the New Mexico court's rejection of a Texas decree purporting to reinstate a lien on New Mexico land was plainly motivated by a sense of outrage at the Texas court's highly dubious application of the principle of subrogation. The owner of the property had procured insurance, loss payable to the holder of a mechanic's lien. After the loss the owner assigned the policy to the lienor in return for a release of the lien and other consideration. In a Texas

⁵⁹ In the preparation of this paper I have encountered only one case involving personal incapacity. The question was of corporate incapacity under the law of the state of incorporation rather than the law of the situs, so that the case is not directly relevant to the policy question under discussion. It lends significant support, however, to the general principle of recognition for foreign land decrees. A Kentucky testator devised a share of his residuary estate, including land in Texas, to a New York charitable corporation, limited by New York law in the value of real property which it could own. The corporation intervened in a Kentucky proceeding brought by the heirs against the executors for a determination of their rights, which resulted in a holding that the corporation was incapable of taking. In a subsequent action of trespass to try title, brought by the corporation in Texas, the United States circuit court directed a verdict for the corporation. The Circuit Court of Appeals reversed, holding the Kentucky decree conclusive. *Norton v. House of Mercy*, 101 Fed. 382 (C.A. 5th, 1900).

⁶⁰ 15 N.M. 304, 107 Pac. 679 (1910).

action on the policy brought by the lienor, the owner being personally served as a defendant, the plaintiff had judgment; but the insurance company, on a cross-bill to which the owner was made a party, obtained a decree purporting to declare void the release of the lien, and declaring that the insurance company was subrogated to the rights of the lienor. When the insurance company relied on that decree as *res judicata* in its action to enforce the lien in New Mexico, the court, perceiving that to sustain the contention would be to hold that the owner got no protection whatever in return for his premiums, avoided that unpalatable result by invoking the convenient doctrine of *Fall v. Eastin*⁶¹ and kindred cases.⁶² Much as one may sympathize with the court in this avoidance, it must be clear that the hardship of such a result is part of the price which we must occasionally pay for the higher values of interstate application of the principles of *res judicata* in a federal system. The attitude of the New Mexico court in this case has nothing to do with the nature of equity decrees as such; still less has it anything to do with land policy. It is simply a strong conviction concerning a detail in the law of insurance. It has no more to do with the sovereignty of New Mexico than have any of the myriad differences in, or errors of, law which the courts of New Mexico must accept with good grace under the full faith and credit clause.⁶³ That clause is an imperfect instrument indeed if its incidence can be deflected by the essentially fortuitous presence in the case of a lien on real estate.

For such further light as is available on the second and third types of solicitude for local control and policy there is no better source than the opinions of the justices of the Supreme Court of Nebraska in the *Fall* case itself. The circumstances in which the state court reached its final decision brought about not only a thorough consideration of the problem but a special need for the justices holding opposing views to join issue. The result was, in places, a down-to-earth approach that is rare in a line of cases marked by the repetition of purportedly self-evident propositions. In the original decision⁶⁴ the court, composed of Chief Justice Holcomb

⁶¹ 215 U.S. 1 (1909).

⁶² For future reference, it should be noted that the court's escape was superficially facilitated by the form of the Texas decree, which purported to settle the rights of the parties without addressing any command to the owner, or taking any steps against him to effectuate the declaration. Inferentially, if the Texas court had gone to the pains of obtaining the signature of the owner to appropriate documents by committing him to jail until he signed, the New Mexico court would have accepted the result with resignation if not equanimity—in perfect accord with the authorities.

⁶³ *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Milliken v. Meyer*, 311 U.S. 457 (1940). Cf. *Goodrich, Two States and Real Estate*, 89 U. of Pa. L. Rev. 417, 425-29 (1941).

⁶⁴ *Fall v. Eastin*, 75 Neb. 104, 106 N.W. 412 (1905). The facts are too well known to be restated.

and Associate Justices Sedgwick and Barnes, held that the decree of the Washington court was entitled to full faith and credit, Sedgwick, J., writing the opinion of the court and Barnes, J., dissenting in a short opinion. Shortly thereafter Chief Justice Holcomb's term expired. He was succeeded by Sedgwick; and Charles B. Letton, a former commissioner of appeals, filled the vacancy as associate justice. On rehearing, the court reversed its former decision,⁶⁵ Letton, J., writing the opinion and Sedgwick, now Chief Justice, dissenting at length. The fact that the reversal coincided with a change in the court's personnel was doubtless regarded by the justices, especially Justice Letton, as a reason for setting forth the fullest and most effective justification of their positions which was possible.

Justice Letton, like Justice Barnes, was deeply impressed by the fact that the Nebraska law permitted no such division of the separate property of the spouses upon divorce as was authorized by Washington law and ordered by the Washington decree. This difference on a point in the law of husband and wife had, as it happened, been expressed in Nebraska in terms of the jurisdiction of courts. In fact, the court had previously taken the unusual course of holding that a decree of a Nebraska court purporting to award domestic land standing in the husband's name to the wife upon divorce was void and subject to collateral attack.⁶⁶ Mrs. Fall, said Justice Letton, was "asking the court to give effect to a decree of the Washington court which it would not enforce if it had been rendered in a court of this state. . . . A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void. . . . We know of no rule which compels us to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts upon the same cause of action. . . ." ⁶⁷ Observe that this is not an argument that the Washington court did not have jurisdiction to divide the property of the spouses on divorce; nor is it a holding that the Nebraska court lacked jurisdiction to enforce the Washington

⁶⁵ 75 Neb. 120, 113 N.W. 175 (1907).

⁶⁶ *Cizek v. Cizek*, 69 Neb. 797, 800, 96 N.W. 657, 658 (1903), rev'd on rehearing 69 Neb. 800, 811, 99 N.W. 28, 31 (1904). In so doing, the court, assisted by Commissioner (later Justice) Letton, reversed a sensible decision by Commissioner (later Dean) Roscoe Pound, who had held that though the court might have dealt with the question irregularly or erroneously, it had jurisdiction of the parties and the subject matter, and its decree was not open to collateral attack. Commissioner Duffie concurred. Letton succeeded Pound as commissioner. On rehearing, the former judgment was vacated, Commissioner Kirkpatrick writing the opinion and Commissioners Duffie and Letton concurring. Apparently Charles B. Letton was not the man to neglect an opportunity to rectify the errors of his predecessors.

⁶⁷ 75 Neb. 120, 132, 134, 113 N.W. 175, 180, 181 (1907).

decree.⁶⁸ It is simply a declaration that Nebraska will have nothing to do with the Washington decree because it grows out of a law which is different from the law of Nebraska. Nothing is really added to the force of this declaration by the circumstance that Nebraska has spoken of its substantive law of divorce in terms of jurisdiction and has been betrayed into an anomalous position by its terminology. With regard to the final sentence in the quoted portion of the opinion, we may note, first, that while *Fauntleroy v. Lum*⁶⁹ had not then been decided, it was a fresh memory when the *Fall* case reached the Supreme Court, and has now been on the books for forty-five years; and, second, that while the full faith and credit clause does not require a state to apply the doctrines of *res judicata* to the judgments of its own courts, it does require their application to judgments of the courts of sister states.

When Justice Letton seeks to bolster his argument by the epithetic assertion that "the act directed by the Washington court [the conveyance] is in opposition to the public policy of this state, in relation to the enforcement of the duty of marital support,"⁷⁰ it is hard to take him seriously. Bear in mind that he has just finished saying that "[i]n the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."⁷¹ But apart from this remarkable inconsistency, are we to believe that a statute defining the jurisdiction of Nebraska courts in divorce cases expresses Nebraska's policy of matrimonial support pertaining to *couples domiciled in Washington*? Of one thing we may be sure: the Nebraska policy in question is not a land policy. It is a policy "in relation to the enforcement of the duty of marital support." If Nebraska has a legitimate interest in such a policy as applied to couples domiciled in another state, and if it has such a policy, what is it? Nebraska laws allow alimony on principles which, as pointed out by Chief Justice Sedgwick, do not differ materially from those on which Washington divides the marital property.⁷² If the Washington court had awarded a money decree for alimony,

⁶⁸ The lack of jurisdiction of the Nebraska court in *Cizek v. Cizek*, 69 Neb. 797, 96 N.W. 657 (1903), stemmed from the provisions of the statute authorizing suits for divorce; the action on the decree is not a suit for divorce.

⁶⁹ 210 U.S. 230 (1908).

⁷⁰ 75 Neb. 120, 134-35, 113 N.W. 175, 181 (1907).

⁷¹ *Ibid.*, at 128 and 178.

⁷² *Ibid.*, at 136 and 182.

the Nebraska court would have enforced it and would have sold Mr. Fall's land on execution—perhaps to Mrs. Fall—to satisfy the obligation. The conclusion is inescapable that this second species of concern for local policy and dominion over local land has nothing to do with the nature of equity decrees, nor with land policy; it is nothing more than a refusal to apply the principles of *res judicata* merely because the foreign law differs—and that in a minor particular concerning the method of attaining a commonly desired result—from the law of the forum.

A recent commentator, yielding without a shot much of the ground won by his predecessors, assumes it to be established law that decrees of this sort are not within the operation of the full faith and credit clause, and contents himself with the assurance that the states will, as a matter of comity, enforce such decrees “where the law is substantially the same in both states.”⁷³ I should have thought that the last word on dissimilarity of law as a criterion in the choice of law, and a fortiori in the recognition of judgments of sister states, was spoken in 1918 by Judge Cardozo:

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition. . . .⁷⁴

Such a criterion can exist only as an egregious anachronism in the context of an expanding full faith and credit clause.

The third type of specific concern for preserving the dominion of a state over its land against the intrusion of foreign decrees has to do with the integrity of the recording system. On this score Justice Letton said:

[I]f the courts of other states can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action “upon the conscience” of the holder of the legal title, the recording acts of this state would cease to afford protection to purchasers of land, and thus the title in fact be affected, and the power of the state over the transfer and devolution of lands interfered with.

⁷³ Schwartz, *Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees*, 54 Dick. L. Rev. 293, 300, 297, 298, 299, 302, 303 (1950).

⁷⁴ *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918). A word of caution may be in order: Since Cardozo was speaking of local policy as a reason for refusing to enforce a foreign statutory cause of action, he should not be understood as implying that the state has similar freedom to decline to recognize a foreign judgment. Indeed, recent cases have significantly limited the freedom of a state to refuse enforcement on grounds of policy to a cause of action of the sort with which Cardozo was concerned in this case. *Hughes v. Fetter*, 341 U.S. 609 (1951); *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952).

If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee . . . such purchaser, though relying on the laws of this state for his protection, would receive no title. This is the contention of the appellee [Mrs. Fall], carried to its ultimate conclusion, and, if this is correct, the action of the court of another state directly interferes with the operation of the laws of this state over lands within its sovereignty.⁷⁵

Chief Justice Sedgwick remarked, with restraint, "I do not understand the application of [this] language."⁷⁶ I do not understand it either, and for half a century no one has explained it. The language seems almost perverse in its refusal to confront the issue. No one has ever contended that a conveyance by Fall to a bona fide purchaser would be void; nor is that result a logical consequence of the position that the foreign decree should be treated as *res judicata*. Of course Fall could have conveyed a good title to a bona fide purchaser.⁷⁷ Although Holmes himself, somewhat perversely, speculated that the Nebraska court's decision might be interpreted as treating Mrs. Eastin as an innocent purchaser,⁷⁸ no member of the Nebraska court so much as intimated that she had such a status. The "bona fides" of the conveyance to her was in issue at the trial, and the issue was resolved against her.⁷⁹ It could hardly have been resolved otherwise on the facts. Not even Justice Letton questioned the finding. He argued only that Mrs. Fall's contention, *carried to its ultimate conclusion*, would mean that the beneficiary of the foreign decree would prevail not only over a transferee in Mrs. Eastin's position, but also over a hypothetical innocent purchaser.

I have *tried* to understand this argument, because of its obvious importance to the question whether the thesis I am supporting poses any real threat to the interests of the situs state. The best I can do is to understand how Justice Letton might have been misled, in good faith, into his confusion. The attorneys for Mrs. Fall—as lawyers still do—prejudiced their case by grasping for straws when they had solid ground beneath their feet. They counted not only on the Washington decree but also on the commissioner's deed which had been executed pursuant to it. Now, if a deed

⁷⁵ 75 Neb. 120, 133, 113 N.W. 175, 180 (1907). Cf. *Cooley v. Scarlett*, 38 Ill. 317, 319 (1865).

⁷⁶ *Ibid.*, at 148 and 186.

⁷⁷ Similarly, if he had executed a deed to Mrs. Fall in obedience to the Washington court's decree, he could have conveyed title to a purchaser without notice if the second deed was recorded first.

⁷⁸ *Fall v. Eastin*, 215 U.S. 1, 15 (1909).

⁷⁹ 75 Neb. 120, 123–24, 113 N.W. 175, 177 (1907).

executed by a commissioner pursuant to the decree of a foreign court actually passes title, a judge has cause for concern over the possible consequences to his state's recording system. This probably remains true even though the case is not as strong as Justice Letton put it—that is, it remains true even though the commissioner's deed is not good, until recorded, as against an innocent purchaser. The plight of a Nebraska lawyer examining a title, when he encounters on the record a conveyance by a commissioner appointed by a foreign court, is one which readily arouses sympathetic understanding. His problem, in such a suppositious case, would be to inquire fully into the unfamiliar powers of the foreign court; to examine the record of the proceedings leading to the decree; and perhaps to disentangle nice distinctions under the full faith and credit clause. It may well be said that a state could hardly tolerate such complexities. But, while thoughtless lawyers still count on foreign decrees and commissioners' deeds as muniments of title,⁸⁰ no judge and no commentator who has considered the question carefully has ever urged the recognition of the foreign decree in such terms. The thesis is simply that the foreign decree establishes an obligation to convey, or, if you please, an equitable interest in the land such as is created by a contract to convey. A judicial proceeding at the situs is essential to the enforcement of the obligation and the perfection of the interest. Innocent purchasers will be fully protected. The decree of the court at the situs, when it is rendered, will be the source of title. If a commissioner's deed is executed and recorded pursuant to the *local* decree, its appearance in the records will cause the title examiner no more difficulty than the many similar deeds he encounters, resulting from local judicial proceedings not preceded by an action abroad. The local decree insulates him against all questions as to the jurisdiction of the foreign court, the regularity of its proceedings, and the operation of the full faith and credit clause. All those questions, and in addition the question of the rights of the parties on the merits, are *res judicata* under the local decree. I am persuaded that Mrs. Fall's attorneys so frightened Justice Letton by the abstracter's nightmare conjured up by their supererogatory effort to work the foreign commissioner's deed into the chain of title that it was their own fault that he was diverted from the sound basis of their case.

