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Recognition of Foreign Judgments

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RECOGNITION OF FOREIGN JUDGMENTS

SEYMOUR W. WURFEL†

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This article complements a previous one entitled *Choice of Law Rules in North Carolina*.¹ The purpose here is to examine the conflicts rules and other legal principles immediately pertinent to the resolution of problems of recognition and enforcement of sister-state and foreign judgments in North Carolina.

I. RECOGNITION OF SISTER-STATE JUDGMENTS

1. *Full Faith and Credit*

The constitutional mandate that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State"² has been interpreted by the Supreme Court in

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¹Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. REV. 243 (1970) [hereinafter cited as *Wurfel*].

²U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970).

litigation arising in North Carolina. In *Kovacs v. Brewer*³ the Supreme Court held that once jurisdiction is established, full faith and credit must be given even to custody or support decrees of a sister state unless there is a clear finding of subsequent change of circumstances warranting a new disposition. That the full faith and credit clause does not preclude forum courts from re-examining findings of jurisdictional fact made in ex parte judicial proceedings in a sister state was recognized in *Williams v. North Carolina*.⁴ The Supreme Court of North Carolina has clearly enunciated its obligation to give full faith and credit to the final judgments of sister states.⁵

Full faith and credit must be given by state courts to final federal

³356 U.S. 604 (1958), *vacating and remanding* 245 N.C. 630, 97 S.E.2d 96 (1957). See *Harris v. Balk*, 198 U.S. 215 (1905). Moreover, normally a forum court is without power to modify a judgment duly entered in a court of competent jurisdiction in another state. *Laughridge v. Lovejoy*, 234 N.C. 663, 68 S.E.2d 403 (1951). The limitation on this latter rule is well stated in *In re Klutz*, 7 N.C. App. 383, 385, 172 S.E.2d 95, 96 (1970):

The Full Faith and Credit Clause . . . does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state, or to treat as final and conclusive an order of a sister state which is interlocutory in nature. . . . When an order for custody has been entered by a court in another state, a court of this state may, upon gaining jurisdiction, and upon showing of changed circumstances, enter a new order.

Cases reflecting the custody-awarding powers of North Carolina courts in multistate situations are collected and discussed in *Wurfel*, 299-305. See also *Webb v. Friedberg*, 189 N.C. 166, 126 S.E. 508 (1925).

⁴325 U.S. 226 (1945), *aff'g* 224 N.C. 183, 29 S.E.2d 744 (1944). *Williams* and some of the subsequent federally considered divorce cases limiting its application by broad use of the res judicata doctrine are examined in *Wurfel*, 293-97. For three entertaining and instructive accounts of the legal lore generated by *Williams*, see *Baer, So Your Client Wants A Divorce!*, 24 N.C.L. REV. 1 (1945); *Baer, The Aftermath of Williams vs. North Carolina*, 28 N.C.L. REV. 265 (1950); *Baer, The Law of Divorce Fifteen Years After Williams v. North Carolina*, 36 N.C.L. REV. 265 (1958). See also *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969). *Cf. Irby v. Wilson*, 21 N.C. 568 (1837). *Irby* held that a purported Tennessee decree of divorce, granted to the husband on service by publication six years after the wife had removed to North Carolina, was a nullity and, hence, that the wife's purported remarriage before the death of the Tennessee husband was void. The court said:

[T]he decree of the Court of Tennessee is altogether inoperative and null, because it was not an adjudication *between any parties*; since the wife did not appear in the suit, nor was served with process, and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore, not subject to the jurisdiction of Tennessee, nor amenable to her tribunals.

Id. at 576.

⁵*Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966); *Crescent Hat Co. v. Chizak*, 223 N.C. 371, 26 S.E.2d 871 (1943).

court judgments⁶ and by federal courts to final state-court judgments.⁷ A final judgment of a federal district court must be given full faith and credit in all other federal courts.⁸

A federal statute permits final money or property judgments of any federal district court to be registered in and directly enforced by any other federal district court;⁹ a comparable statute applies to Court of Claims judgments in favor of the United States.¹⁰ The mandate of a federal district court injunction runs throughout the United States.¹¹ Accordingly, occasion to resort to state-court action to enforce a federal judgment or injunction is rare.

The fundamental rule that a judgment of a sister state may not be directly executed but must be sued upon and reduced to judgment in the jurisdiction in which execution is sought received early recognition in

⁶*Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E.2d 655 (1958); *Jocie Motor Lines, Inc. v. Johnson*, 231 N.C. 367, 57 S.E.2d 388 (1950); *Yerys v. New York Life Ins. Co.*, 210 N.C. 442, 187 S.E. 583 (1936); *Pigot v. Davis*, 10 N.C. 25, 27 (1824). See *Swope v. St. Mary Parish School Bd.*, 256 La. 1110, 241 So. 2d 238 (1970).

⁷*Angel v. Bullington*, 330 U.S. 183 (1947); *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941); *Miller v. Barnwell Bros.*, 137 F.2d 257 (4th Cir. 1943); *Resolute Ins. Co. v. North Carolina*, 276 F. Supp. 660 (E.D.N.C. 1967), *aff'd*, 397 F.2d 586 (4th Cir.), *cert. denied*, 393 U.S. 978 (1968); *Cobb v. Clark*, 257 F. Supp. 175 (M.D.N.C. 1966), *aff'd per curiam*, 375 F.2d 773 (4th Cir. 1967); *Manning v. State Farm Mut. Auto Ins. Co.*, 235 F. Supp. 615 (W.D.N.C. 1964); *Maager v. Hoye*, 122 F. Supp. 932 (W.D.N.C. 1954).

⁸*Ferguson v. Babcock Lumber & Land Co.*, 252 F. 705 (4th Cir.), *cert. denied*, 248 U.S. 570 (1918). Plaintiff lumber company brought a quiet-title action in the Federal District Court for the Western District of North Carolina relying on title derived from an 1899 final judgment of the Federal District Court for the Eastern District of Tennessee holding that the land in question was in Tennessee and not in North Carolina. In subsequent litigation between the States of North Carolina and Tennessee the Supreme Court determined that this land was in fact in North Carolina and not in Tennessee. In affirming the judgment of the District Court quieting plaintiff's title, the Court of Appeals said:

[O]ne who claims title to . . . land under a grant from one state as land situated in that state, may sue to recover it from citizens of another state who claim under a grant from that other state, in the United States courts of the first state, and have the title finally adjudicated by that court.

Id. at 707.

[T]he decree adjudging valid . . . title under which it claims, having been rendered by a court of competent jurisdiction, must receive . . . full faith and credit.

Id. at 710. See also *Durfee v. Duke*, 375 U.S. 106 (1963).

⁹28 U.S.C. § 1963 (1970). See Note, *Registration of Federal Judgments*, 42 IOWA L. REV. 285 (1957).

¹⁰28 U.S.C. § 2508 (1970).

¹¹*Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

North Carolina.¹² The full faith and credit clause does not require a sister state to apply the same procedural remedies permitted by the original judgment-rendering state when executing its own subsequent judgment predicated upon the earlier judgment. The Supreme Court reaffirmed this principle in *Williams*.

In *Williams* the Supreme Court remarked generally that "a judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had . . . jurisdiction . . . to render the judgment."¹³ In elaborating upon this rule, the Supreme Court of North Carolina succinctly noted: "Ordinarily, the judgment of a sister state may be collaterally attacked upon the following grounds: (1) lack of jurisdiction; (2) fraud in the procurement; or (3) that it is against public policy."¹⁴ Each of these three grounds will be considered separately.

2. *Jurisdictional Facts*

Which jurisdictional facts remain open to collateral attack in defense of a suit brought on a sister state judgment? In 1928 the North Carolina Supreme Court in *Bonnett-Brown Corp. v. Coble*¹⁵ upheld a Chicago Municipal Court judgment entered upon a warrant of attorney to confess judgment. In so doing, the court observed:

The defendant . . . may defeat recovery . . . by showing want of jurisdiction either as to the subject-matter or as to the person of the defendant. . . .

With respect to . . . jurisdiction of the subject-matter . . . in an action brought on a judgment rendered in another State there arises a presumption of jurisdiction, which of course is subject to rebuttal, if the judgment be that of a court of general jurisdiction.¹⁶

¹²*McLure v. Benceni*, 37 N.C. 513 (1843). *Accord*, *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417 (1955). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1971) states: "The local law of the forum determines the methods by which a judgment of another state is enforced." However, such methods cannot be made so complex and expensive as to make enforcement of sister-state judgments unduly difficult. *Broderick v. Bosner*, 294 U.S. 629 (1935).

¹³*Williams v. North Carolina*, 325 U.S. 226, 229 (1945). *Accord*, *Lynde v. Lynde*, 181 U.S. 183 (1901); *First Nat'l Bank v. Wells*, 267 N.C. 276, 148 S.E.2d 119 (1966).

¹⁴*Howland v. Stitzer*, 231 N.C. 528, 531, 58 S.E.2d 104, 106 (1950), *cited in* *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969).

¹⁵195 N.C. 491, 142 S.E. 772 (1928).