Similarly, Justice Letton may have been disturbed by the form of the remedy sought in the Nebraska case. The suit was one to remove a cloud from the title, and thus assumed that Mrs. Fall had title of some kind. Under Nebraska law an equitable title was sufficient basis for such an

⁸⁰ Cf. *McRary v. McRary*, 228 N.C. 714, 47 S. E. 2d 27 (1948).

action, and Justice Sedgwick was satisfied that the obligation of the foreign decree created an interest which was such a "title." But for reasons that have already been indicated, a judge has some reason to shy away from any suggestion that the foreign decree, of its own force, transfers any "title" whatever. For this reason, if for no other, lawyers today who seek to realize upon the victory represented by a foreign decree would be well advised to cast their prayer in other terms, as by an action for declaratory and supplemental relief or a bill to execute the decree.⁸¹

It is possible that the cause of the confusion lies deeper than the tactical errors of Mrs. Fall's counsel. Langdell, in a metaphysical mood, inquiring why it is that equity submits to the limitation that it can act only in personam, had said: "Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which . . . would be especially abhorrent to equity itself."⁸² There is no direct evidence that Justice Letton had this conception in mind, and it is not easy to relate it to his position. Conceivably, however, he might have reasoned that to give conclusive effect to the Washington decree would be to give it, indirectly, an "in rem" effect; if it is "in rem" it is binding on all the world; hence to give effect to it at all necessarily involves giving it effect as against innocent purchasers. Such reasoning involves such a patent shift in the meaning attached to the phrase "in rem" that it should mislead no one who has read Professor Cook on the dangers of just such shifts.⁸³ Langdell may have contributed to Letton's unwitting distortion of the issue; but there is certainly no reason why a foreign personal decree cannot be treated as conclusive upon the parties and those in privity with them, and still as not affecting the rights of bona fide purchasers for value. If there is an apparent contradiction in this statement, it is adequately explained by the terms and the policies of the very recording statutes we are concerned about.⁸⁴

I have tried conscientiously to find some substance in the reiterated apprehension that the application of principles of *res judicata* to foreign personal decrees relating to land will be inimical to the legitimate interest

⁸¹ It has been suggested that the explanation of the Fall case may lie in the fact that Fall himself was not personally served in the Nebraska proceeding. Pound, *The Progress of the Law, 1918-1919: Equity*, 33 Harv. L. Rev. 420, 424 n. 30 (1920). Under modern conceptions, at least, that circumstance could have made no difference, in view of the Nebraska court's in rem jurisdiction. See note 46, *supra*. But it may have had an influence on Justice Letton. See 75 Neb. 120, 130, 134, 113 N.W. 175, 181 (1907).

⁸² Langdell, *A Brief Survey of Equity Jurisdiction* 6 (2d ed., 1908).

⁸³ Cook, *The Powers of Courts of Equity*, 15 Col. L. Rev. 37, 106, 228 (1915).

⁸⁴ The principle that a judgment has the effect of a transfer of title has no application to foreign decrees. Rest., *Judgments* § 110; cf. *ibid.*, at § 89 (1942).

of the state of the situs. I have been unable to do so, either in the concrete expressions of the courts or in the flights of my own imagination. This was to be expected, in view of the powerful evidence offered by the universal recognition of deeds executed pursuant to foreign decrees. It is also to be expected, however, that additional specific policy arguments will be advanced from time to time. When they are advanced they should be examined with care. They may have nothing to do with land policy at all; and certainly the principle of sovereignty over land cannot be allowed to function as an umbrella, sheltering the rejection by a state of unfamiliar or erroneous doctrine where such rejection would be precluded but for the presence in the case of a controversy relating to real estate. Even if land law is involved, such objections may be founded on mere differences in treatment which will not bear the name of policy. Even if the differences seem substantial, they may relate to "minor morals of expediency and debatable questions of internal policy."⁸⁵ In such cases opinions will differ. But there is no reason to fear that the application of full faith and credit to foreign decrees will place the land policy of the state at the mercy of venal and hostile tribunals. Our systems of conflict-of-laws rules are sufficiently homogeneous to insure that the law of the situs will be given due consideration.⁸⁶ Every state has an equal interest in the sound development and application of choice-of-law rules where land is concerned. In the event that a foreign state ignores, or refuses to apply, or misapplies the applicable law of the situs, there is a substantial possibility that the error may be rectified by the Supreme Court on direct review. This is not the place to undertake a consideration of the literature on the question of the extent to which the Constitution makes the choice of law a federal question; but certain recent cases are suggestive,⁸⁷ and certain others strongly

⁸⁵ Crouch, J., dissenting in *Mertz v. Mertz*, 271 N.Y. 466, 475, 3 N.E. 2d 597, 600 (1936).

⁸⁶ The attitude of the Supreme Court of Canada, assuming that a foreign decree must be based on foreign law and that the law of the situs has been ignored, is both unrealistic and offensive, and would be doubly so in an American court considering the judgment of a sister state. *Duke v. Andler*, [1932] 4 D.L.R. 529, 539. It is instructive to note that the only thought offered by the court by way of rationalizing the refusal to give effect to the foreign decree was an appeal to conceptualism: "[I]f the Courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities . . . would be of no real consequence." *Ibid.*, at 541. We are at the bottom of the barrel when the distinction is defended for its own sake.

⁸⁷ *Hughes v. Fetter*, 341 U.S. 609 (1951); *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952). On the general problem, see 1 Crosskey, *Politics and the Constitution in the History of the United States* 541-57 (1953); Cheatham, *A Federal Nation and Conflict of Laws*, 22 Rocky Mount. L. Rev. 109 (1950); Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 Va. L. Rev. 557, 605 (1943); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 Ore. L. Rev. 109 (1943); Dodd, *The Power of the Supreme Court to Review State*

invite the litigant to avail himself of the opportunity to find out.⁸⁸ Finally, the compulsion to accept the foreign decree exists only as the Supreme Court determines that the full faith and credit clause applies. The Court has said that the clause does not state an inexorable command, that that Court is the final arbiter, and that there may be exceptions from its operation.⁸⁹ Thus, in the remote event that a court of a sister state were to repudiate the law of the situs in a matter importantly affecting a substantial land policy of the situs; and the Supreme Court were to refuse review on the ground that no federal question is involved; and the courts at the situs were to refuse effect to the foreign decree; only the Supreme Court could require that it be given effect, and it would still be open to the Court to hold that, in the particular case, the policy of the situs state should prevail. I do not mean to hold out false hopes of exceptions. When the Supreme Court comes to hold that the full faith and credit clause applies to decrees relating to foreign land it will doubtless state the proposition generally, holding exceptions to a minimum and in time eliminating them one by one, as it has done with money judgments. My point is rather that it is the Supreme Court which determines, in the showdown case, whether the foreign decree shall be operative or not. Thus the land policy of the situs state is not subordinated to the authority of another state. It is subordinated to the same supreme authority which, under the Constitution, can nullify the most fervently held land policy if it conflicts with the equal protection clause⁹⁰ or the treaty power.⁹¹ It is subordinated to the same judicial authority which, one hundred and sixty-four years ago, was invested with jurisdiction to determine questions of title to land within the states in important classes of litigation, including controversies between citizens of different states.⁹² It is subordinated only to the Constitution.

Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926); Hilpert & Cooley, The Federal Constitution and the Choice of Law, 25 Wash. U. L. Q. 27 (1939); Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161 (1931); Langmaid, The Full Faith and Credit Required for Public Acts, 24 Ill. L. Rev. 383 (1929); Smith, The Constitution and the Conflict of Laws, 27 Geo. L. J. 536 (1939); Cheatham, Sources of Rules for Conflict of Laws, 89 U. of Pa. L. Rev. 430 (1941); Corwin, The "Full Faith and Credit" Clause, 81 U. of Pa. L. Rev. 371 (1933); Reese, Full Faith and Credit to Statutes: The Defense of Public Policy, 19 Univ. Chi. L. Rev. 339 (1952).

⁸⁸ *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *Morris v. Jones*, 329 U.S. 545, 552 (1947).

⁸⁹ Cf. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947).

⁹⁰ *Oyama v. California*, 332 U.S. 633 (1948).

⁹¹ *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

⁹² No citation of authority is needed to sustain the elementary proposition that the United States courts in the exercise of their constitutionally conferred jurisdiction have full power to

In closing this phase of the discussion, I should like to turn from the attempt to discover, on the merits, whether there is substance in the fear of encroachment on local control and policy, and consider for a moment a phenomenon which, like the practice of conceding validity to deeds executed pursuant to foreign decrees, strongly tends to show that there is no substance in such fear. The leading cases, such as *Fall v. Eastin*, are of the type in which the claimant prevails in the foreign court and obtains a decree requiring the doing of an act which will change the status quo. What happens when the claimant who resorts to a foreign court for relief is rebuffed, the court holding that he is not entitled to a decree ordering a conveyance? One court, unaware that such cases have been generally assigned to a special category requiring distinctive treatment, responded to such a situation by invoking the standard authorities in derogation of the foreign court's power, and with repeated expressions of reluctance denied effect to the decree.⁹³ The husband had filed suit for divorce in Oregon. The wife, answering, asserted that certain land in Oklahoma, having been bought with their joint earnings, in equity belonged to her. The Oregon court disagreed, ruling that the husband was the owner, "absolutely and free from any claim, interest or estate of" the wife. Thereafter the husband brought an action of ejectment in Oklahoma, in which the wife again sought to show an interest in the money invested in the land. The husband, relying on the Oregon decree, argued that it did not attempt to vest any title to Oklahoma land; that, inasmuch as the legal title was already in him, it was not varied by the decree; and that the decree therefore settled personal rights alone. The Oregon court might have settled the matter conclusively if it had required the wife to execute some document of title; but since it found the wife had no interest, it perceived no reason for requiring her to execute a deed or a release. While the trial court was impressed with this argument, the Oklahoma Supreme Court felt constrained to follow, with reluctance, the authority of *Fall v.*

determine title to land within the states. But since the proposition is not often mentioned in discussions of the present question, it seems appropriate to recall that the famous case of *Pennoyer v. Neff*, 95 U.S. 714 (1878), was one in which the federal courts upset a title to Oregon land regularly acquired under the law of Oregon. The power of a district court over title to the property of a bankrupt is a striking illustration, involving practical problems with respect to title investigation which are not presented by the recognition of foreign decrees as *res judicata*. 44 Stat. 664 (1938), 11 U.S.C.A. § 44(g) (1953); 3 American Law of Property § 13.6a (1952); 6 Am. Jur. (Rev.) Bankruptcy §§ 847, 865 (1950); 2 Collier, Bankruptcy § 21.30 (1940); *Robertson v. Howard*, 229 U.S. 254 (1913); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734 (1931); *Gross v. Irving Trust Co.*, 289 U.S. 342 (1933).

⁹³ *Sharp v. Sharp*, 65 Okla. 76, 166 Pac. 175 (1916). See also *O'Connell v. Sewell*, 191 Ark. 707, 87 S.W. 2d 985 (1935).

Eastin, and remanded the case with instructions that the wife be given a second chance to prove the claim that the land was bought with her money. Other courts have not been so helpless in the face of such palpable attempts to flout elementary principles of *res judicata*—where there is such a convenient semantic way of escape from the dogma of exclusive control of land. There is a solid line of cases declaring what may be loosely referred to as the estoppel principle: that where one claiming an interest in local land invokes the aid of a foreign court, in a suitable proceeding in which the court has jurisdiction of the defendant, *and loses*, he is precluded, or estopped, from thereafter asserting his claim in the courts of the situs. Thus in a Texas case, the Court of Civil Appeals held:

Plaintiff . . . himself selected the Oklahoma forum for the adjudication of the question of the validity of the deed upon which he afterwards relied in this suit. He presented that instrument to the Oklahoma court as evidence of his title to the land in dispute and of his right to the rents and revenues derived from said land. He affirmatively invoked the judgment of that court upon the sufficiency of that deed to show title to the property, and that court, in the exercise of the jurisdiction thus invoked, held the deed void. Under the authorities cited plaintiff . . . is bound by that decree, and is estopped to dispute its effect in any other court.⁹⁴

What becomes of the vaunted exclusiveness of the state's control over questions of title to land if the sovereign policy can be set at naught by the election of a private litigant to pursue his claim in the courts of another state, coupled with the unsuccessful event of the action? Surely it is apparent that a negative decree can be as significant in its effect on asserted interests as one giving affirmative relief. Perhaps when no conveyance is ordered the apprehended threat to the orderliness of the recording system seems less imminent; but one gets the impression that the concern for the integrity of local control comprehends more than this. These "estoppel"

⁹⁴ *Hall v. Jones*, 54 S.W. 2d 835, 837 (Tex. Civ. App., 1932). See also *MacDonald v. Dexter*, 234 Ill. 517, 85 N.E. 209 (1908); *Norton v. House of Mercy*, 101 Fed. 382 (C.A. 5th, 1900); *Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 59 Pac. 533, (1899); *Niles v. Lee*, 169 Mich. 474, 135 N.W. 274 (1912); *Roller v. Murray*, 71 W.Va. 161, 76 S.E. 172 (1912).

The two elements of these "estoppel" cases are: (1) the unsuccessful claimant himself invoked the jurisdiction of the foreign court; (2) the foreign judgment is asserted defensively against the unsuccessful claimant. *Fall v. Eastin* itself has the first, but not the second of these two elements. Mr. Fall, as plaintiff in the divorce action, invoked the jurisdiction of the Washington court by claiming the Nebraska land as his own and asking that his ownership be confirmed. But the title stood in his name, and affirmative relief was awarded to the wife. Therefore the case is not inconsistent with the authority of the "estoppel" cases, however inconsistent those cases themselves are with the essential doctrine of *Fall v. Eastin*.