¹⁶*Id.* at 494-95, 142 S.E. at 774. *See In re Blalock*, 233 N.C. 493, 64 S.E.2d 848 (1951); *Howland v. Stitzer*, 231 N.C. 528, 58 S.E.2d 104 (1950).

The court also said:

“[T]he fact that a judgment of a court of another state was entered under a warrant of attorney to confess judgment . . . and without service of process or appearance other than that pursuant to the warrant itself, does not take it out of the full faith and credit provision of the Federal Constitution And this is true whether or not such judgments . . . are permitted in the State in which the judgment of the sister State is asserted.”¹⁷

Thus, the legal effect of jurisdictional facts is to be determined by applying the law of the original judgment-granting state, subject only to federal due process requirements.¹⁸ Only the jurisdictional facts themselves may be redetermined by the second state court.¹⁹

3. *Widening Concepts of Jurisdiction over the Person*

In 1966 the North Carolina Supreme Court extended these established jurisdictional principles to a New York judgment predicated upon personal service in North Carolina under a New York long-arm statute.²⁰ The New York judgment had been by default in favor of a New York resident against a North Carolina corporation.²¹ It was stipulated that the original cause of action arose in New York and that no part of the New York judgment had been paid. In the North Carolina suit the plaintiff introduced a certified copy of the New York judgment and rested. The trial court granted the defendant's motion for nonsuit, finding that “‘no personal service of process upon the defendant has ever been made within the territorial jurisdiction of . . . New York, and that

¹⁷195 N.C. at 494, 142 S.E. at 774, quoting *Egley v. T.B. Bennett & Co.*, 196 Ind. 50, 145 N.E. 830 (1924); accord, *Federal Land Bank v. Garman*, 220 N.C. 585, 18 S.E.2d 182 (1942).

¹⁸*Adam v. Saenger*, 303 U.S. 59 (1938); *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1965); *Dansby v. North Carolina Mut. Life Ins. Co.*, 209 N.C. 127, 183 S.E. 521 (1936); *In re Osborne*, 205 N.C. 716, 172 S.E. 491 (1933); *Monarch Refrig. Co. v. Farmer's Peanut Co.*, 74 F.2d 790 (4th Cir.), cert. denied, 295 U.S. 732 (1935); *Maager v. Hoye*, 122 F. Supp. 932 (E.D.N.C. 1954). In *American Inst. of Mktg. Sys., Inc. v. Willard Realty Co.*, 8 N.C. App. 43, 173 S.E.2d 519 (1970), the court upheld a Missouri magistrate-court judgment against a North Carolina corporation based upon service in Missouri upon an agent designated by a clause of a contract entered into between the plaintiff and the defendant. In doing so, the court looked first to the effect given by Missouri law to such service and then to federal authority to determine whether the Missouri rule constituted due process of law.

¹⁹*Hill v. Mendenhall*, 88 U.S. 543 (1874); *Davis v. Bessemer City Cotton Mills*, 178 F. 784 (1910); *Davidson v. Sharpe*, 28 N.C. 14 (1845).

²⁰*Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966).

²¹*Id.* at 524, 146 S.E.2d at 398-99.

the judgment rendered . . . without such service of process is not entitled to recognition in the courts . . . of North Carolina under the full faith and credit clause"²² The North Carolina Supreme Court reversed, stating:

There is a decided trend in favor of *in personam* jurisdiction based on substituted service or personal service beyond the territorial jurisdiction of the forum state. Most of the states have by statute so provided in certain circumstances, and the courts have held that such statutes do not violate due process; this is especially true in actions against foreign corporations. The Supreme Court of the United States, in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) stated: ". . . recently in *International Shoe Co. v. Washington*, 326 U.S. 310 [1945], the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "the traditional notions of fair play and substantial justice".' . . ."

The fact that defendant, a North Carolina corporation, was served with process beyond the territorial jurisdiction of the New York court is not, nothing else appearing, sufficient to establish a want of jurisdiction of defendant by the New York court, as against the principle that jurisdiction will be presumed until the contrary is shown. *The validity and effect of a judgment of another state must be determined by the laws of that state.* . . . The defendant will have the opportunity . . . to show, if it can, from the proceedings had in the New York court and the laws of that state that there was no legal and valid service of process.²³

Thus, North Carolina accepts the validity of personal jurisdiction asserted by long-arm statutes predicated upon relevant activity by the defendant within the judgment-rendering state. In light of the *McGee*²⁴ and *International Shoe Co.*²⁵ decisions, this result appears to conform to federal mandate.

The present trend is to maximize the reach of long-arm jurisdiction

²²*Id.* at 525, 146 S.E.2d at 399.

²³*Id.* at 526-27, 146 S.E.2d at 400-01 (emphasis added). *Accord*, *Voliva v. Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910); *Bennett v. Western Union Tel. Co.*, 152 N.C. 671, 68 S.E. 202 (1910).

²⁴355 U.S. 220 (1957).

²⁵326 U.S. 310 (1945). Two North Carolina decisions relied on *McGee* and *International Shoe Co.* in upholding personal jurisdiction exercised over nonresident foreign corporations, based upon substituted service of process, and predicated solely upon the language of N.C. GEN. STAT. § 55-

both by the language used in such statutes²⁶ and by judicial interpretation thereof. Thus, the Hawaiian statute has been held to confer personal jurisdiction over a nonresident English corporation by service made on it in England, despite the express realization that the enforcement forum of such a judgment would probably be the court of a foreign country not bound by our domestic full faith and credit obligations.²⁷ North Carolina courts would be obliged to give full faith and credit to this Hawaiian judgment, subject to the possibility of certiorari review by the Supreme Court of the United States on the issue of due process.²⁸ This obligation exists even though the North Carolina Supreme Court might

145(a)(1) (1965). Section 55-145 extends to "any cause of action arising . . . out of any contract made in this State or to be performed in this State." These decisions were *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970), and *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

²⁶CAL. CIV. PRO. CODE § 410.10 (West Supp. 1971) (effective July 1, 1970) provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." The Comment of the Judicial Council which accompanies this § states:

All the recognized bases of judicial jurisdiction are included. In the case of natural persons, such bases currently include presence, domicile, residence, citizenship, consent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, use or possession of a thing in a state as well as other relationships to a state

In the case of corporations and unincorporated associations (including partnerships), such bases currently include incorporation or organization in a state, consent, appointment of an agent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or possession of a thing in a state, and other relationships to a state.

See Comment, *In Personam Jurisdiction in California: A 1970 License to do Whatever's Right*, 1 PAC. L.J. 671-94 (1970). See also ILL. ANN. STAT. ch. 110, § 17 (1959); MONT. REV. CODES ANN. § 93-2701, Rule 4B (Supp. Vol. 7, 1971); N.Y. CIV. PRAC. LAW § 301 (McKinney Supp. 1970-71); UTAH CODE ANN. §§ 78-27-22 to -28 (Supp. 1971); WIS. STAT. ANN. § 262.05 (Supp. 1971-72); Note, *In Personam Jurisdiction Expanded: Utah's Long-Arm Statute*, 1970 UTAH L. REV. 222.

²⁷*Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969). Negligent manufacture in England by Duple, an English corporation, resulting in injury in Hawaii constituted commission of a tortious act within Hawaii under Hawaii's long-arm statute. Duple was held subject to the court's jurisdiction. The court recognized, however, that

problems of full faith and credit do indeed exist and enforcement in England of any judgment appellees may secure in Hawaii may well prove difficult if the views of English courts do not coincide with ours as to what is fair and just and in the best interests of foreign trade. This does not, however, relieve us of our obligation to deal with these problems in the light of the requirements of the Constitution of the United States as we view them.

Id. at 235-36.

²⁸*Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 527, 146 S.E.2d 397, 401 (1966).

feel that the jurisdictional facts found would not meet the requirements of the North Carolina long-arm statute.²⁹ The decisive inquiry is whether those facts meet the requirements of the Hawaiian statute.

State long-arm statutes that spell out the circumstances in which personal jurisdiction may be exercised upon substituted service in effect impose their own limitations upon the power of the court to exercise judicial jurisdiction by excluding those circumstances not expressly defined by the statute. Consequently, a plaintiff must overcome this first hurdle of establishing a statutory basis for jurisdiction before reaching the federal test of whether the personal jurisdiction granted by the statute meets minimum due process requirements of the fourteenth amendment.³⁰ The California statute, which provides that "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States,"³¹ eliminates the first obstacle and appropriately adopts the second as its determining factor.

Foreign divorce, support, and custody decrees provide the other primary area for the contest of personal jurisdiction. The relevant North Carolina cases were reviewed in a prior article³² and will not be reconsidered here.

Once jurisdiction of the person has been obtained, it continues through all subsequent proceedings arising ancillary to the original cause of action, even though the party is a nonresident. This jurisdiction is subject to reasonable notice and the opportunity to be heard at each new step in the proceeding.³³ North Carolina Courts have applied this rule.

²⁹N.C. GEN. STAT. § 1-75.4 (1969). For an examination of recent North Carolina legislation regarding service of process outside the state see Louis, *Modern Statutory Approaches To Service of Process Outside The State—Comparing the North Carolina Rules of Civil Procedure With The Uniform Interstate And International Procedure Act*, 49 N.C.L. REV. 235 (1971).

³⁰See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note §§ 24-79, at 102 (1971):

Whether a state has empowered one of its courts to act in a certain case depends upon the local law of that state. The same law determines the effect of any action that the court may take in excess of its authority. If under this law such action in the particular case does no more than make the judgment erroneous and subject to reversal on appeal, the judgment, so long as it remains unreversed, will be recognized as valid in other states; among States of the United States, this result is required by the full faith and credit clause of the Constitution. On the other hand, if under the local law of the state of rendition the judgment is void and subject to collateral attack, it will so be treated everywhere.

³¹CAL. CIV. PRO. CODE § 410.10 (West Supp. 1971).

³²Wurfel 294-305.

³³RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 26 (1971). *But cf.* Adam v. Saenger, 303 U.S. 59 (1938).

In *Hinnant v. Hinnant*³⁴ the court stated:

The defendant [now stationed at Shaw Field, Sumter, South Carolina] was personally served with summons in the original action instituted in 1953 in Robeson County. He and his counsel of record signed the consent judgment which, by its express terms, retained the cause on the docket. Thereafter service on the attorney of record was sufficient. "The relation of the attorney of record to the action, nothing else appearing, continues so long as the opposing party has the right by statute or otherwise to enter a motion therein or to apply to the court for further relief." . . . The defendant's objection that service was made upon his attorney of record, is not sustained.

In the plaintiff's action for limited divorce, for alimony, custody and support for the children, the court acquired jurisdiction of the parties and the children. That jurisdiction continues and the action is still pending. "Jurisdiction rests in this court (superior) . . . until the death of one of the parties, or the youngest child of the marriage reaches the age of maturity, whichever event shall first occur." . . .

. . . [T]he Superior Court of Robeson County has the continuing authority to require compliance with the . . . judgment. The defendant has threatened to defeat the continuing terms of that judgment by removing from the State specifically described property now in its jurisdiction. The equitable power inherent in the superior court is amply sufficient to warrant the restraint imposed

4. *Subject Matter Jurisdiction*

The following discussion assumes that personal jurisdiction of the parties existed and focuses on the question of whether the court rendering judgment had jurisdiction of the subject matter. In rem and quasi in rem proceedings will be examined separately.

In nations in which legislative power is not constitutionally restricted, the legislature may confer unlimited subject matter jurisdiction upon its courts, and their judgments will be valid, at least internally. However, in the United States judicial jurisdiction is limited by legislation and by requirements of both federal and state constitutions. As to subject matter jurisdiction, due process limitations are infrequent. How-

³⁴258 N.C. 509, 512-13, 128 S.E.2d 900, 902 (1963); *accord*, *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E.2d 469 (1958). However, custody proceedings are in rem in nature, and the child must be before the court for it to enter a valid order affecting the person of the child (other than in exercise of its coercive jurisdiction over a parent). *Weddington v. Weddington*, 243 N.C. 702, 705, 92 S.E.2d 71, 74 (1956); *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

ever, most state legislatures have created complex court systems that usually establish some courts whose jurisdiction is limited as to amount in controversy or subject matter or both.

Judgments of magistrates' courts, recorders' courts, municipal courts, district courts, separate probate courts, and other "courts of limited jurisdiction" are frequently collaterally attacked in the original state or sister states. In either case the local law of the judgment-rendering state determines whether the judgment is valid, voidable, or void.³⁵ If the attack is made in a sister state (where it is necessarily collateral), the requisite full faith and credit is extended by according to the judgment precisely the same effect given to it in the state where it was rendered. Thus, if the judgment may be collaterally attacked at home for lack of subject matter jurisdiction, it may be so attacked elsewhere.

Normally, if the subject matter jurisdiction is valid where the judgment is rendered, that jurisdiction must be upheld by sister states. This rule is subject to the exception that if the law of the judgment state that shields the judgment from collateral attack conflicts with an important federal policy, then the judgment state's rules of *res judicata* must yield to the federal policy.³⁷ Another narrow exception is that *ex parte* divorce decrees may be collaterally attacked in another state on the ground that the plaintiff was not domiciled in the decree-granting state, even though by the law of the latter a finding of domicile would not be subject to collateral attack.³⁸

A state may exercise wide discretion in determining its local law regarding the permissibility of collateral attack on its own judgments for want of subject matter jurisdiction. With the exceptions above stated, the

³⁵RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 97 (1971). The local law is, of course, subject to constitutional limitations. *Id.*

³⁶*Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948); *Davis v. Davis*, 305 U.S. 32 (1938).

³⁷*Kalb v. Feurstein*, 308 U.S. 433 (1940). *Kalb* held that a federal statute that prevented state courts from exercising jurisdiction to foreclose mortgages on farmers' lands during federal bankruptcy proceedings overrode such a foreclosure decree erroneously entered and rendered it void and subject to collateral attack. The policy of the federal statute was strong enough to overcome state rules of *res judicata*.

³⁸*Williams v. North Carolina*, 325 U.S. 266 (1945). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971) reads:

A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

local law of the judgment state must be followed by sister states in according full faith and credit. These options are open only in shaping the local law of a state and not its conflicts rule regarding sister-state judgments. Under the full faith and credit clause, the conflicts rule of the forum for this purpose must be to apply the local law of the judgment-granting state to such judgments.

If the jurisdictional question raised by collateral attack has not been determined by judgment-state law, the forum state might well adopt a parallel to the solution used by federal courts in diversity cases, that is, to apply the rule which it believes the state court will adopt when it has occasion to decide the issue.³⁹ In these circumstances a state court is likely to look to its own domestic law or to the weight of authority as a model for resolving the question. As long as such law is not violative of federal due process standards, this solution would probably be upheld.

One formulation of permissible local law guidelines provides:

Important factors to be considered in determining whether there are sufficient grounds of public policy for denying the judgment the effect of *res judicata* are (1) whether the lack of jurisdiction or competence over the subject matter of the controversy is clear or doubtful, (2) whether the determination as to jurisdiction or competence depends upon questions of fact or of law, (3) whether the court is one of general or of limited jurisdiction, (4) whether the question of jurisdiction or of competence was actually litigated and (5) the strength of the policy underlying the denial of competence to a court.⁴⁰

Since the domestic North Carolina rules regarding the extent to which its judgments are subject to collateral attack for asserted lack of subject matter jurisdiction are the ones to be applied by sister states in according full faith and credit to North Carolina judgments, an examination of these North Carolina rules in their conflicts context is appropriate. In a number of circumstances, purported North Carolina judg-

³⁹In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941), the Court observed, "[T]he proper function of the . . . federal court is to ascertain what the state law is, not what it ought to be." In *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *cert. denied*, 368 U.S. 901 (1961), Judge Friendly put it this way: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so." *Cf. Peterson v. U-Haul Co.*, 409 F.2d 1174 (8th Cir. 1969); *Cudahy Co. v. American Lab., Inc.*, 313 F. Supp. 1339, 1342 (D. Neb. 1970).

⁴⁰RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 97, Comment *d* at 296 (1971). *See also* RESTATEMENT OF JUDGMENTS § 10 (1942).

ments have been held void for lack of subject matter jurisdiction and hence subject to collateral attack. The reasoning was well stated in *High v. Pearce*:⁴¹

The real question upon which decision must rest is that of jurisdiction: Were acts of the clerk of the Superior Court of Johnston County, in allotting dower to the widow in lands situate in Wilson County, void for want of jurisdiction?

. . . [A] dower proceeding must be brought in the county of the residence of the decedent, which in this instance is Wilson County

. . . .

. . . [T]he proceeding before the clerk of the Superior Court of Johnston County was *coram non judice* and was void for want of jurisdiction. . . .

. . . .

. . . .

. . . Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose. . . . Obviously, summons is ineffectual to bring a person into such a court; and if he comes voluntarily, it has no more effect than if he had walked into an empty hall.

Thus, not only purported judgments of clerks of court⁴² but also those of a justice of the peace,⁴³ the Industrial Commission,⁴⁴ county

⁴¹220 N.C. 266, 270-71, 17 S.E.2d 108, 111-12 (1941). For an interesting assault upon the doctrine that consent cannot confer subject matter jurisdiction, see Dobbs, *The Decline of Jurisdiction By Consent*, 40 N.C.L. REV. 49 (1961). The author notes:

The parties cannot give a court jurisdiction of the subject matter by their consent or acquiescence. So sanctified is this formula that a halo of constitutionality surrounds it. In the name of this saintly precept a plaintiff may choose his forum, lose his suit and try again in another forum on the ground that the first court had no jurisdiction.

Id. at 49 (footnotes omitted). Dobbs' conclusion, in part, is that "almost every reason that history suggests to support the rule against [subject matter] jurisdiction by consent has disappeared. . . . When the no consent rule was developed, *res judicata* was not the significant legal tool that it is today, and the policies of *res judicata* were not weighed in the balance." *Id.* at 78-79.

⁴²*Springer v. Shavender*, 118 N.C. 33, 23 S.E. 976 (1896).

⁴³*J.R. Cary Co. v. Allegood*, 121 N.C. 54, 28 S.E. 61 (1897).