On the other hand; the early case of *Brown v. Lexington & Danville R.R.*, 13 N.J. Eq. 191 (1860), presenting the second but not the first of the elements, treats the foreign decree as conclusive. Thus New Jersey, one of the principal strongholds of the doctrine of exclusive local control, seems committed to the proposition, broader than that of the "estoppel" cases, that the foreign decree may be used defensively.

cases are no mere aberration. They reflect a deep-rooted conviction that one who has chosen his own forum should not be permitted to complain against its authority, though the situation may be otherwise if he is summoned to that forum against his will. Thus the United States Supreme Court, while refusing conclusive effect to a French judgment against American citizens, indicated that if an American citizen should invoke the jurisdiction of the French court the judgment would be conclusive.⁹⁵

These cases demonstrate that once again the states have willingly, and without unwelcome consequences, yielded a substantial degree of jurisdiction to foreign courts to determine conclusively controversies relating to interests in local land—this time on principles of *res judicata*. But their significance is greater than this. What a court does when it holds that a foreign decree is conclusive in the “estoppel” situation is to apply that phase of the general principle of *res judicata* known as the barring effect.⁹⁶ What a court does when it holds that an affirmative foreign decree in favor of the plaintiff is not conclusive is to refuse to apply that phase of the general principle known as merger.⁹⁷ But, at least in the constitutional context of full faith and credit, these two aspects of the general principle are of equal dignity and utility; they express the same considerations of fairness to litigants and the same interest of the nation in an end of litigation. If the operation of the foreign judgment as a bar is accepted, how can its operation as a conclusive determination that the plaintiff is entitled to relief be denied? The point is not just that there should be the usual “mutuality of estoppel,” but that the rejection of the merger effect rests on wholly inadequate reasons.

Finally, the existence of these estoppel cases is a circumstance which by itself is sufficient, in my judgment, to make nonsense of the proposition that a court cannot by its decree *create* an equitable interest in land in

⁹⁵ *Hilton v. Guyot*, 159 U.S. 113 (1895). The rule as stated by the Supreme Court is broader than the “estoppel” cases concerning land, since it does not require that the foreign proceeding terminate adversely to the one invoking the jurisdiction. “The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. . . . So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either.” *Ibid.*, at 170. Under the full faith and credit clause, of course, a state has no such freedom to refuse conclusiveness to the judgment of a sister state, where, though the defendant was summoned against his will, the foreign court had jurisdiction of his person. It should also be noted that the soundness or unsoundness of the much-criticized “reciprocity” theory of the *Hilton* case is irrelevant to the subject here under discussion.

⁹⁶ Rest., Judgments §§ 45(b), 48 (1942).

⁹⁷ *Ibid.*, at §§ 45(a), 47. In this position a court may get some support from the Restatement, § 46. But the Restatement makes no allowance for the “estoppel” doctrine in cases relating to foreign land. See § 71, comment b.

another state.⁹⁸ Suppose that a plaintiff, claiming an interest in local land by reason of a contract, or by reason of marital rights, institutes an action in a foreign court, with jurisdiction of the defendant, and wins a decree ordering a conveyance. In the absence of compliance, under traditional doctrines, the decree is entitled to no weight whatever at the situs, except—under a modern view—as a determination of *facts* in issue (not issues of law). But suppose the same plaintiff *loses* his case in the foreign court. Under the doctrine that the foreign decree operates as a bar—and that doctrine is apparently adopted by the *Restatement of Judgments*⁹⁹—the plaintiff is forever precluded, in the courts of the situs or elsewhere, from relitigating his claim. Yet he may, in truth, have had a contract which was perfectly valid under the law of the situs, and that contract may, under the law of the situs, have given him an equitable interest in the land.¹⁰⁰ Indeed, in precisely such a case the Supreme Court has held that the foreign decree is entitled to full faith and credit. The plaintiff, a lawyer, sued in West Virginia to enforce an alleged trust in West Virginia land, arising out of a fee arrangement embracing land in Virginia as well. The defendant pleaded in bar a Virginia decree, rendered in a similar action brought by the plaintiff in Virginia, holding that the plaintiff was not entitled to recover because the contract was champertous. The West Virginia court sustained the plea on the explicit ground that it was required by the Constitution to give full faith and credit to the Virginia decree, although the fee arrangement was assumed to be valid under the law of West Virginia.¹⁰¹ Dismissing the plaintiff's writ of error, the Court held:

It is not contended that the West Virginia court, in holding the Virginia judgment to be conclusive upon the present controversy, violated the "full faith and credit" clause of the Federal Constitution. By that clause, and by the act of Congress . . . passed to carry it into effect, it was incumbent upon the West Virginia court to give to the judgment the same faith and credit that it had by law or usage in the courts of Virginia. The effect of this was that, provided the Virginia court had jurisdiction of the subject-matter and of the parties (which was not questioned), the merits of the controversy there concluded were not open to reinvestigation in the courts of West Vir-

⁹⁸ Rest., Conflict of Laws § 240 (1934). Cf. *ibid.*, at § 239, and the view of Professor Beale, discussed above, that the foreign decree operates conclusively where a second suit can be brought on the original cause of action, but not otherwise, because there is no remedy on the decree. 2 Beale, Conflict of Laws § 449.1 (1935); and cf. 21 Harv. L. Rev. 210 (1908).

⁹⁹ Rest., Judgments § 46. Cf. *ibid.*, at § 71, comment b.

¹⁰⁰ Of course he may have had such a contract. It is not true, as some appear to think, that claimants who assert rights to local land in foreign courts regularly win when they should not, and lose only when their claims are palpably unfounded.

¹⁰¹ *Roller v. Murray*, 71 W.Va. 161, 76 S.E. 172 (1912).

ginia. It is not here questioned that the West Virginia courts gave such credit to the Virginia judgment as was thus required.¹⁰²

Under the traditional view, therefore, we are confronted with the remarkable proposition that, while a foreign court has no power to create (or confirm) equitable interests in local land, it has complete and lawful jurisdiction to destroy such interests.

IV

*Fall v. Eastin*¹⁰³ is a most unhappy decision. The case for Mrs. Fall was poorly presented.¹⁰⁴ The Supreme Court found it difficult to state wherein the appellant disagreed with the very vulnerable opinion of Justice Letton. Her lawyers were still arguing that the commissioner's deed was entitled to full faith and credit.¹⁰⁵ They offered a vague theory to the effect that, while the Washington court could not "create" an equity in Nebraska land, it could "divide" and "apportion" existing equities.¹⁰⁶ There was no brief and no appearance for Mrs. Eastin, Mr. Fall's transferee. Mr. Justice McKenna's opinion is indiscriminating, confused, unworthy, reluctant, and ambiguous. He thought that the Court "need not inquire" whether the doctrine that "a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect is illogical or inconsequent."¹⁰⁷ This is indiscriminating because, as we have seen, there is a substantial difference between treating the foreign decree, or the foreign master's deed, as a muniment of title, and treating the decree as a conclusive adjudication of the rights of the parties. It is confused because, when Justice McKenna comes to explain that inquiry is foreclosed by authority, he mixes up the question before the Court with the quite different situation in the discredited case of *Hart v. Sansom*.¹⁰⁸ He thought, also,

¹⁰² *Roller v. Murray*, 234 U.S. 738, 745 (1914). The holding is not as solid as one might wish on the constitutional question. The case was decided six months before the Supreme Court was given jurisdiction to review state court decisions *in favor* of rights asserted under the Constitution. Act of December 23, 1914, c. 2, 38 Stat. 790 (1914), 28 U.S.C.A. § 1257 (1949). But, since the language quoted was used in answer to the plaintiff's contention that the West Virginia court had deprived him of due process of law in giving conclusive effect to the Virginia judgment, it can hardly be dismissed as *obiter*.

¹⁰³ 215 U.S. 1 (1909).

¹⁰⁴ See *ibid.*, at 7; Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land, 34 Yale L. J. 591, 605 (1925).

¹⁰⁵ *Ibid.*, at 4.

¹⁰⁶ *Ibid.*, at 7-8.

¹⁰⁷ *Ibid.*, at 10.

¹⁰⁸ 110 U.S. 151 (1884). See *Fall v. Eastin*, 215 U.S. 1, 10-11 (1909); Barbour, The Extra-Territorial Effect of the Equitable Decree, 17 Mich. L. Rev. 527, 537 (1919).

that the Court need not "consider whether the other view [giving effect to the Washington proceedings] would not more completely fulfill the Constitution of the United States."¹⁰⁹ This, like the disinclination to inquire into the "illogical or inconsequent" character of refusal to credit the foreign decree when a deed made by the defendant under its coercion is recognized, is unworthy, because it is always the duty of the Supreme Court to inquire whether the requirements of the Constitution are fulfilled. He said without qualification that "[t]he policy of a [situs] state would not be violated"¹¹⁰ if the same effect were given to the foreign decree as to the defendant's deed under it. Undiscriminating again, because to recognize the foreign decree as passing title *would* create problems in the examination of titles at the situs. He cited, but did not apply, *Fauntleroy v. Lum*. He quoted the statement in *Dull v. Blackman*¹¹¹ that "if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title." He said that the case for Mrs. Fall might be "plausibly . . . sustained," but that the contrary view was "firmly established."¹¹² He discussed *Burnley v. Stevenson*¹¹³ at some length, quoting from it the following language: "[W]hen [the foreign decree is] pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein. . . ."¹¹⁴ He added:

There is . . . much temptation in the facts of this case to follow the ruling of the Supreme Court of Ohio [in *Burnley v. Stevenson*]. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, submitting to the jurisdiction which he had invoked, made counter-charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not questioned by the Supreme Court [of Nebraska]. . . .¹¹⁵

The reluctance is apparent. Indeed, this statement of Mrs. Fall's case is so strong that the uninitiated reader may well wonder how the Court ruled

¹⁰⁹ 215 U.S. 1, 10 (1909).

¹¹⁰ *Ibid.*

¹¹¹ 169 U.S. 243, 246-47 (1898); 215 U.S. 1, 11 (1909).

¹¹² 215 U.S. 1, 11 (1909).

¹¹³ 24 Ohio St. 474, 16 Am. Rep. 621 (1873).

¹¹⁴ 215 U.S. 1, 13 (1909).

¹¹⁵ *Ibid.*, at 14.

against her. It did so by completing the statement quoted above with a masterpiece of ambiguity:

... but as the ruling of the [Nebraska Supreme] court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title does not offend the Constitution of the United States, we are constrained to affirm its judgment.¹¹⁶

That is all. Did the Nebraska decision rest on an adequate and independent state ground, or not? Justice Holmes did not think that the majority thought it did—hence his concurring opinion. If it did, was that ground, as Holmes thought, that Mrs. Eastin was an innocent purchaser, or that Nebraska had done away with the equitable doctrine as to purchasers with notice, or that an action to quiet title was the wrong remedy? Mr. Justice McKenna did not say. Justices Harlan and Brewer dissented, as well they might.

The most rational and charitable interpretation which can be put upon this unfortunate opinion is that it held, reluctantly, that the inapplicability of the full faith and credit clause to such decrees was too firmly established by authority to be open to question. What, then, was the paramount and overriding authority which enforced this unwanted result? The first case cited by Justice McKenna was *Watts v. Waddle*,¹¹⁷ which, he said, "has features like the case at bar."¹¹⁸ He cited subsequent cases, too; but a brief analysis will show that none of them required the decision.¹¹⁹ What

¹¹⁶ *Ibid.*

¹¹⁷ 6 Pet. (U.S.) 389 (1832).

¹¹⁸ 215 U.S. 1, 8 (1909).

¹¹⁹ *Watkins v. Holman*, 16 Pet. (U.S.) 25 (1842); *Corbett v. Nutt*, 10 Wall. (U.S.) 464 (1870); *Carpenter v. Strange*, 141 U.S. 87 (1891). Not one of these cases requires the result which the Court reached in *Fall v. Eastin*.

Watkins v. Holman: Holman, owning land in Alabama, contracted to sell it to Brown, but died before making the conveyance. His widow, residing in Boston, was there appointed administratrix. She conveyed the land to Brown on the authority of (1) an order of the Massachusetts court, assented to by Holman's heirs, purporting to authorize the conveyance on Brown's petition; (2) an act of the Alabama legislature authorizing her to sell lands of the estate for the payment of debts. Holman's heirs sued in ejectment to recover the land from Brown's transferees. The Supreme Court held that the order of the Massachusetts court did not enable the administratrix to convey the legal title, since that court was powerless to invest her with title. The effect of the Massachusetts decree as an adjudication of the equitable interests of the parties was not directly presented to the Court. If it had been, the response would have been clear, as is shown by the Court's treatment of the argument that the defendants, by virtue of the contract to sell, were the equitable owners: in fervent terms, the Court asserted that no equitable defense could be interposed in an ejectment action. "Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere." 16 Pet. 25, 59 (1832). When it is noted that this opinion was written by Justice McLean, who also wrote the opinion in *Watts v. Waddle*, it will be appreciated that he was not denying that advantage might be taken of a foreign decree in an appropriate proceeding in equity. The case can stand for no more than that a foreign decree does not create interests which can defeat an ejectment action in a system of strict separation of law and equity. Even that was not necessary to the decision; the

is this keystone case that binds the court to an "illogical or inconsequent" position which does not completely fulfill the Constitution?

Watts v. Waddle was a sequel to the famous *Massie v. Watts*.¹²⁰ It grew out of the same act of disloyalty by a surveyor which led to Chief Justice Marshall's classic affirmation of the jurisdiction of a court of equity, in a proper case and with the defendant before it, to order a conveyance of foreign land. The facts of *Massie v. Watts* are well known, but, as an introduction to the events which led to *Watts v. Waddle*, they may be restated briefly.

Court directed judgment for the defendants on the ground that the act of the Alabama legislature validly authorized the conveyance by the administratrix.

Corbett v. Nutt: A District of Columbia court purported to appoint a new trustee for Virginia lands. The lands were sold for nonpayment of taxes, and the trustee so appointed redeemed pursuant to an act of Congress providing for redemption, in the case of land owned by a person under legal disability, by the trustee or other person having charge of the person or estate of such owner. While holding that the District of Columbia court could not vest title in its appointee, the Court held that since the new trustee had apparent authority he was a person "having charge" of the estate, and the redemption was proper. Clearly there is no support for *Fall v. Eastin* here: there would not be the slightest inconsistency between requiring conclusive effect for the Washington decree and holding that a court cannot vest its appointee with legal title to foreign land. Moreover, what was said as to the power of the District of Columbia court, though obviously sound, was just as obviously pure dictum.

Carpenter v. Strange: This is the strongest of the four cases cited, but it falls far short of compelling the result reached in *Fall v. Eastin*. One Merrill, trustee for Mrs. Carpenter, misappropriated the trust property. Certain land of his own, located in Tennessee, he conveyed to Mrs. Strange without consideration. Then he died. Mrs. Strange qualified as his executrix in New York, and there Mrs. Carpenter brought an equitable action against her, in her representative capacity, to recover the misappropriated funds, alleging that the conveyance of the Tennessee land to Mrs. Strange was in fraud of her rights as a creditor. The New York court entered a substantial money decree for the plaintiff, and purported to adjudge the conveyance of the Tennessee land to Mrs. Strange to be "absolutely null and void from the beginning" as a fraud on the plaintiff as creditor. Mrs. Strange having qualified as executrix in Tennessee, the plaintiff brought an equitable proceeding there to enforce her rights under the New York decree, attaching the land which had been conveyed to Mrs. Strange. The Supreme Court held that Tennessee must give full faith and credit to the New York decree for money, but that it was not bound to respect the adjudication that the conveyance was void. The latter holding was based, first, on the fact that Mrs. Strange had been sued in New York only as executrix, whereas she claimed the land in her individual capacity; and, second, on the fact that the New York court had purported to affect the title to the land directly, instead of exercising its power to order Mrs. Strange to make a conveyance. But for space limitations, it would be desirable to quote here a full page from the opinion (pp. 105-6) to demonstrate the careful phraseology with which the court emphasized the impropriety of this procedure, as distinguished from the correct exercise of jurisdiction in personam. The result might well have been different if, in the New York case, Mrs. Strange had been sued in her individual capacity as well, and if the New York court had couched its decree in terms of an order to her to convey the Tennessee land for the benefit of the defrauded creditor rather than in terms of an adjudication that the conveyance to her was void. The Supreme Court's insistence on the importance of such a distinction in wording is sheer formalism, of course; the Court might well have treated the decree, as it stood, as a final adjudication of the rights of the parties. But this is not the first time that an unfortunate choice of words or legal concepts has proved fatal in court.

¹²⁰ 6 Cranch (U.S.) 148 (1810).

Ferdinand Oneal [sic] was the holder of a military warrant for public land in Ohio. An entry was made under this warrant which apparently entitled Oneal to one thousand acres on the bank of the Scioto River, in what became the town of Chillicothe, the description resting upon two other entries, one by Thomas Massie and one by Robert Powell. Massie was employed to survey the Oneal entry. Watts, by assignment, succeeded to the rights of Oneal. Unexpected bends in the river injected an ambiguity into the calls of the entry. At the time the entries were made it was believed that they were such that each of the three entrants could have the acreage claimed within the allotted frontage on the river. But Massie, the surveyor, placed such an interpretation on the entries that those of Powell and Massie covered almost the entire space allotted on the river for the three claims, so that the land which should have gone to Watts was included in the surveys filed for Massie and Powell. Massie also bought Powell's rights, so that he became the sole beneficiary of his misconstruction of the calls; and he procured patents settling the title in himself—or so everyone assumed in the early stages of the protracted litigation. He promptly proceeded to sell the land thus acquired to other people.

Watts brought his action against Massie in the United States circuit court for Kentucky, which acquired personal jurisdiction of the defendant. Judge Innis entered a decree ordering Massie to convey to Watts a properly surveyed tract fronting on the river. Massie appealed to the Supreme Court, which affirmed with Marshall's classic opinion, holding that an agent indulging in such practices holds the land acquired as trustee for his principal, and can be required to convey by a court having personal jurisdiction. So much can be gathered from the report of *Massie v. Watts* in the Supreme Court, and is quite familiar.

What happened next is not so generally known. Like Mr. E. W. Fall and many another defendant, Massie treated the decree with contempt; he disregarded it, and made no conveyance. Watts then filed an action in the circuit court of the United States for Ohio, "to compel Nathaniel Massie and others, to make a conveyance to the complainant, of the legal title to the said [land], the elder equitable title thereto being in the complainant."¹²¹ Mr. Justice McLean, after reciting the award of the decree to Watts by the circuit court in Kentucky and the affirmance by the Supreme Court in *Massie v. Watts*, describes the subsequent action thus: "To carry this decree into effect, in the state of Ohio, suit was instituted by

¹²¹ *Watts v. Waddle*, 6 Pet. (U.S.) 389, 390 (1832).

Watts in the circuit court. . . ."¹²² Thereupon, we may gather, Watts called on certain luckless people in Chillicothe, including one William Lamb, who had bought from Massie parts of the land acquired by his perfidy. I feel sure that he called with a copy of John Marshall's instructive essay on applied ethics in his breast pocket. At all events, he was able to convince Mr. Lamb that, if he wished to continue in possession of the land he had bought from Massie, he would have to treat with the rightful owner, Watts. As an amicable settlement of the matter, Watts and Lamb entered into an agreement whereby Lamb agreed to pay a substantial price for the land, and Watts agreed to give him a good and sufficient warranty conveyance—as soon as a final decree should be entered in the action which Watts had brought against Massie in the Ohio circuit court.

This contract was made in November 1815, some five years after Watts's victory in the Supreme Court. It contemplated that the final decree in the Ohio case would be forthcoming by February 1, 1816. Actually, Watts won a final decree in that case in January 1818.¹²³ Unfortunately, the decision of the circuit court appears not to be reported. But there was an appeal to the Supreme Court: not by Massie, and not by Lamb, but by certain other of Massie's grantees who had been made defendants.¹²⁴ In Brightly's edition of the reports, following Justice McLean's statement that the final decree in the Supreme Court was entered in September 1822, there is a reference to 7 Wheat. 158. This is an error, since that reference is to *Watts v. Lindsey's Heirs*, a case involving different land, which Watts lost. Clearly the correct reference should be to *Kerr v. Watts*,¹²⁵ which was decided in March 1821. In the report of the case on appeal, the history of the litigation is recounted, and the Ohio proceeding is described: "The object of the present suit was, *to carry into execution against the defendants, who had acquired Massie's title, the decree against him in Kentucky, affirmed in this court.*"¹²⁶ Justice Johnson said: "Since that decision [in *Massie v. Watts*], it has been ascertained, that the present defendants are in possession of the land, or the greater part of it; and Massie having changed his residence to Ohio, this suit has become necessary, both *to enforce the former decree against him*, and to obtain relief against the actual possessors of the land."¹²⁷

¹²² *Ibid.*, at 392. (Italics supplied.)

¹²⁴ *Ibid.*

¹²³ 6 Pet. (U.S.) 389, 392, 395 (1832).

¹²⁵ 6 Wheat. (U.S.) 550 (1821).

¹²⁶ *Ibid.*, at 554. (Italics supplied.) The record in the Kentucky case was made part of the bill. *Ibid.*, at 552, 561.

¹²⁷ *Ibid.*, at 558. (Italics supplied.) A question of crucial interest, of course, is whether the Kentucky decree (affirmed by the Supreme Court) was given conclusive effect by the circuit

At this point, since neither Massie nor Lamb appealed from the Ohio judgment in Watts's favor, Watts seemed to have won his long battle, and to be in position to complete his contract with Lamb. But a dismaying discovery was made: although everyone had apparently assumed the contrary, Massie had never procured a patent on the land which he had appropriated to himself by his survey—or at least that part of it which he had conveyed to Lamb. The legal title was in the heirs of Powell, whose rights Massie had purchased. Watts had to begin all over again. He brought a suit, again in the circuit court in Kentucky, against Powell's heirs, and in 1826 obtained a decree against them ordering a conveyance of that part of the land covered by their patent which was rightfully his.¹²⁸ Again the decree was disregarded by contumacious defendants. Watts obtained a patent in his own name, and on the basis of that and the Kentucky decree tendered a deed to Waddle, to whom Lamb had assigned the contract. The tender was refused. Thereafter, a commissioner appointed by the court in Kentucky, pursuant to a Kentucky statute, executed a deed. Again a tender was made and refused. Waddle finally despaired of the contract's ever being performed, and sued Watts for a return of the purchase money, recovering judgment for nearly \$8,000. Then Watts filed the action that produced the precedent known as *Watts v. Waddle*, an action in equity in the circuit court for Ohio, to enjoin enforcement of the judgment for the purchase money, and to enforce specific performance of the contract. He did not live to see the outcome; the circuit court dismissed his suit, and the appeal was continued by his heirs.

There is no ground for wonder that the appeal was lost. Everything was wrong with Watts's suit for specific performance:

(1) A suit was pending against Watts and the heirs of Oneal in Kentucky, brought by one Banks, who claimed the Oneal warrant as a senior assignee, with rights superior to those of Watts, who had been personally served. Although the suit had been allowed to languish, Watts had not procured a dismissal.

(2) In his Kentucky action against Powell's heirs, Watts had failed to

court in Ohio (and the Supreme Court reviewing its decision). A full exposition is not feasible here; but careful analysis will show that, despite superficial indications to the contrary, the Court treated the decree as conclusive. See *ibid.*, at 558, 554, 561, 560.

Analysis of the decision will also reveal that Watts' title was upheld even as against bona fide purchasers for value. However, it is clear that this was the result of a peculiar rule applicable to Virginia land warrants. *Ibid.*, at 560. In passing, one wonders whether the decision, based on this unique rule, might possibly have been a source of Justice Letton's fear that recognition of foreign decrees would defeat the rights of innocent purchasers.

¹²⁸ *Watts v. Waddle*, 6 Pet. (U.S.) 389, 393 (1832).

join the husbands of Powell's married daughters. Where issue had been born, the husbands were entitled to a life estate in the property of their wives. Their possible interests were not foreclosed by a decree to which they were not parties.

(3) Similarly, Watts had failed to join Powell's widow. She had a possible dower interest which was not foreclosed, notwithstanding the argument that Powell held only as trustee for Watts.

(4) Disregarding all these objections, Watts did not get legal title by virtue of the Kentucky decree, or the commissioner's deed under it.

It was in connection with the last point that Justice McLean, who had also written the opinion in the circuit court,¹²⁹ used the language which has been so much quoted: "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt. . . ."¹³⁰ Read in its context, the statement is entirely unobjectionable; indeed, the care with which it was phrased, and the reason for the phrasing, become apparent. In the circuit court Justice McLean expressed the same idea in these words: "No decree of a court in a foreign jurisdiction, can operate as a conveyance of land in Ohio. The mode by which real estate must be transferred, either by act of the parties or by operation of law, is fixed by the laws of the respective states."¹³¹ The argument to the contrary was not based on any hypothesis of power in the Kentucky court to transfer title to Ohio land, but rather on an Ohio statute validating conveyances made in conformity with the law of the place of execution. The court quite properly construed the statute as applying to deeds executed by individuals, and not to the decrees of foreign courts, nor the deeds of commissioners appointed by foreign courts. The entire matter is summed up in a brief passage:

[A]t most, Watts derived only an equitable estate under the decree against Powell's heirs. . . . Under the deed tendered to Waddle, he could not defend himself against an action of ejectment commenced by Powell's heirs, or by any other persons claiming under a legal conveyance from them. A decree of a court in Ohio, having jurisdiction of the subject-matter, is necessary to give a legal effect to the decree in Kentucky. And even if this had been done, there would still exist serious objections to the title.¹³²

This, then—this cornerstone of the preclusive line of authority which prevented the Supreme Court from following its better judgment in *Fall v.*

¹²⁹ 1 McLean 200, 29 Fed. Cas. 446, No. 17,295 (D. Ohio, 1833).

¹³⁰ 6 Pet. (U.S.) 389, 400 (1832).

¹³¹ 1 McLean 200, 204, 29 Fed. Cas. 446, 447 (D. Ohio, 1833).

¹³² 6 Pet. (U.S.) 389, 401-2 (D. Ohio, 1832).

Eastin—was a marketable title case: an application of the principle that (in the words of Justice McLean) “No court of chancery will force a doubtful title on the vendee.”¹³³ This is the case that was read by the Court in *Fall v. Eastin* as having “features like the case at bar.”¹³⁴ The process of distinguishing cases can, on occasion, become somewhat refined. This is not such an occasion. The difference between a suit for specific performance, in which a party who has procured the decree of a foreign court ordering a conveyance attempts to force the rights thus acquired upon a third person who has contracted to buy, and a suit brought by such a party against the original defendant and his transferees to perfect his rights under the decree, is so wide as to be unmistakable. There is not a word in *Watts v. Waddle* inconsistent with the proposition that one who wins such a foreign decree acquires rights under it which he can enforce at the situs. On the contrary, to rely on the case as establishing the contradictory of that proposition is to deny the precise reason for the decision. Watts’s title was unmarketable because he had not taken the proper course, which was to proceed in equity in Ohio to enforce the Kentucky decree.¹³⁵ To decree specific performance against the purchaser would have been to cast on him the burden of that proceeding.

This review of *Watts v. Waddle* establishes two things clearly:

First, the decision in *Fall v. Eastin* was not dictated by authority.

Second, the successful plaintiff in the foreign forum was not without a remedy, or form of procedure, for the enforcement of his victory. A remedy existed in the form of an equitable proceeding at the situs “to carry [the decree] into effect.”¹³⁶ Watts brought such a proceeding against Massie and prevailed. The foreign decree was treated as conclusive. He failed to bring such a proceeding against Powell’s heirs, and his failure to do so was

¹³³ *Ibid.*, at 402.

¹³⁴ 215 U.S. 1, 8 (1909).

¹³⁵ It is not hard to guess why he relied on desperate alternatives to the proper course, which he had followed when Massie flouted the first decree. Although Ohio at that time had a statute giving its equity courts power to transfer land titles directly by decree [see Huston, *The Enforcement of Decrees in Equity* 17 (1915), and Millar, *Civil Procedure of the Trial Court in Historical Perspective* 476 (1952)], the notion which was later given temporary credit in *Hart v. Sansom*, that the court could not act without personal jurisdiction of the defendant, was generally entertained. Thus Henry Clay, representing Watts in the original case in the Supreme Court, argued: “If Watts could not sue Massie in Kentucky, he would be without remedy. He could not sue in Ohio, because the defendant could not be found there.” *Massie v. Watts*, 6 Cranch (U.S.) 148, 157 (1810). It was a relatively simple matter, after Massie moved his residence to Ohio, to serve him there, together with those to whom he had sold the land; but the problem of Ohio service on the numerous Kentucky heirs of Powell must have seemed insuperable.