⁴⁴*Reaves v. Earle-Chesterfield Mill Co.*, 216 N.C. 462, 5 S.E.2d 305 (1939). The employer and the employee made an agreement for disability compensation, and this agreement was approved by the North Carolina Industrial Commission. After some payments had been made under the agreement, the employer refused further compliance. An award directing compliance was entered and was affirmed on appeal by the Superior Court. In reversing, the Supreme Court said:

[T]he jurisdiction of the Industrial Commission attaches only . . . if the residence of the employee is in this State. . . .

courts,⁴⁵ a special judge,⁴⁶ and a resident judge of the district court⁴⁷ were held void and subject to collateral attack when subject matter jurisdiction was absent. These judgments would not be entitled to full faith and credit in the courts of sister states. There were also cases holding "void" purported judgments of superior courts because subject matter jurisdiction was absent.⁴⁸ Although these decisions were on direct appeal, the language used is broad enough to encourage courts of sister states, on collateral attack, to reject other North Carolina superior court judgments having the same or similar infirmities.

The uniform court system prescribed by Article IV of the North Carolina Constitution became operational throughout the state on January 1, 1971. Since this time, the possibility of a North Carolina judgment being held void for lack of subject matter jurisdiction has been substantially reduced but not entirely eliminated. In pertinent part section twelve of Article IV of the Constitution (effective July 1, 1971) provides:

(3) Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) . . . The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

(5) . . . The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

Chapter 7A of the North Carolina General Statutes implements

. . . [N]either the agreement entered into by the plaintiff and the defendant nor the subsequent payments of the defendant thereupon amounted to a waiver of jurisdiction. . . . It is an administrative board, with quasi-judicial functions . . . and has a special or limited jurisdiction created by statute and confined to its terms.

Id. at 465, 5 S.E.2d at 306. This voiding of award occurred on direct attack on appeal. By a 1963 amendment to the North Carolina General Statutes, residence of the employee in the state is no longer a jurisdictional requisite. Ch. 450, § 2 [1963] N.C. Sess. L. 528. *See* N.C. GEN. STAT. § 97-36 (Supp. 1969).

⁴⁵*Perry v. Owens*, 257 N.C. 98, 125 S.E.2d 287 (1962) (counterclaim).

⁴⁶*Reid v. Reid*, 199 N.C. 740, 155 S.E. 719 (1930).

⁴⁷*Hill v. Stansbury*, 224 N.C. 356, 30 S.E.2d 150 (1944).

⁴⁸In *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964), an employee sued a co-employee in the superior court for injuries negligently inflicted in a scope-of-employment situation. The trial court sustained a plea in bar that under the North Carolina Workmen's Compensation Act a co-

Article IV of the Constitution. It provides that except for original jurisdiction of claims against the State vested in the Supreme Court and for the exclusive original jurisdiction for the probate of wills and the administration of decedents' estates vested in the Superior Court, all original civil jurisdiction is vested concurrently in both the superior-court division and the district-court division of the General Court of Justice⁴⁹ and that no civil judgment in a matter of concurrent jurisdiction "is void or voidable for the sole reason that it was rendered by" one of these two courts when the "allocation" of the statute provides that the cause should be tried in the other court.⁵⁰ By limiting trial courts to two and giving them both general, concurrent jurisdiction except in probate matters, it appears that the subject matter jurisdiction of a North Carolina trial court is now not normally subject to domestic collateral attack except in probate matters. If so construed by the North Carolina courts, sister states under the full faith and credit clause must accord such treatment to North Carolina judgments.

These statutory changes do not purport to give subject matter competence to the Industrial Commission beyond its stated statutory powers,⁵¹ nor to confer upon either the superior or district court a jurisdiction which neither possesses.⁵² Consequently, there remains the possibil-

employee was immune from such suit. Affirming, the Supreme Court observed that "the proceedings of a court without jurisdiction of the subject matter are a nullity." *Id.* at 465, 137 S.E.2d at 808.

In *Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952), a municipal election required by law to be held in 1951 was not held, and thereafter the superior court issued a mandamus to compel a primary election in January 1952 and a general election in February 1952. This was recited to be a consent proceeding. The elections were held, and the hold-over municipal officers refused to turn over their offices to the 1952 electees. In a contempt proceeding brought before another judge of the superior court, the order to show cause was dismissed. The Supreme Court affirmed.

The validity of this conclusion is not diminished . . . by the circumstance that the primary and election were held in obedience to the consent judgment. In the very nature of things, a court lacks jurisdiction to authorize or compel the holding of an invalid primary, or a void election. The parties to a cause cannot by consent invest a court with a power not conferred upon it by law. . . . When a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose.

Id. at 153, 72 S.E.2d at 420.

RESTATEMENT OF JUDGMENTS § 117 (1942) provides: "Subject to general equitable considerations . . . equitable relief will be given from a void judgment."

⁴⁹N.C. GEN. STAT. §§ 7A-240, -241 (1969).

⁵⁰N.C. GEN. STAT. § 7A-242 (1969).

⁵¹*See* *Reaves v. Earle-Chesterfield Mill Co.*, 216 N.C. 462, 5 S.E.2d 305 (1939).

⁵²*See* *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952); *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108 (1941). *Cf.* *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E.2d 417 (1971).

ity of collateral attack when a trial tribunal enters a judgment in a matter over which it possesses neither exclusive nor concurrent subject matter jurisdiction.⁵³

When North Carolina courts have been confronted with assertions that judgments of sister states were not entitled to full faith and credit because subject matter jurisdiction was absent, the matter has been resolved by applying the local law of the judgment-granting state. Until 1931 North Carolina followed the common law rule that proof of the law of another jurisdiction is a question of fact that must be submitted under proper instructions to the jury for decision by it.⁵⁴ Since then, a statute has provided that the court must take notice not only of sister state laws but of the laws of foreign countries as well.⁵⁵ Consequently, the determination today would be made by the court as a question of law.

Collateral attacks against a West Virginia probate court decree⁵⁶ and a New York divorce court decree recognizing a property settlement agreement⁵⁷ were denied upon determinations that these courts had subject matter jurisdiction. Each judgment was given the legal effect it had where rendered. However, without reference to the law of Ohio, it was held that an Ohio court had no subject matter jurisdiction in a divorce decree to convey title to a parcel of North Carolina land, and such decree was denied recognition in a title proceeding in North Carolina.⁵⁸ This situation is almost unique in that adjudication of land title is not nor-

⁵³The present writing touches upon only a few aspects of practice and procedure pertinent to the resolution of foreign-judgment problems. The definitive work on current North Carolina law in the entire area of practice and procedure is T. WILSON & J. WILSON, *MCINTOSH NORTH CAROLINA PRACTICE AND PROCEDURE* (Supp. 1970). The author of the 1970 Supplement is Dean James Dickson Phillips of the University of North Carolina School of Law.

⁵⁴*Mottu v. Davis*, 153 N.C. 160, 166, 69 S.E. 63, 65 (1910).

⁵⁵N.C. GEN. STAT. § 8-4 (1969).

⁵⁶*Groome v. Leatherwood*, 240 N.C. 573, 83 S.E.2d 536 (1954).

⁵⁷*Howland v. Stitzer*, 231 N.C. 528, 58 S.E.2d 104 (1950). *See* *Sears v. Sears*, 253 N.C. 415, 117 S.E.2d 7 (1960).

⁵⁸*McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948). The court held:

The full faith and credit clause has never been applied without limitation. . . .

. . . .

. . . .

No principle is more fundamental or firmly settled than that the local sovereignty by itself, or its judicial agencies, can alone adjudicate upon and determine the status of land within its borders, including its title and incidents and the mode in which it may be charged or conveyed. Neither the laws of another sovereignty nor the judicial proceedings, decrees, and judgments of its courts can in the least degree affect such lands.

Id. at 716-17, 47 S.E.2d at 29-30.

mally a transitory cause of action, and this jurisdiction may be exclusively exercised by the loci court with in rem jurisdiction.⁵⁹

5. *Fraud*

The law regarding the availability of fraud as a ground for collateral attack of sister-state judgments was originally obscure. One nineteenth century Supreme Court decision rejected on procedural grounds the equitable defense of fraud to an action at law on a Kentucky judgment brought in Mississippi.⁶⁰ Another contained dicta to the effect that fraudulent testimony might vitiate a French judgment sought to be enforced in the United States.⁶¹ Yet another clearly distinguished intrinsic from extrinsic fraud.⁶²

The North Carolina case of *Levin v. Gladstein*⁶³ cast considerable light on this problem. In *Levin* the defendant buyer felt that goods were not up to sample and returned them from Durham, North Carolina to the seller in Baltimore, Maryland. When the defendant went to Baltimore to discuss the matter, he was served with summons in a suit to

⁵⁹The enforceability of equity decrees of sister states is discussed following note 143 *infra*. The effect to be given to the exercise of in rem jurisdiction by a sister state is considered following note 198 *infra*.

⁶⁰*Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866). Other inconclusive decisions include *Jaster v. Currie*, 198 U.S. 144 (1905); *Cole v. Cunningham*, 133 U.S. 107 (1890); *Hanley v. Donoghue*, 116 U.S. 1 (1885); and *Maxwell v. Stewart*, 89 U.S. (22 Wall.) 77 (1874).