¹³⁶ 1 McLean 200, 201, 29 Fed. Cas. 446 (D. Ohio, 1833).

the decisive reason for his failure to enforce specific performance against his purchaser.

It is ironical that the instrument which has been employed to frustrate the jurisdiction which Marshall affirmed in *Massie v. Watts* is a bit of language lifted out of its context in a later stage of the same litigation.

V

Professor Barbour's thesis stands up well. Critical re-examination of the supporting arguments leaves them intact, and even tends to reinforce them as other considerations come into view. We have examined to some extent the reaction of courts to arguments of a similar kind. The time has come to consider the objections which have been raised by legal scholars against the thesis.

We must begin with Professor Cook, although, as a predecessor of Barbour in this field, he is not formally to be classed among the critics. His major concern, and his great contribution, was to show that "[it is] time for judges and writers to stop talking language suitable to the time of Coke in discussing the power of equity, and to recognize that a court of equity is a legal tribunal with power to adjudicate and settle controversies as finally as a court of law."¹³⁷ He effectually disposed of any objection to the recognition of land decrees based merely on the nature of equity decrees as such, or of the obligation created by them. But the land decree was a special and troublesome case in the general topic with which he was concerned, and his treatment of it must be described as gingerly.¹³⁸ He used strange language: "From the nature of things the law of the jurisdic-

¹³⁷ Cook, *The Powers of the Courts of Equity*, 15 Col. L. Rev. 37, 233-34 (1915).

¹³⁸ At the outset, we are confronted by a difficulty of terminology which cannot be avoided; but because, in the end, we come back to the position that a court having jurisdiction of the parties has jurisdiction to order a conveyance of foreign land, we may relegate the discussion to a footnote to avoid confusion. The difficulty is that Cook, after some travail, classifies actions for specific performance of contracts to convey land as, at least predominantly, in rem. This does not lead him, as might be supposed, to the conclusion that a court without jurisdiction of the land has no jurisdiction in such actions; on the contrary, he argues in the end for giving an effect to the decree, and the commissioner's deed under it, which goes beyond what is contended for in this paper. He contrives to do this by means of a special and esoteric analysis which would not be serviceable in forensic argument, and which seems, besides, to be imperfect in its logic. The argument proceeds thus [*ibid.*, at 119-29]: An action for specific performance of a contract to convey is in rem because its ultimate object is to deprive the defendant of a specific res which he has. Irrespective of what the defendant may do, it will have such an effect; for although, for historical reasons, the court proceeds as if it were acting only in personam—in form doing nothing more than directing the defendant to convey—it not only may attach the defendant for contempt, but may and will sequester his personal property, issue a writ of injunction for possession, and then issue a writ of assistance commanding the sheriff to put the plaintiff in possession. Thus the court of equity brought about a state of facts to which the common law attached the consequence that the defendant lost his title, though retaining a common-law power to regain it; and the plaintiff acquired a defeasible

tion where the land is must in the final analysis determine who is entitled to the possession and enjoyment of it, since its tribunals and officers are the only ones that can deal with the physical *res*."¹³⁹ If this means only that no sheriff but a local sheriff can put the plaintiff in possession, and then only under process issuing from a local court, it is of course true. If the reference to the law of the situs makes it mean more—if it means that such process will issue only when the relationship between the parties gives rise, under that law, and independently of the decree, to an equitable interest—it ignores the possibility, entirely consistent with “the nature of things,” that the state of the situs may, voluntarily or under the compulsion of the full faith and credit clause, treat the foreign decree as *res judicata*, thus precluding any new inquiry into the incidence of the law of the situs. Yet he goes on to argue, noting the practice of recognizing deeds executed under duress applied by the foreign court, that a deed by a foreign commissioner should be recognized as passing title of its own force.¹⁴⁰ Once again, let me make it clear that, like Professor Barbour, I dissociate myself from such overstatements of the case. The foreign court does not have the power over the land that the court at the situs has; and a foreign commissioner’s deed appearing on the records at the situs would create substantial practical problems for the title examiner, thus impairing the utility of the recording system.

legal title. Today, the court can pass the title by its decree, or by the device of a commissioner’s deed pursuant to statute.

It is reasonable enough to describe such an action as *in rem* when this is the available machinery. But, in what I am afraid is a clear non sequitur, Cook carries over the *in rem* label to the action for specific performance which is brought in a jurisdiction other than that in which the land is located. Here his reasons for the characterization fail. The court can enforce its decree only by attachment for contempt or sequestration. It cannot issue a writ of assistance and put the plaintiff in possession. It cannot vest the title by its decree, or by a commissioner’s deed. On Cook’s own principle of looking to the actual consequences, therefore, such an action is procedurally (and, it may be added, constitutionally, for purposes of due process of law) one *in personam*, even though its object is to obtain a specific *res* from the defendant.

Having got himself into this position, Cook could defend the jurisdiction of the court away from the situs only by an extraordinary feat of analysis; but defend it he did. After all, “from the legal point of view the *res* of which the plaintiff seeks to deprive the defendant in an action *in rem*, is not only the physical object but also the congeries of legal rights, privileges and other jural relations which go to make up title or ownership. This congeries of jural relations, not being a physical object, can not of course have any physical situs.” There is no inherent reason why it cannot be transferred by acts done without the jurisdiction, whether those acts be those of the owner or of a foreign court.

This analytical game of in-and-out-the-window would be too much for most lawyers. Chief Justice Marshall firmly established, on simple grounds, the jurisdiction of a court of equity, having the defendant before it, to order a conveyance of foreign land. Let’s leave it that Cook affirmed that jurisdiction, and go on from there.

¹³⁹ *Ibid.*, at 128.

¹⁴⁰ *Ibid.*, at 128–29, notes 56, 57.

On the other hand, Professor Cook took a restricted view of the class of cases in which the decree of the foreign court should be recognized. This led him to accept the decision in *Bullock v. Bullock*,¹⁴¹ the New York court had undertaken to *create*, and not merely to enforce, an equitable interest in New Jersey land, no such interest having been in existence prior to the decree. This position stems from his unsupported statement, already discussed, that a remedy on the decree was available only in cases in which a consensual relation between the parties had given rise, independently of the decree, to an equitable interest. It is unnecessary to repeat what has been said on that score. I shall add only that I should like to know how Professor Cook would have responded to the suggestion that a foreign court may "create" rather than merely "enforce" an equitable interest in local land, simply by finding an enforceable contract between the parties to an action for specific performance where, according to the law of the situs, no such enforceable contract exists.¹⁴²

The first response to Professor Barbour's article was made by Dean Pound.¹⁴³ He regarded Professor Barbour, and the cases supporting him, as relying chiefly on arguments drawn from the enforceability of foreign decrees for money. These were not in point, he thought, because this status for money decrees had come about by reason of statutes allowing execution on them, and thus putting them on the same basis as money judgments. Where other types of equity decrees were concerned, the object was still, as always, to compel the defendant to do his duty, and that duty was "not necessarily" merged in the decree. There was never any necessity for a proceeding to enforce the decree as distinguished from the original claim. Nor was it necessary in cases like *Bullock v. Bullock* to sue on a right created by the decree; the right to alimony exists independently of and anterior to the decree, and can be enforced at the situs—even as against transferees in fraud of the wife's rights. Finally, if foreign courts are allowed to create duties to convey land, when such duties are gen-

¹⁴¹ 52 N.J. Eq. 561 (1894).

¹⁴² There is little more in Professor Cook's article bearing directly on the problem under discussion. He approved *Burnley v. Stevenson* [15 Col. L. Rev. 37, 245 (1915)], that being a specific performance case, although he thought it a bit extreme—oddly, for the reason that it seemed to treat the foreign decree as passing title. It is not clear why one who would treat a foreign commissioner's deed as passing title would balk at treating the decree in the same way. But such procedural merit as the objection has is probably met by the fact that under the Ohio code of civil procedure equitable defenses could be pleaded at law, coupled with the fact of the Ohio court's jurisdiction in rem as the court of the situs. Finally, as emphasizing the limited nature of Professor Cook's consideration of the problem, it should be noted that he disclaimed any inquiry into the application of the full faith and credit clause. *Ibid.*, at 245 n. 47.

¹⁴³ *The Progress of the Law, 1918-19: Equity*, 33 Harv. L. Rev. 420, 423-25 (1920).

erally recognized as giving rise to equitable ownership as against everyone except purchasers for value without notice, "the result is to allow one state through its courts to create real rights in land in another state—and if it may do so by its courts, why not through its legislature?"

The argument that a decision, sound in itself, will Open the Door to intolerable abuses has a tendency to induce irresolution; so immediate attention may be given to Dean Pound's last point. A complete answer is fortunately at hand, in a form which, of course, was not available when Dean Pound wrote:

[T]he full faith and credit clause does not ordinarily require [a state] to substitute for its own law the conflicting law of another state. . . . It was for this reason that we held that the state of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred. *Alaska Packers Assn. v. Industrial Accident Comm'n*, [294 U.S. 532], 544-550 [1935]. And for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, [306 U.S. 493], 502-505 [1939].

. . . Where a court must make choice of one of two conflicting statutes of different states and apply it to a cause of action which has not been previously litigated, there can be no plea of res judicata. But when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become res judicata in one state, must be recognized as such in every other.

The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another. . . .

From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other. . . .

The constitutional command requires a state to enforce a judgment of a sister state . . . even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state.¹⁴⁴

The argument that suit on the foreign decree in a case like *Bullock v. Bullock* is unnecessary, since suit for alimony may be brought at the situs, is not a reassuring one. It is not clear precisely what the suggested alternative is. The case cited¹⁴⁵ held that a wife may recover alimony after the husband has established a separate domicile and obtained an ex parte divorce on service by publication alone. Thus the apparent suggestion is that the alimony proceeding at the situs may be brought after the divorce.

¹⁴⁴ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436, 437, 438, 439 (1943).

¹⁴⁵ *Cochran v. Cochran*, 42 Neb. 612, 60 N.W. 942 (1894). See Goodrich's comment on this case, *Enforcement of a Foreign Equitable Decree*, 5 Iowa L. Bull. 230, 242 n. 56 (1920), and cf. *Estin v. Estin*, 334 U.S. 541 (1948).

But the cases which raise the problem under discussion are not cases of *ex parte* divorce. *Bullock v. Bullock*, for example, was a normal, contested action; it was brought by the wife at the common domicile; the husband was personally served and appeared. There is, to say the least, grave doubt that a right to alimony will survive a decree entered by a court having personal jurisdiction of the wife.¹⁴⁶ The case cited also indicates that (in Nebraska) a wife may sue for alimony without divorce; but if the suggestion is that the wife could have sued first in New Jersey for alimony, and then for divorce at the domicile, surely the alternative is unacceptable. The divorce action must, of course, be brought at the domicile of one of the parties, and that, by definition, is different from the situs. Under either of the alternatives intimated here, the result would be to split a normal divorce proceeding into two separate actions on the merits, and to remove the question of alimony from the court which must consider the grounds for dissolving the marriage. (This is to say nothing of questions of timing which might be important; nor of the expense of litigation; nor of the multiplication of the problem where the husband owns land in more than one state.) The argument that suit to enforce the decree is unnecessary proceeds on pragmatic grounds; but on precisely such grounds one may doubt the desirability of compelling such a result.

Perhaps the argument is only this: that after obtaining the decree for divorce and alimony at the domicile, the wife may bring an independent action for alimony at the situs; at least if the law of the situs has similar laws as to alimony, she may have a decree there, to be satisfied out of the land; and if fraudulent transfer is a problem, she may resort to the usual equitable remedy.

If the constructive view adopted by some courts were followed, it would not be necessary to proceed on the theory of an independent and anterior right existing by the law of the situs, and it might not be permissible to do so: the action could be brought on the decree, to establish even the obligation to pay future installments.¹⁴⁷ If it is brought on the theory suggested by Dean Pound, we encounter not only the previously stated objections to splitting the question of alimony from the main proceeding, but the additional fact of pointless relitigation. Whether it is brought on that theory or on the decree, the availability of an equitable remedy against a fraudulent conveyance is not particularly comforting. The court which had the

¹⁴⁶ Alimony after Foreign Decrees of Divorce, 53 Harv. L. Rev. 1180 (1940). Cf. Goodrich, *op. cit. supra* note 145, at 241; *Estin v. Estin*, 334 U.S. 541, 554 (1948).

¹⁴⁷ *Fanchier v. Gammell*, 148 Miss. 723, 114 So. 813 (1927); *Cummings v. Cummings*, 97 Cal. App. 144, 275 Pac. 245 (1929).

best opportunity to consider the relationship between the parties and their conduct toward each other decided that the wife should have security, in the form of a mortgage on the husband's land, for the payment of the small monthly installments. The general right of a creditor to have a fraudulent conveyance set aside is a poor substitute for such an arrangement. In practical effect it may mean only that, though her resources and the object to be attained are small indeed, she may institute another difficult and expensive suit in equity.¹⁴⁸ The New York court had provided meaningful assurance that her small monthly allotment would be paid. It is difficult to understand how depriving her of that assurance fostered the sovereignty of New Jersey, or served any other purpose except to impair the force and value of the money decree.¹⁴⁹

The next commentator, Goodrich, was,¹⁵⁰ and still is,¹⁵¹ an enthusiastic supporter of the Barbour thesis. In his early article, commenting on a new decision in support of the thesis,¹⁵² he took the position that the result was a desirable one if it did not do violence to settled legal principles, and proceeded to inquire whether it was in conflict with such principles. He rejected the arguments advanced to sustain the *Bullock* case: that the order for the mortgage was not part of the judgment, but "ancillary to the execution"; that the decree did not create a binding obligation, but only a "duty to the court" ("[i]t seems to the writer that this argument is deprived of all its force by the great mass of authority allowing, without question, an action on a foreign decree for the payment of money");¹⁵³ that enforcement of the foreign decree involves interference with the prerogatives of the situs state. On the last point he rested, like Barbour, on the incongruity of the argument with the practice of recognizing the deed executed under foreign compulsion.¹⁵⁴ He rejected the distinction between

¹⁴⁸ Mrs. Bullock's own experience is instructive. Having gained nothing by her first equity suit in New Jersey, she sued at law on the New York decree to recover accrued installments (at the rate of \$100 per month). For this purpose, the New Jersey court treated the New York decree as conclusive. *Bullock v. Bullock*, 57 N.J.L. 508, 31 Atl. 1024 (1895). But if, at this stage, Mr. Bullock had made a fraudulent conveyance, her only recourse would have been, after exhausting her legal remedies, to file a new suit in equity to set the conveyance aside.