⁶¹*Hilton v. Guyot*, 159 U.S. 113 (1895). The Court concluded:

The very judgment [French] now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to reexamination, either merely because it was a foreign judgment, or because judgments of that nation would be reexaminable in the courts of France.

Id. at 228.

The Court had previously distinguished a judgment of "our own tribunals" from a judgment of a foreign country in these words:

It has . . . been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. . . .

But it is now established in England . . . that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

Id. at 207.

⁶²*United States v. Throckmorton*, 98 U.S. 61 (1878).

⁶³142 N.C. 482, 55 S.E. 371 (1906).

recover the purchase price. He then agreed with the plaintiff that the plaintiff would withdraw the suit and he would accept the goods at a stated price. Thereafter the plaintiff entered a default judgment in the Maryland suit against the defendant. In an action on the Maryland judgment, the North Carolina court refused to accord it full faith and credit:

[T]he judgment obtained by the fraud of plaintiffs . . . would be open to attack in the Courts of Maryland . . . and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that State. . . .

. . . "If, in the State in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other States. . . .

[E]quitable as well as legal defenses are . . . admissible in actions at law."⁶⁴

Even here, this clear-cut example of extrinsic fraud was not expressly so labeled but was characterized as "fraud in its procurement."⁶⁵

It should be noted that *Levin* invokes the local law of the state rendering judgment to determine whether equitable relief against it is available but holds that the local law of the forum in which enforcement is sought determines the procedure to be used in affording such relief. This rule has been adopted by *Restatement (Second) of Conflict of Laws*.⁶⁶ When extrinsic fraud is established, a North Carolina judgment so tainted is open to collateral attack not only in North Carolina but in the courts of sister states as well.⁶⁷

⁶⁴*Id.* at 491-92, 55 S.E. at 375. See RESTATEMENT OF JUDGMENTS § 118 (1942), comment *e* at 575.

⁶⁵*Id.* at 493, 55 S.E. at 375; *accord*, *Stocks v. Stocks*, 179 N.C. 285, 102 S.E. 306 (1920).

⁶⁶RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115 (1971) states: "A judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition." Comment *a* to the proposed official draft stated that § 115 "does not apply to relief against a judgment which could be obtained in the state of rendition only in the proceeding itself, either in the trial court, as by a motion to have the judgment set aside on the ground of newly discovered evidence, or an appeal." *Id.* at 411 (Proposed Official Draft 1967). (This comment was omitted from the *Restatement* as finally adopted.)

Comment *d* at 334, in pertinent part, reads: "If the state of rendition follows the usual rule, only fraud . . . which deprives the complainant of an opportunity to present adequately his claim or defense, will provide a basis for equitable relief against the judgment." Comment *b* at 333 adds: "[T]he local law of the state of rendition will be applied to determine whether equitable relief can be obtained against the judgment. On the other hand, the local law of the state where recognition or enforcement of the judgment is sought determines the procedure for obtaining such relief."

⁶⁷See note 66 *supra*.

The assertion that the judgment collaterally attacked was obtained by perjured testimony or false evidence is the one most frequently brought to court. The courts consistently classify this allegation as a reliance on intrinsic fraud and deny relief. *McCoy v. Justice*⁶⁸ is typical. In that case the defendants, the administrator and widow of a decedent, had previously obtained a final judgment against the plaintiff for criminal conversation with and alienation of the affections of decedent's wife. In affirming the granting of the defendants' motion for nonsuit, the court said:

The essence of the plaintiff's case . . . is crystallized in an effort to set aside the judgment upon the ground of false testimony. If the judgment were vacated for this cause and the plaintiff were again the unsuccessful party why could he not assail the second judgment upon similar allegations? It is for the public good that there be an end to litigation.⁶⁹

A 1969 case reaffirmed the basic rule of *McCoy* in refusing to set aside a Massachusetts judgment which the plaintiff testified was procured by

⁶⁸199 N.C. 602, 155 S.E. 452 (1930).

⁶⁹*Id.* at 613, 155 S.E. at 459. The *McCoy* opinion further states:

The objection to relitigation rests upon solid ground.

. . . .

. . . [In] *United States v. Throckmorton*, [98 U.S. 61 (1878)] . . . the Supreme Court stated the principle that relief may be given to a party against whom a judgment has been rendered if the fraud practiced upon him prevented him from presenting all his case to the court, but that a judgment will not be set aside on perjured testimony or for any matter that was presented and considered in the judgment assailed. . . .

. . . *Pico v. Cohn*, [91 Cal. 129, 25 P. 970 (1891)] . . . held that perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a final decree, although it is reasonably certain that the result of a new trial would be different. . . . [T]he Court said: ". . . Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . ."

. . . .

Our own decisions have from the beginning been in accord with these principles. In *Gatlin v. Kilpatrick*, 4 N.C., 147 [1814], it was held that if a party's claims have been decided by a court of competent jurisdiction and he has had an opportunity of presenting them he shall no longer be at liberty, if unsuccessful, to harass his adversary . . . Equity will not set aside even an "unconscientious verdict at law unless it were not competent to the complaining party to make his defense in a court of law." *Peace v. Nailing*, 16 N.C., 289 [1829].

. . . [I]n *Dyche v. Patton*, 43 N.C. 295 [1852] . . . the Court held that a verdict obtained in a court of law by perjured testimony would not be set aside unless the witness on whose testimony the verdict was given had been convicted of perjury or a sufficient reason was given for failure to prosecute him. . . . The principle was stressed in *Mottu v. Davis*, 153 N.C. 160, [69 S.E. 63 (1910)] in these words: ". . . [P]erjury, being

her own perjured testimony.⁷⁰ Whether the intervening conviction of a material witness for perjury committed in the trial leading to the questioned judgment would change the rule and permit collateral attack is an issue that appears to be open for determination in North Carolina. There are dicta to the effect that such facts would alter the result.⁷¹ The crime of perjury is difficult to prove, and convictions thereof are rare; hence, it is not surprising that this precise problem has not come to the court for decision. The *Restatement of Judgments*⁷² would deny collateral relief from the judgment, even after the conviction of a party or material witness for perjury or forgery material to the rendition of the judgment. *A fortiori*, the *Restatement* would deny collateral relief for the mere admission of perjury made by the witness.

Other examples of intrinsic fraud are collected in *Johnson v. Stephenson*.⁷³ In *Johnson* the court refused to impose a constructive trust on certain real estate devised under a will that allegedly had been procured by undue influence and fraud. The court held that since the right of direct attack by caveat gave the daughter a full and adequate remedy, equitable relief by way of constructive trust was not available.

In *Johnson* the court also discussed the difference between extrinsic and intrinsic fraud, noting decisions by other courts that allow an heir to establish a constructive trust collaterally, despite the probate of a will, where it is proved that the decree of probate was obtained by extrinsic fraud that deprived the plaintiff of an opportunity to caveat.⁷⁴ Several examples of extrinsic fraud, which can be attacked collaterally, were set out by the court. These included false representations made to an heir out of court that caused him to defer filing a caveat until the time limit elapsed;⁷⁵ false statements made in procuring probate that the

intrinsic fraud, is not ground for equitable relief against a judgment resulting from it, but the fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment and which prevents the losing party from having an adversary trial of the issue."

Id. at 606-08, 155 S.E. at 455-56. *Accord*, *Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E.2d 871 (1943) (upholding a New York judgment); *Cody v. Hovey*, 216 N.C. 391, 396, 5 S.E.2d 165, 168 (1939) (upholding a New York judgment); *Horne v. Edwards*, 215 N.C. 622, 3 S.E.2d 1 (1939) (upholding a North Carolina judgment).

⁷⁰*Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E.2d 549, *cert. denied*, 275 N.C. 501 (1969).

⁷¹*See Dyche v. Patton*, 56 N.C. 332 (1857); *Moore v. Gulley*, 144 N.C. 81, 56 S.E. 681 (1907).

⁷²RESTATEMENT OF JUDGMENTS § 126, Comment *c* at 614 (1942).

⁷³269 N.C. 200, 152 S.E.2d 214 (1967).

⁷⁴*Id.* at 204-05, 152 S.E.2d at 218.

⁷⁵*Caldwell v. Taylor*, 218 Cal. 471, 23 P.2d 758 (1933).

deceased left no heirs, as a result of which the heir did not receive notice of the proceedings in time to file a caveat;⁷⁶ false statements purporting to show service of notice on next of kin;⁷⁷ and intentional failure to disclose to the probate court the existence of a pretermitted heir.⁷⁸ Other instances held *not* to constitute extrinsic fraud are the intentional failure of an administrator to plead the statute of limitations in defense to an otherwise valid claim against the estate;⁷⁹ conduct and representations of an insurer's local agent that deprived the insurer of an opportunity to defend against a claim reduced to judgment, in the absence of collusion between the agent and the claimant;⁸⁰ the inducement of a North Carolina resident to appear personally in a New York suit by commencing that suit by attachment proceedings;⁸¹ and the failure of a defendant's attorney to file an answer when there was no collusion with the plaintiff.⁸²

Six inequitable circumstances attendant to a judgment and yet not constituting grounds for collateral attack are given in *Restatement of Judgments*. These are ignorance of pendency of an *in rem* proceeding; false testimony or documents; nonfraudulent, factual misrepresentation by the original plaintiff causing the original defendant not to defend; newly discovered evidence; error of law or fact by the court, the present complainant, or his attorney; and negligence of the attorney or other agent of the present complainant.⁸³

The forum state must apply the local law of the judgment state in determining what constitutes extrinsic fraud. The North Carolina con-

⁷⁶Zaremba v. Woods, 17 Cal. App. 2d 309, 61 P.2d 976 (1936).

⁷⁷Seeds v. Seeds, 116 Ohio St. 144, 156 N.E. 193 (1927).

⁷⁸Purinton v. Dyson, 8 Cal. 2d 322, 65 P.2d 777 (1937).

⁷⁹Best v. Best, 161 N.C. 513, 77 S.E. 762 (1913).

⁸⁰North Carolina Mut. & Provident Ass'n v. Edwards, 168 N.C. 378, 84 S.E. 359 (1915).

⁸¹Williamson v. Jerome, 169 N.C. 215, 85 S.E. 300 (1915). RESTATEMENT OF JUDGMENTS § 38 (1942) provides: "If, in a proceeding begun by attachment or garnishment or by a creditor's bill in a court which has no jurisdiction over the defendant, he enters a general appearance, the court may render a judgment against him personally." However, § 39 reads, "If . . . he enters an appearance solely for the purpose of contesting the validity of the proceedings, the court does not acquire jurisdiction over him and cannot render a judgment against him personally." Finally, § 40 states, "If . . . he enters an appearance for the purpose of contesting the validity of the plaintiff's claim, he does not thereby subject himself personally to the jurisdiction of the court, if in appearing he states that he does not submit himself to the jurisdiction of the court."

⁸²Ring v. Whitman, 194 N.C. 544, 140 S.E. 159 (1927).

⁸³RESTATEMENT OF JUDGMENTS §§ 126(2)(a)-(f) (Supp. 1948).

flict of laws rule, as stated in *Levin v. Gladstein*,⁸⁴ so holds. The *Restatement (Second) of Conflicts of Laws* provides:

Recognition and enforcement will be denied the judgment if equitable relief on the ground of fraud could be obtained against it in the state of rendition. If the state of rendition follows the usual rule, only fraud . . . which deprives the complainant of an opportunity to present adequately his claim or defense, will provide a basis for equitable relief against the judgment.⁸⁵

It further states that

the local law of the state of rendition will be applied to determine whether equitable relief can be obtained against the judgment. On the other hand, the local law of the state where recognition or enforcement of a judgment is sought determines the procedure for obtaining such relief.⁸⁶

The remedy of obtaining a new trial in the original proceeding, based upon newly discovered evidence previously unavailable (but not so because of negligence of the movant) or upon other grounds, is wholly separate from seeking collateral relief predicated on fraud.⁸⁷ The relief from judgment now provided for by Rule Sixty of the *North Carolina Rules of Civil Procedure* gives a remedy which is at least in part cumulative to collateral attack by a separate action.⁸⁸ However, procedures

⁸⁴142 N.C. 482, 491, 55 S.E. 371, 375 (1906).

⁸⁵RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115, Comment *d* at 334 (1971).

⁸⁶*Id.* Comment *b* at 333.

⁸⁷N.C. GEN. STAT. § 1A-1, Rule 59 (1969) details motion for new trial grounds and procedures.

⁸⁸See *Robinson v. McAdams*, 11 N.C. App. 105, 109, 180 S.E.2d 399, 402 (1971). N.C. GEN. STAT. § 1A-1, Rule 60(b) (1969) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

RESTATEMENT OF JUDGMENTS §§ 120-121 (1942) are directed to the circumstances under which the judgment-rendering jurisdiction should grant equitable relief against its own judgments.

under either Rule Fifty-Nine or Sixty, where pursued to conclusion, may result in *res judicata* consequences.

Strangers to a judgment may collaterally impeach it not only for extrinsic fraud but also where it has been procured through the fraud of either party or the collusion of both for the purpose of defrauding a third person.⁸⁹

6. *Public Policy Considerations*

There is a very narrow range within which the public policy of the forum jurisdiction will permit exceptions to the mandate of the full faith and credit clause. Thus, under the supremacy clause a federal bankruptcy court need not recognize a state mortgage-foreclosure decree entered in violation of the bankruptcy act.⁹⁰ Perhaps more clearly a matter of public policy, one state will not enforce a fine or other criminal judgment of a sister state.⁹¹ On the other hand, if the judgment grants monetary relief to an individual, as distinguished from a state or state agency, it is held not to be penal in nature and is entitled to full faith and credit.⁹²

A regular judgment of a sister state based upon a tax claim must be accorded full faith and credit.⁹³ However, mere tax claims or administrative tax assessments of one state need not be entertained in the courts of another state. In spite of this fact, voluntary statutes permitting such suits on a reciprocal basis are now common, and North Carolina has such legislation.⁹⁴ Antedating this statute, there is a maverick North

⁸⁹*Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968). Here, an insurer filed a motion to intervene in a suit pending against its insured in which it asserted that there was collusion between the plaintiff and the insured. The court denied intervention but said that in a subsequent action against the insurer, it could "plead the defense of fraud and collusion incident to the manner in which judgment is obtained." *Id.* at 490, 160 S.E.2d at 320. Regarding the rights of a "stranger," interested in but not a party to a judgment, the court stated: "Judgments of any court may be impeached for fraud or collusion by strangers to them who, if the judgment were given full faith and credit, would be prejudiced in regard to some pre-existing right." *Id.* at 488, 160 S.E.2d at 318; *accord*, *Manning v. State Farm Mut. Auto. Ins. Co.*, 235 F. Supp. 615 (W.D.N.C. 1964), *citing* *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1965).

⁹⁰*Kalb v. Fierstein*, 308 U.S. 433 (1940).

⁹¹*The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *cf.* *Pye, The Effect of Foreign Criminal Judgments in the United States*, 32 U.M.K.C.L. Rev. 114 (1964). The question of the enforcement of criminal judgments by sister states is wholly apart from questions of extradition.

⁹²*Huntington v. Attril*, 146 U.S. 657 (1892); *cf.* *Testa v. Katt*, 330 U.S. 386 (1947) (civil suit for treble damages for an overcharge made in violation of the Emergency Price Control Act).

⁹³*Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

⁹⁴N.C. GEN. STAT. §§ 105-268 to -269 (1965). Neither of these provisions has yet undergone judicial construction.

Carolina case in which New Jersey was permitted to recover on a claim for delinquent corporate franchise taxes assessed and asserted against an insolvent corporation in a state proceeding in North Carolina.⁹⁵ This case typifies the adage that a strong offense is the best defense. New Jersey insisted it was entitled to preferred creditor status since it held a tax claim; the court contented itself with denying preferred status and allowing the claim only general creditor status; the court and all concerned never considered the possibility that as a foreign tax claim—as distinguished from a judgment—it was entitled to no recognition at all.

When a collateral attack is based on forum public policy, the contention is often made that the foreign judgment enforced a gambling transaction. This issue was raised in *Fauntleroy v. Lum*.⁹⁶ A claim based on a Mississippi cotton futures contract, illegal in Mississippi, became the subject of an arbitration award in Mississippi, and this award was reduced to judgment in Missouri. Mississippi refused to accord full faith and credit to the Missouri judgment. The United States Supreme Court held that full faith and credit must be given to the Missouri judgment, even though it violated Mississippi public policy.⁹⁷ This decision narrows almost to the vanishing point the area of state public policy relief from the mandate of the full faith and credit clause—at least so far as the judgments of sister states are concerned.

Although North Carolina has asserted this public policy approach, it has avoided a direct confrontation with the federal constitutional issue. In *Cody v. Hovey*,⁹⁸ the plaintiff obtained a New York judgment against the defendants in an amount in excess of one million dollars. In a suit on this judgment, the defendant conceded the jurisdiction of the New York court but asserted that the judgment was not entitled to full faith and credit, since the transaction on which it was based was a void stock market gambling transaction denounced by a North Carolina statute. That statute provided, “[N]or shall courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such [gambling] contract.”⁹⁹ Following two appeals, the North Carolina Supreme Court, after citing *Fauntleroy* and purporting in part to distinguish it, remanded to the trial court to determine whether

⁹⁵*Holshouser Co. v. Gold Hill Copper Co.*, 138 N.C. 248, 50 S.E. 650 (1905).

⁹⁶210 U.S. 230 (1908).

⁹⁷*Id.* at 234.

⁹⁸216 N.C. 391, 5 S.E.2d 165 (1939).