¹⁴⁹ These seem to me to be Dean Pound's two principal points. As to his reasons relating to the nature of equity decrees, and the application of the principle of merger, I can only say that it is regrettable that he did not notice Professor Cook's persuasive arguments.

¹⁵⁰ Goodrich, *op. cit.* supra note 145.

¹⁵¹ Goodrich, *Conflict of Laws* § 218 (3d ed., 1949).

¹⁵² *Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919).

¹⁵³ Goodrich, *op. cit.* supra note 145, at 234.

¹⁵⁴ Perhaps he overstates the case a bit when he suggests that "the decree of the court at the situs is what affects the title to the land, and there is no foreign interference at all." *Ibid.*, at 237. Barbour made a similar suggestion. 17 Mich. L. Rev. 527, 550 (1919). It would be more

decrees resting on "antecedent obligation" and other decrees. The objection that no remedy existed on the decree was not basic; it could be cured, if necessary, by statute; but, agreeing with Cook that a remedy does exist, in a bill to enforce the decree, he effectively showed the lack of basis for Cook's limitation of the remedy to cases of antecedent obligation. He rejected Dean Pound's arguments, that suit on the foreign decree is unnecessary in the divorce cases, and that the cause of action is not merged in the decree, contending for a full application of the principles of *res judicata*.

In 1925 Professor Lorenzen joined forces with Barbour and Goodrich, supporting the thesis fully—with one important exception.¹⁵⁵ Building on Cook as well as on Barbour, he leveled a devastating barrage against all objections based on the character of equity decrees as not giving rise to enforceable obligations. In answer to Dean Pound, he showed that the courts have not attributed the enforceability of money decrees to statutes allowing execution on them. He rejected the distinction between decrees based on antecedent obligation and others: in the cases supporting the thesis, where the decree was based on antecedent obligation, the merits of the original cause of action were treated as conclusively settled. Hence the action was on the decree. The objection that there is no form of procedure for the enforcement of the foreign decree he dismissed as "no argument at all." Objections based on the resistance to allowing foreign states to create property interests in local land he dealt with primarily on the basis of the incongruity of recognizing the deed executed under compulsion, adding what should have been a helpful clarification: "The title will not be changed except as the result of a decree of the court of the situs, that is, only after there is record evidence of such change at the situs and this is the only real interest that the state of the situs has in the matter."¹⁵⁶

Then came the exception. Quoting almost in full the concurring opinion of Justice Holmes in *Fall v. Eastin*,¹⁵⁷ he submitted that "... Mr. Justice Holmes has given us the key to the final solution of our problem. . . ."¹⁵⁸ This solution, offered as a reconciliation of the interests of society in the principles of *res judicata* and the interest of a state in controlling the title

accurate and more candid to concede that the foreign decree, since it is conclusive, is the origin of the change in title; the effect on the title is brought about, however, not by the force of the foreign decree as such, but by the force which the Constitution of the United States gives to the principle of *res judicata*.

¹⁵⁵ Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land, 34 Yale L. J. 591 (1925).

¹⁵⁶ *Ibid.*, at 609-10.

¹⁵⁷ 215 U.S. 1, 14 (1909).

¹⁵⁸ Lorenzen, *op. cit. supra*, at 611.

of domestic land, was: "[T]he foreign decree is entitled to be enforced under the full faith and credit clause as between the immediate parties, but . . . the state in which the property is situated may decline to give effect to it as against third parties, including purchasers with notice of the foreign decree."¹⁵⁹

Few people have taken Mr. Justice Holmes's cryptic opinion so seriously. The Nebraska court did not consider Mrs. Eastin an innocent purchaser. Neither has Nebraska, so far as I know, seen fit "to do away with equity or with the equitable doctrine as to purchasers with notice. . . ."¹⁶⁰ It is difficult to understand why Professor Lorenzen should have developed this sudden concern for the interest of the state in controlling title to domestic land, after he had been at considerable pains to show that no interest of the situs state is jeopardized by recognition of the foreign decree. It is equally difficult to imagine that those who insist on the red meat of inviolable sovereignty for the law of the situs will be satisfied with the cake crumb Lorenzen offers them. If there were any threat to the substantial interests of the situs state, the real damage would be done in the compulsory recognition of foreign-created interests enforceable against the holder of the record title—unless, indeed, one is to accept Holmes's somewhat incredible intimation that the interest of a state in abolishing universally accepted principles of equity is more sacrosanct than its interest in controlling the transfer of title. Are we really to believe that the full faith and credit problem is to be resolved by subordination of the interest in finality of judgments to the interest of the situs state in protecting purchasers with notice?

We have seen that the jurisdiction of a court having the parties before it to order a conveyance of foreign land is not, and must not be, frustrated by the situs state's refusal to recognize a deed made by the defendant under compulsion of the decree. We have seen that it should not be frustrated, either, by the ingenuity of the defendant in evading the foreign court's enforcement process. After all the labor, including that of Lorenzen, which has been expended in arriving at this stage, are we to announce to the defendant that he may, nevertheless, frustrate that jurisdiction utterly, having evaded the foreign court's attachment process, by the ridiculously simple expedient of conveying the land to his friend? This is bringing forth a mouse with a vengeance.¹⁶¹

¹⁵⁹ *Ibid.*

¹⁶⁰ Holmes, J., concurring in *Fall v. Eastin*, 215 U.S. 1, 15 (1909).

¹⁶¹ The greatest difficulty I find with my own thesis is that it may be subject to similar criticism: it would allow the defendant to frustrate the foreign decree by conveying to an

Such superficial plausibility as there may be in the Holmes-Lorenzen suggestion, that a change in the law as to innocent purchasers raises no federal question, rests upon the unspoken assumption that such a change would be of general applicability. It disappears entirely when we articulate the obvious fact that it would be nothing of the sort. The situs state would go on enforcing equitable interests against purchasers with notice in all other cases, including those in which the interest arose from acts of the parties outside the state; it would refuse to do so only in the case of the unperformed foreign decree, thereby denying effect to that decree as an adjudication, discriminating against it, and treating it as having less dignity than a private contract. Before Lorenzen wrote his article, Justice Holmes himself had shown that a state cannot stultify the Constitution by refusing credit to judgments it dislikes under a convenient *ad hoc* rule.¹⁶²

Professor Walsh,¹⁶³ after noting the settled doctrine that a decree for the payment of money will support an action of debt, concludes that other decrees "may be enforced by action in equity in any other state in which personal jurisdiction over the defendant is secured provided the decree does not dispose of property in the state in which the later action is brought on principles differing from the law of that state." He thus disposes of any objection founded on the nature of the decree or the obliga-

innocent purchaser. The only apparent remedy for that defect is some provision for constructive notice. I cannot argue, however, that the pendency of the foreign action should constitute such notice under the doctrine of *lis pendens*. While some recording statutes might allow the foreign decree to be recorded, giving the record an effect similar to that of a contract to convey, I can find no basis for maintaining that the full faith and credit clause requires the situs state to provide such a medium of constructive notice. It seems to me that there is merit in the position that the intrusion of foreign decrees or commissioners' deeds into the records leads to undesirable complexities—whether the purpose is to record an actual transfer of title or simply to constitute notice of an asserted interest. This last statement must be made with some hesitation in view of the practice under the Bankruptcy Act, 44 Stat. 664 (1938), 11 U.S.C.A. § 44(g) (1953), (see discussion and citations in note 92 *supra*); but that practice itself suggests that the clean-cut way to deal with the problem of constructive notice, if it should become acute, would be to invoke the federal legislative power—this time under the full faith and credit clause. It seems reasonably clear that under its power to implement that clause Congress could provide for the recordation at the situs of notice that an interest in the land is claimed by virtue of the foreign proceeding or decree. In the meantime, the successful plaintiff must protect himself against a transfer to an innocent purchaser by commencing his action to enforce the foreign decree at the situs and securing the benefits of *lis pendens* before such a transfer can be made. This ought not to be excessively difficult, since legitimate land transactions ordinarily take some time.

¹⁶² "[I]t is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney v. Supreme Lodge*, 252 U.S. 411, 415 (1920).

¹⁶³ Walsh, *Equity* § 17 (1930).

tion it creates, and of the objection that there is no remedy on the decree. His reservation is based solely on the argument that to treat the foreign decree as *res judicata* is to make that decree "the real operating power" which transfers title. To do that, he says—falling into one of those non sequiturs which lie in wait for those who like these Latin labels—is to give it an operation "in rem," which of course it cannot have. This, according to Walsh, "demonstrates that the constitutional provision [for full faith and credit] does not apply." The cases are all reconciled by the principle of comity: a state need not respect the foreign decree, but will do so, whether it is based on antecedent consensual obligation or not, when, and only when, "the law involved is the same in both states."

Here the argument becomes somewhat confused. Professor Barbour's article is "brilliant" (though it proceeds on the "sophistry" that to enforce the foreign decree is to enforce a personal obligation of the defendant), but it makes the "mistake of taking mere form for the substance." Walsh's conclusion is: "The matter will be settled finally when it is recognized that these actions in equity having for their object the transfer or settlement of title to land are actually *in rem* . . . that they are personal only as a matter of mere form."¹⁶⁴ It is not easy to evaluate this conclusion. Walsh seems to be building upon Cook's terminology, but he misses the subtlety of Cook's analysis, coming to an untenable conclusion from which Cook had the agility to extricate himself—the conclusion that a court without jurisdiction of the physical *res* has no jurisdiction. Probably Walsh does not mean to say that Marshall was wrong in *Massie v. Watts*, but only that there is such a defect of jurisdiction that full faith and credit does not apply; foreign courts may continue, as Marshall said they could, ordering conveyances of local land; but courts at the situs may trifle with their solemn judgments, and nullify them if they wish; or they may condescend to pay them lip service—provided they have retried the merits of the case and come to the conclusion that they would have decided the same way in the absence of the prior proceeding—on the basis of "comity."

This suggests an important question which cannot be fully explored here: How much room is there, in the American constitutional system, for the application of principles of "comity" to the judgments of sister states? Speaking very generally, there is ground for a preliminary inference that under our Constitution there exists a dichotomy: either a judgment is rendered without jurisdiction, in which case due process of law would be denied by holding it conclusive; or it is rendered with jurisdiction, in which case it is entitled to full faith and credit. In the days of *Haddock v. Had-*

¹⁶⁴ *Ibid.*, at 76.

*dock*¹⁶⁵ there was an exception, allowing room for the operation of "comity"; the anomalous results to which it led are a matter of history. The most recent development in the law of divorce jurisdiction raises this problem all over again on a slightly different level, and the majority of the Court of Appeals for the Third Circuit gives explicit support to the conception of a dichotomy.¹⁶⁶ There may remain an exception in the case of judgments based on penal causes of action; but, if so, it seems marked for imminent subjection to the same fate that overtook the exception of judgments for taxes.¹⁶⁷ It would be difficult, in arguing for the existence of the dichotomy, to account for the custody decrees which are valid where rendered but which do not unduly confine the courts of other states. Perhaps they could be explained on the ground of their lack of finality.¹⁶⁸ Paradoxically, the Supreme Court's most recent encounter with the problem of custody decrees yields substantial support for the view that due process and full faith and credit are correlative.¹⁶⁹ Whatever may be the ultimate answer to the broad question, at least one state court has interpreted the Supreme Court's refusal to apply the full faith and credit clause to foreign decrees ordering the conveyance of local land as precluding recognition on the basis of comity. In *Sharp v. Sharp* the Oklahoma Supreme Court, having reluctantly followed *Fall v. Eastin*, said:

¹⁶⁵ 201 U.S. 562 (1906). See Schofield, Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision, 10 Ill. L. Rev. 11 (1915).

¹⁶⁶ "With regard to this type of case one can generalize and say that due process at home and full faith and credit in another state are correlative." Goodrich, J., in *Alton v. Alton*, 207 F. 2d 667, 676 (C.A. 3d, 1953). If the soundness of this position were dependent on the soundness of the majority opinion as a whole one might hesitate to rely on it, since the opinion seems vulnerable in its insistence that due process is denied by a court which decrees a divorce with both parties before it. But the dissent, vigorous as it is, does not dispute the existence of the dichotomy; on the contrary, one may find in it at least oblique recognition of the possible existence of such a principle. ("Perhaps full faith should be given to every American divorce decree which satisfies due process." Hastie, J., dissenting, *ibid.*, at 684.) If the Supreme Court should recognize the validity in the Virgin Islands of divorces granted pursuant to the second part of the Island law, history indicates that it will be extremely difficult to escape the command that such divorces shall be treated as valid elsewhere. I do not for a moment believe that Judge Hastie is advocating a return to the chaotic conditions that followed the Haddock case. Anyone who does so must face the probability that within the ensuing thirty-six years there will appear a counterpart of the first Williams case, *Williams v. North Carolina*, 317 U.S. 287 (1942).

¹⁶⁷ *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935).

¹⁶⁸ *Cf. New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

¹⁶⁹ *May v. Anderson*, 345 U.S. 528 (1953). Mr. Justice Burton's significant reliance on such cases as *Estin v. Estin*, 334 U.S. 541 (1948), is highlighted by Mr. Justice Frankfurter's concurring opinion, written solely to disclaim the dichotomy theory. Justices Jackson and Reed, dissenting, expressly embrace the theory.

As also bearing on the general question, see *Sutton v. Leib*, 342 U.S. 402, 409 (1952); *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908); *Haddock v. Haddock*, 201 U.S. 562, 628, 632 (1906); *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

So, we have concluded, also reluctantly, that, being not compelled by the force of the constitutional provisions to give full faith and credit to the Oregon decree, we are concluded from affording it that effect through comity. In this state judgments void for lack of jurisdiction may be attacked or set aside in proper proceedings, by any party in interest at any time. The defendant had this right under our statutes. To concede, through comity, full faith and credit to the Oregon decree would be to deny defendant's rights and to confer upon that court, by judicial fiat, a jurisdiction which it does not have.¹⁷⁰

The opinion is not a sophisticated one; admittedly, the reasoning involves some shifting of the meaning of "jurisdiction"; it denies jurisdiction where jurisdiction, both of the person and the subject matter, was conceded by the Supreme Court;¹⁷¹ the result is unfortunate, since the Supreme Court did not so much as intimate that the situs state is precluded from giving conclusive effect to the foreign decree;¹⁷² but the sense of correlativeness expressed here ought to be a warning to anyone who is tempted by the Walsh position.¹⁷³

Professor Stumberg¹⁷⁴ dismisses as "beside the point" all objections to enforcement based on old hypotheses as to the nature of the equitable decree and the application of the principle of merger. Concluding that the question, whether foreign decrees other than those for the payment of

¹⁷⁰ 65 Okla. 76, 79, 166 Pac. 175, 178 (1916).

¹⁷¹ *Fall v. Eastin*, 215 U.S. 1, 5 (1909).

¹⁷² In *Roller v. Murray*, 234 U.S. 738 (1914), the Court, finding no substantial federal question in a contention that West Virginia had denied the plaintiff due process of law by treating a former Virginia decree as a bar to his claim to West Virginia land, said: "Supposing the courts of West Virginia erred in giving conclusive effect to the Virginia decision, this was no more than an error of law, committed in the exercise of jurisdiction over the subject-matter and the parties; and such an error—not involving a federal question—affords no opportunity for a review in this court." *Ibid.*, at 744. Cf. *May v. Anderson*, 345 U.S. 528 (1953).

¹⁷³ Professor Walsh also asks: "But why should a foreign decree disposing of local real property have a greater force or effect than a foreign judgment at law in ejectment, which would be admittedly void?" Walsh, *Equity* 76 (1930). Two brief answers may be given, one formal, the other practical: (1) Ejectment being one of the few actions which are essentially local, because of the nature of the relief sought, the law remains to the effect that no court except that at the situs has "jurisdiction." But it has long been established that a court of equity with the defendant before it has "jurisdiction" to order a conveyance. So one judgment is not entitled to recognition; the other should be. (2) Since few sane lawyers would apply to a court for an order directing the sheriff to put the plaintiff in possession of land when the sheriff could not obey without being guilty of trespass or worse, the question of the res judicata effect of foreign judgments in ejectment seldom, if ever, arises. The case is different where lawyers are invited by a long line of unimpeachable authority to bring suits in equity before a convenient tribunal, and do so regularly in good faith.

Moreover, the limitations on jurisdiction of "local" actions generally [cf. *Rest.*, Judgments § 71, comment b (1942)] are undergoing a salutary process of erosion. See *Little v. Chicago*, 81 P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846 (1896); *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916); and cf. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

¹⁷⁴ Stumberg, *Conflict of Laws* 123-30 (2d ed., 1951).

money should be enforced elsewhere, "depends ultimately upon considerations of convenience," he gives some aid and comfort to the Holmes-Lorenzen view that the Constitution does not require a state to do equity. He rejects the antecedent-obligation distinction. "The most serious objection to a doctrine of compulsory full faith and credit to foreign equitable decrees," he believes, is that "a court might thus be compelled to order an act through the use of chancery process in a manner contrary to its local policy." This unusually worded statement is designed to encompass two propositions: first, a state should not be compelled "to make dispositions of realty which might conflict with the policy of its local law"; second, equitable process is an extraordinary remedy, granted only under exceptional circumstances. When a court is asked to enforce a foreign decree, "[i]t is being asked to employ its extraordinary process to bring about a result with regard to local land of which it may disapprove. Whether it should be compelled to do so is a matter of opinion which should be governed . . . by considerations of the possible results of compulsory enforcement."

The suggestion that equity powers are "extraordinary" or "discretionary" in such a sense that courts of equity are above the command of the full faith and credit clause will surely not bear analysis. I do not wish to misinterpret Professor Stumberg, but he seems clearly to be saying that a court of equity need not bestir itself to award its unusual remedies unless it is moved to do so by the facts of the original cause of action. This places equity—that separate system of higher, discretionary law—serenely out of reach of the full faith and credit clause. Equity may not be asked to bring about a result—at least with respect to local land—of which it may disapprove. The argument immediately encounters a snag in the fact that it is plainly untenable with respect to money decrees; and since it is based on the extraordinary and discretionary character of equitable relief as such, it ought to be as true of money decrees as of any other. Equity decrees the payment of money only in "exceptional cases," where the remedy at law is "inadequate." Professor Stumberg does not directly notice this difficulty. Speaking of judgments at law, however, he says: "But judgments only give rise to a duty to pay money and this enforcement does not materially affect conditions at the forum." Whether that proposition is directed to judgments at law or equity decrees for money, it cannot be demonstrated. Bitter fights have been waged in the name of state policy against the compulsory recognition of foreign money judgments; an equity decree of specific performance against a purchaser is different from a judgment against him at law for damages; and no one has yet

shown that transferring a land title in pursuance of a foreign decree affects conditions at the situs more significantly than does the recognition of a money judgment based on a difference in law.

Surely it is too late to object to the enforcement of foreign decrees affecting land on such a ground. Specific performance is not only the natural remedy for breach of contract; it is available as a matter of routine in land cases, and, like other equitable relief, is becoming increasingly available wherever legal remedies are less efficient to the ends of justice.¹⁷⁵ After more than a century of "fusion," an objection cannot be very persuasive insofar as it rests on a "tendency to regard the legal judgment as the norm and the equitable decree as anomalous. . . ."¹⁷⁶

Professor Stumberg's closing remark is that whether a court should be compelled to enforce foreign decrees affecting local land when it disapproves of the result is "a matter of opinion which should be governed . . . by considerations of the possible results of compulsory enforcement."¹⁷⁷ Such scope as the Constitution allows for balancing competing considerations regarding the faith and credit to be given to the judgments of sister states is, it should be observed, reserved for the Supreme Court. And patient consideration of the possible results of enforcement has failed to bring to light any results detrimental to any legitimate interest of the situs state in a federal system.

This has not been an exhaustive review of the scholarly reactions to the Barbour thesis.¹⁷⁸ Doubtless every writer on equity, conflict of laws, or judgments has paid his respects to the problem. The views noticed have, however, been those of some of the most frequently consulted modern authorities. As the various objections are considered one by one, none of them seems substantial. Is their cumulative effect more compelling?

¹⁷⁵ Cf. Rest., Torts §§ 938, Comment b, 933, Special Note (1939).

¹⁷⁶ Barbour, *The Extra-territorial Effect of the Equitable Decree*, 17 Mich. L. Rev. 527, 551 (1919). Professor Stumberg's apparent acceptance of the rule that the foreign decree establishes the facts conclusively, Rest., Conflict of Laws § 450(2) (1934), seems inconsistent with his position. So does his comment on *Burnley v. Stevenson*, 24 Ohio St. 474 (1873): "Where the foreign equity decree is used as a defense as in *Burnley v. Stevenson* . . . there is no particular difficulty as in such cases [the foreign court's findings of fact are] made effective by a recognized and proper process at the forum." But, as Professor Cook suggested, *Burnley v. Stevenson* is procedurally comprehensible only on the basis that the court at the situs awarded affirmative equitable relief against the plaintiff, in effect requiring—and effectuating—a transfer of title to the defendant. Otherwise, what is the defendant's position (with respect to the marketability of his title, for example) after he has won the case? In the *Burnley* case the Ohio court did employ its "extraordinary" process to bring about a result with regard to local land which it might have disapproved had it considered the case on the merits.

¹⁷⁷ Stumberg, op. cit. supra note 174, at § 176, p. 76.

¹⁷⁸ Further support for the thesis can be found, for example, in Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 Va. L. Rev. 557, 580-84 (1943).

The most striking feature of the state of opinion among these writers is that each objection can be identified with its particular champion, and that a majority would reject any specific objection:

Cook stands alone in the view that there is no remedy on the decree except in cases of antecedent obligation arising from consensual relationship, although he reaches a result similar to that of

Beale (whose views were considered earlier), who alone holds that there is no remedy on the decree in any case, but that the foreign decree is conclusive when suit can be brought on the original cause of action;

Pound alone clings to objections based on the nature of the obligation of an equity decree, and he alone feels that action to enforce the decree is unnecessary;

Goodrich repudiates all objections;

Lorenzen has no support, except from *Stumberg*, and that not very explicit, in his view that the decree is conclusive against the defendant but not his transferees with notice;

Walsh has no support, even from *Cook*, in the view that the foreign court lacks jurisdiction because of the *in rem* character of the action, nor in the requirement that the law of the two states must be the same if there is to be recognition even on the basis of comity;

Stumberg gets no comfort from any of the other writers in his solicitude for local land policy, except from *Pound's* concern about possible foreign legislation; and in his reliance on the extraordinary and discretionary character of equitable relief he has partial support from *Beale* only.

There is, then, no consensus opposed to the thesis. One of the seven critics supports it entirely; two are its vigorous proponents, each with a different reservation. No single objection could win the adherence of a majority of the seven. In such circumstances, the cumulation of negative attitudes is without persuasive significance. Professor *Barbour* has not been answered; he has been fobbed off.

VI

Since the ultimate question of the effect to be given foreign land decrees is one to be decided by the United States Supreme Court, no definitive solution can be found by reference to the state court decisions. From some of those decisions, however, we can derive useful guidance on the practical problem of how to get the maximum benefit from the foreign decree at the earliest possible stage of litigation, and at the same time to prepare the ultimate federal question for submission to the Supreme

Court, if that should become necessary. The conclusions which emerge are that, provided the foreign decree is framed in restrained and appropriate terms, and provided the type of relief sought at the situs is chosen with discrimination, there is a fair chance that the decree will be given a measure of conclusiveness which will be decisive in some cases; there is a growing probability that it will be given full effect as *res judicata*; and, if neither of these results follows, the record will present the federal question in the best form for submission to the Supreme Court, as free as possible from the embarrassment of nonfederal grounds on which the adverse decision might be rested.

We have already noted the harmful consequences of carelessness or overreaching in framing the foreign decree. The theory on which recognition is claimed for that decree is that the foreign court had jurisdiction of the person of the defendant, and jurisdiction to order him to make a conveyance; it is not contended that that court could, by the force of its decree or by a commissioner's deed, directly transfer the title. The decree should be framed in strict accord with that theory; it should purport to do no more than exercise the jurisdiction which is acknowledged; it should, upon appropriate findings of fact and of law, order the defendant to make a conveyance, and no more. Nothing whatever is to be gained by framing it in terms which purport to affect the title directly, or which call for the appointment of a commissioner to convey. Such terms are not consistent with the line of reasoning on the basis of which conclusive effect is claimed; they are an invitation to the court at the situs, and to the Supreme Court, to invoke hornbook principles in support of a holding that the foreign court had no jurisdiction to do what it did, and they are sure to arouse fears as to the effect of recognition on the recording system at the situs. It was just such a decree—requiring no act of the defendant, but purporting of its own force to divest the defendant's title—which lost the case for the plaintiff in *Carpenter v. Strange*.¹⁷⁹

It is not safe, either, to regard such terms as harmless surplusage in a decree which, in the first instance, orders a conveyance. The danger here is rather pointedly illustrated by a recent Tennessee case. A Michigan decree directed the defendant to execute a quit-claim deed to certain land in Sumner County, Tennessee. Instead of stopping there, it went to the unusual length of adding:

¹⁷⁹ 141 U.S. 87 (1891). See also *Davis v. Headley*, 22 N.J. Eq. 115 (1871); *Tolley v. Tolley*, 210 Ark. 144, 194 S.W. 2d 687 (1946); *Cooley v. Scarlett*, 38 Ill. 316 (1865); *Higgins v. Higgins*, 60 S.D. 576, 245 N.W. 397 (1932); *Bailey v. Tully*, 242 Wis. 226, 7 N.W. 2d 837 (1943). But cf. *Hanna v. Read*, 102 Ill. 596 (1882); *Greer v. Greer*, 189 S.W. 2d 104 (Tex. Civ. App., 1945).

[I]n the event the said Defendant fails forthwith to execute said Quit-Claim Deed that this Decree may be filed in the Offices of the Register of Deeds, or an equivalent office in the aforesaid Sumner County, State of Tennessee in lieu of said Quit-Claim Deed.¹⁸⁰

To provide that the decree shall operate of its own force as a conveyance is bad enough; to provide for actual registration at the situs is waving a red flag. The Tennessee court said:

We are not unmindful of the fact that a court of a foreign State, having jurisdiction of the parties, may, in a proper case, compel the execution of a deed to lands in this State by proceedings in the nature of attachment for contempt. But the Michigan court did not elect to pursue this course. . . .

We are asked to give full faith and credit to the Michigan . . . decree upon the theory "that it is conclusive as to all parties *media concludendi*; that the full faith and credit clause of the Federal Constitution requires that the judgment of the State court which had jurisdiction of the parties, and the subject matter in the suit, should be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered."

Counsel cite many cases in support of the foregoing proposition. We are not in disagreement with this principle. . . . But we cannot give full faith and credit to a foreign decree which shows on its face that the court had no jurisdiction of the subject matter, to wit, to vest and divest title to lands located in a foreign State. . . . In other words, the trial court directed in his decree that it should become a valid *muniment of title* to lands in this State. This was clearly in excess of the court's jurisdiction.¹⁸¹

There are other features in the case which prevent one from asserting with confidence that the result would have been otherwise if the Michigan decree had been drafted with suitable restraint; but the adverse reaction to overreaching is clear. If the decree is to be accepted as conclusive for any purpose at the situs, the foreign court must mind its manners; a plaintiff's lawyer drafting the decree must not put into the mouth of that court language which serves no purpose except to arouse the elemental instincts of the court at the situs in defense of its legitimate prerogatives. It may, indeed, be rank formalism to maintain that a decree which is valid and entitled to conclusive effect down to its last paragraph is stripped of all validity by the inadvertent inclusion, at the end, of language from a local form book; but a lawyer interested in winning his case will not court the opportunity to combat such formalism.