⁹⁹Ch. 853, § 1, [1909] N.C. Sess. L. 1257.

the defendant had been afforded the opportunity to assert the same defense in the earlier New York proceeding.¹⁰⁰ At this point a settlement or other disposition possibly occurred. At any rate, the case was neither appealed to the Supreme Court of the United States nor again appealed in North Carolina. *Cody* stands as a monument to the ingenuity of defense counsel rather than as a landmark of federal constitutional law. Consequently, *Fauntleroy* remains good law, and it is most doubtful whether the effort made to distinguish it in *Cody* would withstand Federal Supreme Court scrutiny.¹⁰¹

7. *Final Money Judgments.*

A valid judgment of a state court of last resort is a final judgment for full faith and credit purposes. The same is true of inferior court judgments when no direct appeal has been taken within the time prescribed. The weight of authority holds that a pending appeal from a trial court or intermediate appellate court judgment does not in itself deprive that judgment of full faith and credit finality but does vest the courts of other states with the discretionary power to stay proceedings in a suit on that judgment until the appeal has been determined in the original jurisdiction.¹⁰²

For purposes of res judicata and enforcement of the judgment in other states, the effect of an appeal is determined by the local law of the judgment-rendering state.¹⁰³ Thus, a California judgment pending appeal

¹⁰⁰[The full faith and credit clause] would not prevent a state from withdrawing the jurisdiction of its courts from an action to enforce a judgment rendered in another state when it is made to appear clearly that the judgment was awarded on transactions forbidden by the public policy or statute law of the state, and that the question of the illegality of such transactions had not been raised, considered or determined in the court of the original forum.

Cody v. Hovey, 219 N.C. 369, 374-75, 14 S.E.2d 30, 33 (1941).

¹⁰¹See Note, *Conflict of Laws—Power of State to Deprive Courts of Jurisdiction to Hear Out-of-State Judgments*, 18 N.C.L. REV. 224 (1940). Remarking upon *Cody's* evasions of the full faith and credit issue, the writer concludes:

[I]f a state cannot refuse to give full faith and credit to an out-of-state judgment based on a cause of action contrary to the public policy of the forum, the method of depriving their [*sic*] courts of jurisdiction to entertain any suit on such a judgment is an attempt to do indirectly what cannot be done directly.

Id. at 229.

¹⁰²*Paine v. Schenectady Ins. Co.*, 11 R.I. 411 (1877); Note, *The Finality of Judgments in the Conflict of Laws*, 41 COL. L. REV. 878 (1941).

¹⁰³RESTATEMENT OF JUDGMENTS § 41, Comment *d* at 164 (1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971).

is not a final judgment.¹⁰⁴ However, a North Carolina judgment on appeal, at least until 1970, was by statute final until reversed.¹⁰⁵ Concurrently with the repeal of that statute, North Carolina adopted a parallel to the *Federal Rules of Civil Procedure*, under which a judgment on appeal continues to be final until actually reversed.¹⁰⁶ Presumably the established North Carolina rule remains unchanged.

The full faith and credit clause does not, however, compel the second jurisdiction to take judicial notice of the law of the judgment state. Accordingly, if forum law requires proof of the law of a sister state and this is not made, the forum may apply its own local law to determine the effect of an appeal upon the finality of a judgment.¹⁰⁷ This problem would not arise in a suit on a sister-state judgment brought in North Carolina, since North Carolina requires its courts to take notice not only of the laws of sister states but also of the laws of foreign countries.¹⁰⁸ The *Federal Rules of Civil Procedure* give the trial judge equally wide power in this respect.¹⁰⁹

A judgment on the pleadings, without trial, is a final judgment.¹¹⁰

¹⁰⁴"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." CAL. CIV. PRO. CODE § 1049 (West 1955). See *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 719 (E.D. Wash. 1962).

¹⁰⁵The statute, most recently codified as N.C. GEN. STAT. § 1-221 (1953), was enacted from early English law, 4 Hen. 4, c. 23 (1402). It was repealed in 1967, ch. 954, § 4. [1967] N.C. Sess. L. 1353, to be effective July 1, 1969. The effective date was changed to January 1, 1970 by ch. 895, § 21, [1969] N.C. Sess. L. 1033.

¹⁰⁶See *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 720-25 (E.D. Wash. 1962).

¹⁰⁷See *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

¹⁰⁸N.C. GEN. STAT. § 8-4 (1969). *Thames v. Nello L. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1966).

¹⁰⁹FED. R. CIV. P. 44.1. The federal district court for Nebraska, sitting in diversity, has held that proof of foreign law is a matter of procedure and not substance. Accordingly, although Nebraska law requires the party relying thereon to plead and prove foreign law, the federal district court under its own procedural rules took notice of and applied as controlling the substantive law of another state, in spite of the fact that it had not been pleaded or proved. *Epperson v. Christensen*, 324 F. Supp. 1121 (D. Neb. 1971); *Fullington v. Iowa Sheet Metal Contractors*, 319 F. Supp. 243 (D. Neb. 1970).

¹¹⁰*Marsh v. Atlantic Coast Line R.R.*, 151 N.C. 160, 65 S.E. 911 (1909). In *Marsh* the court gave full faith and credit to a Florida judgment on the same cause which had been rendered on a demurrer to the complaint. See *Johnson v. Pate*, 90 N.C. 334 (1884).

RESTATEMENT OF JUDGMENTS § 50 (1942) provides: "Where a valid and final personal judgment in favor of the defendant is rendered on the ground that the complaint is insufficient in law, the judgment is conclusive as to the matters determined, and if the judgment is on the merits the plaintiff cannot thereafter maintain an action on the original cause of action."

Accord, *Cobb v. Clark*, 257 F. Supp. 175, 176 (M.D.N.C. 1966). "[T]he State court judgment, though rendered on the pleadings and not after trial, was on the merits, and . . . such judgment is as binding as if the judgment had been entered for the defendants after trial and verdict."

A judgment based on a successful plea of the statute of limitations is final in the granting jurisdiction but has no binding effect in other states in which the period of limitation has not yet run on the cause of action.¹¹¹ A judgment of nonsuit, either voluntary or involuntary, or a dismissal without prejudice is not a final judgment.¹¹² Similarly, a judgment based upon the ground that a fact essential to the plaintiff's claim has not yet occurred, thus making the action premature, is not final.¹¹³ Judgments upon the merits of counterclaims¹¹⁴ or recoupment or set-off defenses¹¹⁵ are final except when an affirmative judgment in favor of the claimant cannot be rendered in the original action.¹¹⁶

8. *Merger and Bar*

A cause of action reduced to a money judgment in the court of a sister state is merged in that judgment. A judgment for the defendant becomes a bar to suit on the same cause in another state. In either case, unless the judgment is void suit may not thereafter be brought in another state on the original cause of action.¹¹⁷ However, when the judgment is upon another judgment, merger does not take place, and execution or further suit in other states may be had on either judgment until one full satisfaction is obtained.¹¹⁸ A chain of such proceedings in numerous states is, of course, possible.

¹¹¹RESTATEMENT OF JUDGMENTS § 49, Comment *a* (1942). See *Vanderbilt v. Atlantic Coast Line R.R.*, 188 N.C. 568, 580, 125 S.E. 387, 394 (1924); *Patton v. W.M. Ritter Lumber Co.*, 171 N.C. 837, 839, 73 S.E. 167 (1911).

¹¹²RESTATEMENT OF JUDGMENTS § 53 (1942). *Accord*, *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968) (voluntary nonsuit); *Vickers v. Russell*, 253 N.C. 394, 117 S.E.2d 45 (1960) (involuntary nonsuit).

North Carolina's new rules of civil procedure restrict nonsuit activities. For a discussion of the restrictive effects on nonsuit activities of N.C. GEN. STAT. § 1A-1, Rules 41, 52, see *Cutts v. Casey*, 278 N.C. 390, 419, 180 S.E.2d 297, 313 (1971); T. WILSON & J. WILSON, *McINTOSH NORTH CAROLINA PRACTICE AND PROCEDURE* §§ 1375, 1485.5 (Supp. 1970).

¹¹³RESTATEMENT OF JUDGMENTS § 54 (1942).

¹¹⁴*Id.* § 56.

¹¹⁵*Id.* § 60.

¹¹⁶*Id.* § 57; *Saiced v. Abeyounis*, 217 N.C. 644, 9 S.E.2d 399 (1940).

¹¹⁷*Id.* § 47; *Teale v. Kerr*, 261 N.C. 148, 149, 134 S.E.2d 126, 127 (1964). See *Morris v. Burgess*, 116 N.C. 40, 21 S.E. 27 (1895); *Carter v. Wilson*, 19 N.C. 276 (1837); *Carter v. Wilson*, 18 N.C. 362 (1835); *Wade v. Wade*, 1 N.C. 601 (1804).

¹¹⁸RESTATEMENT OF JUDGMENTS § 47, Comment *k* (1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 116, Comment *c* (1971).

9. *Reversal*

Since the weight of authority holds that a pending appeal from a judgment does not divest that judgment of finality for full faith and credit purposes, occasionally such a judgment will be reversed by direct appeal in the original proceedings after it has been reduced to judgment in a sister state. Under these circumstances the Supreme Court held in *Reed v. Allen*¹¹⁹ that the judgment of the second state, assuming its court had jurisdiction, remains *res judicata* of the issues involved, despite the reversal of the original judgment. Justices Cardozo, Brandeis, and Stone vigorously dissented,¹²⁰ and for practical purposes their view has prevailed.