The theory on which relief is claimed at the situs is at least equally important. Consistently with the reasoning on which recognition is demanded, the plaintiff must scrupulously avoid any prayer for relief predicated on the assumption that he has acquired legal title by virtue of the

¹⁸⁰ Clouse v. Clouse, 185 Tenn. 666, 669, 207 S.W. 2d 576, 577 (1948). See also McRary v. McRary, 228 N.C. 714, 47 S.E. 2d 27 (1948).

¹⁸¹ Clouse v. Clouse, 185 Tenn. 666, 671-72 (1948). (Italics supplied.)

foreign decree. Thus, to bring an action of ejectment, or to rely on the foreign decree in defense to a possessory action in a state in which law and equity powers are kept separate, is the worst possible exercise of judgment.¹⁸² Even in a state which has gone far in the direction of abolishing forms of action and merging law and equity powers, it is important to avoid, in the complaint or in the argument, any theory of the case depending upon derivation of title through the foreign decree. Thus, in a recent North Carolina case, the plaintiff conceived her remedy appropriately enough: her action at the situs is described as one to reduce the foreign judgment to judgment in North Carolina. Her argument, however, must have ranged beyond this conception, for the court said:

The plaintiff seeks to establish the Ohio judgment as a *muniment of title* and to recover the *locus* on the strength thereof. That raises the question of the validity and efficacy of the Ohio decree as a judgment affecting the title and right of possession to land in North Carolina.¹⁸³

Again, one cannot say with confidence that the result would have been different if the argument had been more restrained; but it is clear that reliance on the foreign decree as a muniment of title prejudiced the plaintiff's case unnecessarily. It is noteworthy that in the cases which have given full effect to the foreign decree the procedure followed in the action at the situs has been scrupulously consistent with the argument that, while the foreign decree did not transfer title, it should be regarded as *res judicata*.¹⁸⁴

An action to remove the defendant's claim as a cloud on the plaintiff's title, if that remedy is otherwise available, is a tempting possibility, but is probably not advisable. In the first place, a holding that such a remedy is available only to one having a legal interest¹⁸⁵ would provide an adequate nonfederal ground for the refusal of relief, precluding review by the Supreme Court of the question under the full faith and credit clause. Moreover, even if the situs state gives the holder of an equitable title standing to invoke the remedy,¹⁸⁶ the unsuccessful resort to that mode of relief in

¹⁸² *Watkins v. Holman*, 16 Pet. (U.S.) 25 (1842); *Courtney v. Henry*, 114 Ill. App. 635 (1904); *Tolley v. Tolley*, 210 Ark. 144, 194 S.W. 2d 687 (1946); *City Ins. Co. v. Commercial Bank of Bristol*, 68 Ill. 348 (1873).

¹⁸³ *McRary v. McRary*, 228 N.C. 714, 717-18, 47 S.E. 2d 27, 29-30 (1948). (Italics supplied.) See also *Norris v. Loyd*, 183 Iowa 1056, 168 N.W. 557 (1918).

¹⁸⁴ See, e.g., *Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896); and as to *Burnley v. Stevenson*, see note 176 *supra*.

¹⁸⁵ *Frost v. Spitley*, 121 U.S. 552 (1887).

¹⁸⁶ *Fall v. Fall*, 75 Neb. 104, 108, 106 N.W. 412, 413 (1905); *Casstevens v. Casstevens*, 227 Ill. 547, 81 N.E. 709 (1907); *McClintock*, Equity § 187 (1936).

the *Fall* case stands as a warning that courts may shy away from any position resting on the contention that the foreign decree is a source of "title" of any kind. In spite of the fact that such a reaction relegates the foreign decree to a status inferior to that of a mere contract, reliance on the foreign decree as giving rise to "equitable title" confuses the issue by importing possible nonfederal grounds of decision and by directing the discussion to the effect which the foreign decree may have *ex proprio vigore*.

A procedure which would be strictly in conformity with the theory on which conclusive effect is claimed for the foreign decree would be to bring, at the situs, an action to effectuate the foreign decree, or to carry it into effect. The history of the Watts-Massie-Waddle litigation, together with the other evidence which has been adduced, seems sufficient to destroy the notion that, historically, no such right of action existed. It is to be hoped that lawyers seeking to secure the benefit of foreign decrees will frame their complaints in part on this theory, so that the inaccuracy of the position that there is no such remedy can be authoritatively established. Nevertheless, enthusiasm for the correctness of the view that such a remedy has long been available should not blind one to the unwisdom of staking the whole case on that general proposition. The availability of such a remedy is, after all, a matter of state law; and a holding that, regardless of the evidence adduced, there is no such remedy under the law of the situs state might dispose of the matter on a ground not reviewable by the Supreme Court.

Therefore, the complaint should be framed in the alternative as claiming relief by virtue of a procedure which is both appropriate and unquestionably provided by the law of the situs. Fortunately, such a remedy is almost universally available in the declaratory judgment. The statutory origins of this procedure place it, of course, entirely out of range of the controversy as to whether history reveals the existence of a remedy on the decree. The Uniform Declaratory Judgments Act itself is in force in thirty-six jurisdictions,¹⁸⁷ and of course the federal act is available.¹⁸⁸ The Uniform Act authorizes declaratory judgments "whether or not further relief is or could be claimed."¹⁸⁹ The federal act contains similar provision for supplemental relief.¹⁹⁰ A form of procedure is thus provided which enables the plaintiff to proceed in complete consistency with the theory that the

¹⁸⁷ 9 U.L.A. 62 (Supp., 1953).

¹⁸⁸ 62 Stat. 964 (1948), 28 U.S.C.A. § 2201 (1950).

¹⁸⁹ 9 U.L.A. 234, § 1 (1951).

¹⁹⁰ 62 Stat. 694 (1948), 28 U.S.C.A. § 2202 (1950).

foreign decree, while not of its own force transferring title, should be regarded as conclusively establishing his claim to the land on principles of *res judicata*. Supplemental relief designed to conform the title of record to the interests declared may be obtained as well. The supposed absence of a remedy at the situs—the only obstacle that deterred Professor Beale from supporting the Barbour thesis—is completely circumvented.

As an anchor to windward, the plaintiff's lawyer might also count, in the alternative, on the original cause of action, in cases in which the defendant's obligation to convey exists independently of and antecedent to the foreign decree. Thus, if all else fails, he will be in position, under the view taken by Professor Beale, to invoke the foreign decree as conclusive on the issues both of law and of fact; and no more than this is required in cases of "antecedent obligation."

Thus the ideal action to secure the benefits of the decree at the situs would be framed as one to enforce, or execute, the decree; and, in the alternative, to secure a declaration of the rights of the parties pursuant to the decree, with supplemental relief; and, also in the alternative, to enforce the original cause of action—if there is one—with the decree operating as *res judicata*.

If the foreign decree is properly framed, and if the action at the situs is properly conceived, there is a fair chance that the court at the situs will treat the decree as conclusive, at least as to the findings of fact supporting it.¹⁹¹ In some cases—i.e., where the law applied in the respective states is the same—this effect for the foreign decree will be decisive. To be sure, such a result is anomalous. It would seem that, if the foreign court acted beyond its jurisdiction, its judgment should not be treated as conclusive for any purpose; and that, on the other hand, if it acted within its jurisdiction, its judgment should be conclusive both as to law and fact. There is no analogy for this piecemeal application of *res judicata*. We are not here dealing with the principle of collateral estoppel, which comes into operation when a second suit between the parties involves a different cause of action. The principle involved is that of merger, or of the conclusiveness of a claim which has been reduced to judgment in a competent court. The analogue is the action of debt on a record. In such cases, there is no room for selective application of *res judicata* principles. The rule of the *Restatement* seems no more than a formula, disguised in plausible terminology, for avoiding the more unwelcome aspect of the compulsion to accord full

¹⁹¹ *Bailey v. Tully*, 242 Wis. 226, 7 N.W. 2d 837 (1943); Annotation 145 A.L.R. 583 (1943); Rest., Conflict of Laws § 449(2) (1934). The rule in the Restatement is limited (perhaps as a compromise with the Reporter) to actions on the original claim.

faith and credit: that is, the compulsion to accept a result based upon a difference in, or an error of, law. Professor Beale rejected the rule: "... Section 450 of the Restatement was neither drawn by the Reporter nor acceptable to him."¹⁹² The *Restatement of Judgments* makes no comparable provision for the finality of findings of fact.¹⁹³ Counsel for the plaintiff, however, will doubtless be inclined to consider this strange half loaf better than none.

Finally (again assuming that the foreign decree has been drafted with due restraint and that the theory of the action at the situs has been properly conceived), there is a growing chance that the decree will be given full effect as *res judicata*. Professor Barbour referred to only three states supporting his thesis.¹⁹⁴ Professor Goodrich added a fourth to the list.¹⁹⁵ The investigations undertaken in the preparation of this paper have been directed to the objections which have been raised against the thesis, and no particular effort has been made to determine exhaustively the number of states in which the principle of recognition has been accepted. Even so, it appears that perhaps five additional states may be listed as accepting the principle.¹⁹⁶ But even more encouraging than the scattered cases which actually accord recognition to the foreign decree is the emergence of a new attitude of confidence in and respect for the courts of sister states, which may eventually replace the traditional attitude of suspicious and jealous provincialism. The California courts were recently confronted with this problem: The wife had filed suit in Texas for divorce and for a determination of property rights, praying among other things that certain real property located in California be adjudged to be her separate property, and that her husband had no interest therein. The husband thereafter filed an action in California, asking a declaration that he was the owner of a half interest in this property, with a decree accordingly. The Superior Court denied the wife's motion for a stay of proceedings pending determination of the Texas action. The District Court of Appeals termed this ruling a

¹⁹² 2 Beale, *Conflict of Laws* § 450.1 (1935).

¹⁹³ See *Rest., Judgments* §§ 68, 71, 45, 46; cf. *ibid.* § 45, comment d (1942).

¹⁹⁴ Ohio [*Burnley v. Stevenson*, 24 Ohio St. 474, (1873)]; Michigan [*Dunlap v. Byers*, 110 Mich. 109, 67 N.W. 1067 (1896)]; and Wisconsin [*Mallette v. Scheerer*, 164 Wis. 415, 160 N.W. 182 (1919)].

¹⁹⁵ Iowa [*Matson v. Matson*, 186 Iowa 607, 173 N.W. 127 (1919)].

¹⁹⁶ California [*Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973 (1923)]. But cf. *Taylor v. Taylor*, 192 Cal. 71, 218 Pac. 756 (1923)]; West Virginia [*Piedmont Coal and Iron Co. v. Green*, 3 W.Va. 54 (1868); cf. *Wilson v. Braden*, 48 W.Va. 196, 36 S.E. 367 (1900)]; Texas [*Greer v. Greer*, 189 S.W. 2d 104 (Tex. Civ. App., 1945); cf. *Davis v. Roosevelt*, 53 Tex. 305 (1880)]; Missouri [*McCune v. Goodwillie*, 204 Mo. 306, 102 S.W. 997 (1907)]; Louisiana [*Putnam & Norman v. Conner*, 144 La. 231, 80 So. 265 (1918) (semble)].

"manifest" abuse of discretion.¹⁹⁷ This, of course, goes well beyond a holding that a Texas *judgment* would be entitled to full faith and credit at the situs.¹⁹⁸ The California court attributed its decision to principles of comity, but clearly indicated that it would accord full faith and credit to the Texas judgment when rendered.¹⁹⁹ After so much preoccupation with jealous affirmations of exclusive sovereignty, I consider it refreshing to find the California court saying:

It is the duty of the court to give preference to principles and methods of procedure by which the tribunals of the states may cooperate as harmonious members of the judicial system. California courts should interpose no action to interfere with rights of the wife to which she may be entitled as a resident of Texas in an action for divorce. A conflict of authority should not occur if it can be avoided. Courts should compose rather than irritate. "Our states do not stand in the same relation to each other that foreign countries do. They are members of the same family, and section 1, art. 4, of the Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Comity between states is daily growing and should be encouraged." . . . *The courts of Texas are as competent to administer justice as those of California.* . . .²⁰⁰

VII

"That the doctrinal basis of *res judicata* is living law and not archaic formula is shown in its authoritative extension in recent years."²⁰¹ In our law two persistent doctrines, each inimical to the finality and conclusiveness of judicial proceedings, have hampered the full development of principles of *res judicata*: the dogma that equity acts only in personam, and the doctrine that actions concerning rights in land are local. The case of the foreign land decree stands at the intersection of these two doctrines. If an appropriate case is developed along the lines indicated in the foregoing section, the plaintiff, assuming that he loses in the state court, will be in position to present to the Supreme Court for determination the clear-cut question whether the full faith and credit clause requires that the foreign decree be treated as *res judicata* when it is pleaded as a cause of action or as a ground of defense. The Court will thus be given an opportunity to

¹⁹⁷ *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P. 2d 844 (1950).

¹⁹⁸ Despite the reference in the full faith and credit clause to "judicial proceedings," the mere pendency of a suit on the same cause of action between the same parties in another state is not regarded as ground for abatement or stay of proceedings. *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926).

¹⁹⁹ 96 Cal. App. 2d 119, 128, 214 P. 2d 844, 851 (1950).

²⁰⁰ *Ibid.*, at 130-31 and 852. (Italics supplied.)

²⁰¹ *Goodrich, J.*, in *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d 82, 84 (C.A. 3d, 1941).

review the unfortunate decision in *Fall v. Eastin* in the light of Professor Barbour's criticism and of the subsequent judicial and nonjudicial contributions to the discussion. If it finds that, contrary to its earlier decision, the state of the situs must treat the foreign decree as *res judicata*, it will remove an illogical and inconsequent gloss from the law governing the relationship between the states in our federal system; it will contribute materially to a more complete fulfillment of the Constitution; it will remove a source of hardship and unnecessary relitigation; and it will do this with no impairment of any substantial interest of the situs state in controlling the land located within its borders. In so doing, in this crucial situation, it may well open the way for eventual rectification of some of the undesirable results which flow from one or the other of the stubborn doctrines which combined to produce *Fall v. Eastin*.