The judgment debtor may seek reversal of the second judgment on appeal or may attempt to enjoin its enforcement by independent equity proceedings in the second state. In such a situation the remedy, as distinguished from the right, is to be determined by the law of the second state.¹²¹

The Supreme Court of North Carolina has had occasion to resolve this question of the consequence of reversal of the original judgment. In *Federal Land Bank of Baltimore v. Garman*,¹²² a default deficiency judgment had been entered against the defendants, who were husband and wife, in a Pennsylvania court upon a warrant of attorney on a mortgage note. The plaintiff obtained a judgment in North Carolina based upon this Pennsylvania judgment and the defendants appealed. Meanwhile,

¹¹⁹286 U.S. 191 (1932). See also *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903).

¹²⁰A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there is only one way out of them, and this is a way he failed to follow. Because of that omission he is left to be ensnared in the web, the process of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow. A little of the liberality of method that has shaped the law of restitution in the past . . . is still competent to find a way.

Reed v. Allen, 286 U.S. 191, 209 (1932) (dissenting opinion).

¹²¹*Ellis v. McGovern*, 153 App. Div. 26, 31, 137 N.Y.S. 1029, 1032 (1912). RESTATEMENT OF JUDGMENTS § 44 (1942) provides: "Where a judgment in an action is based upon a prior judgment, and the prior judgment is thereafter reversed; the judgment in the second action cannot be collaterally attacked, but it can be set aside by appropriate proceedings in that action, or equitable or other proceedings by way of restitution can be maintained." Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 112 (1971): "A judgment will not be enforced in other states if it has been vacated in the state of rendition."

¹²²220 N.C. 585, 18 S.E.2d 182 (1942).

the wife appeared in the original Pennsylvania proceeding, had it reopened, proved that she had been only a surety, and—under the Pennsylvania rule that a married woman could not become a surety—obtained an order “that said judgment . . . as respects . . . [the wife] be stricken from the record.”¹²³ Pending the North Carolina appeal, the defendants then moved the Supreme Court of North Carolina to grant a new trial on the ground of newly discovered evidence. After determining that both the original Pennsylvania judgment and the subsequent revision thereof were valid under Pennsylvania law, the court affirmed judgment against the husband but granted the wife a new trial, saying:

The original judgment of the [Pennsylvania court] as to Sarah Edith Garman having been stricken from the record after the rendition of the judgment thereof in this State, it would be manifestly unjust to affirm the judgment in this State. Hence, in the discretion of the Court the motion for a new trial as to her is granted.¹²⁴

The treatment accorded the Pennsylvania judgment by the North Carolina courts was to give it at all times the same faith and credit then accorded to it in Pennsylvania. This is an impeccable discharge of the federal constitutional full faith and credit requirement. The procedure here was not complicated since the issue was raised on direct appeal.

If the second-state judgment has become final, the *Restatement of Conflicts* rule is that the effect of the reversal of the first judgment on the purported finality of the second is determined by the local law of the second state, regardless of whether the issue is raised in the second or any other state.¹²⁵ However, section 112 of the *Restatement of Conflicts* assumes that the local law of the second state will not permit the enforcement of its judgment under these circumstances.¹²⁶ Consequently, the remedy is that afforded by the law of the forum in which relief is sought.¹²⁷

10. Discharge

Payment in full of a judgment or its discharge by accord and satisfaction, release, or discharge in bankruptcy prevents the enforcement

¹²³*Id.* at 595, 18 S.E.2d at 188.

¹²⁴*Id.* at 596, 18 S.E.2d at 189.

¹²⁵RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 121 (1971).

¹²⁶*Id.* § 112. See note 121 *supra*.

¹²⁷RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115 (1971).

thereof in another state.¹²⁸ In the chain-judgment situation, in which multiple judgments have been obtained elsewhere upon the original judgment, the discharge of the original judgment or any of the others based thereon, either directly or indirectly, discharges all such judgments.¹²⁹ Similarly, partial payment will be recognized as a defense in enforcement proceedings brought in other jurisdictions. This fundamental rule was applied by the North Carolina Supreme Court in a suit brought on a South Dakota judgment in which the defendant proved payments made by him to the plaintiff since the rendition of the South Dakota judgment and proved that other amounts had been collected by the plaintiff in South Dakota for which the plaintiff was accountable to the defendant.¹³⁰

Normally a discharged judgment will continue to have the same *res judicata* effect in the state of rendition as it did before discharge. The full faith and credit clause requires sister states to give this judgment the same *res judicata* effect as that accorded by the state of rendition.¹³¹

11. *Inconsistent Judgments*

Occasionally the situation arises in which a second court in a suit on a judgment rendered by a first jurisdiction erroneously finds that the first court did not have jurisdiction of the subject matter or of the person of the defendant, and the second judgment either is not appealed or is erroneously affirmed on appeal. Such a question raises obvious full faith and credit problems for a third jurisdiction. Must it enforce the first or the second judgment? The rule is that the second judgment, even though patently erroneous on its face, may not be collaterally attacked for error and must be accorded full faith and credit if the second court had jurisdiction of the subject matter and the parties.¹³² Thus, despite the fact that the first judgment is not merged in the second, the unreversed finding by the second court that the first was without jurisdiction becomes *res judicata* as to that issue and may be asserted defensively against a suit on the first judgment in any other jurisdiction. The only remedy against the second judgment is a direct appeal in the second

¹²⁸"A judgment will not be enforced in other states if the judgment has been discharged by payment or otherwise under the local law of the state of rendition." *Id.* § 116.

¹²⁹*Id.* Comment *c.*

¹³⁰*Roberts v. Pratt*, 158 N.C. 50, 73 S.E. 129 (1911).

¹³¹RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 116, Comment *b* (1971).

¹³²*Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

jurisdiction, carried to the Supreme Court of the United States from that jurisdiction if need be. If the appeal perpetuates the error, the party is then in effect without remedy. Moreover, the fact that the second court through error has failed to accord full faith and credit to the first judgment does not in these circumstances render the second judgment nugatory.¹³³ Federal adjudication on this issue is, of course, conclusive.

Where there is a chain of relitigation by the same parties in state courts, a federal court has indicated that its full faith and credit duty is to recognize the most recent judgment, thus stopping the litigation at that point.¹³⁴ Complicated facts of this nature have produced some litigation,¹³⁵ and the *Restatement of Conflict of Laws* provides that the latest judgment shall prevail.¹³⁶ This question does not appear to have been submitted to the appellate courts of North Carolina.

12. *Statutes of Limitation Applicable to Foreign Judgments*

The forum court applies its own local statute of limitations—including its borrowing provisions, which refer to and adopt in certain circumstances the statutes of limitation of other jurisdictions—to suits upon sister-state judgments. This practice does not violate the full faith and credit clause, even when the statute of limitations of the judgment-rendering state has not yet barred the judgment.¹³⁷ Conversely, in the absence of a borrowing statute, the forum may enforce a sister-state judgment even though that judgment is already barred by the statute of limitations of the judgment-granting state. Moreover, the second judgment thus obtained must be given full faith and credit by the state of the original judgment as well as by the courts of other states.¹³⁸

¹³³*Id.*

¹³⁴*Porter v. Wilson*, 419 F.2d 254 (9th Cir. 1969), *cert. denied*, 397 U.S. 1020 (1970). The court also held that it was the duty of the federal district court for Arizona, in diversity, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to accept the decision of the Supreme Court of Arizona. *Id.* at 259.

¹³⁵*Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App. 2d 720, 132 P.2d 70 (1942), *cert. denied*, 319 U.S. 774 (1943); *Perkins v. DeWitt*, 279 App. Div. 903, 111 N.Y.S.2d 752 (1952) (mem.); *Ambatielos v. Foundation Co.*, 203 Misc. 470, 116 N.Y.S.2d 641 (Sup. Ct. 1952); *cf.* *Eyber v. Dominion Nat'l Bank*, 249 F. Supp. 531 (W.D. Va. 1966).

¹³⁶RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (1971) provides:

A judgment . . . will not be recognized or enforced in sister States if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment was rendered.

¹³⁷*McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(2) (1971).

¹³⁸*Roche v. McDonald*, 275 U.S. 449 (1928); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(1) (1971).

These principles have been clearly enunciated in the North Carolina cases. In *Sayer v. Henderson*,¹³⁹ a North Carolina suit on a New York judgment, the court reiterated these principles:

“The power of the Legislature of each State to enact statutes of limitation and rules of prescription is well recognized and unquestioned. It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced.’”

These results are consistent with the conventional classification of statutes of limitations as procedural for conflict of laws purposes and, hence, determinable by the local law of the forum. In *Wise v. Hollowell*¹⁴⁰ the court concurred in this principle, stating: “In the trial of an action whatever relates merely to the remedy and constitutes a part of the procedure, is determined by the law of the forum; but whatever goes to the substance of the controversy and affects the rights of the parties is governed by the *lex loci*.”

In a suit commenced on March 27, 1899 to collect unpaid support and alimony, payable on a semi-annual basis, awarded by an Illinois divorce decree entered November 16, 1880, a majority of the North Carolina court reached the interesting conclusion that payments that became due less than ten years before March 27, 1899 were not barred by the pertinent ten year North Carolina statute of limitations but that as to payments falling due earlier than then the statute precluded recovery.¹⁴¹ The majority opinion held:

The plea of the statute, in an action in our State on a judgment obtained in another State is a plea to the remedy, and consequently the *lex fori* must prevail in such an action That, in North Carolina, is the 10-year [*sic*] statute. . . . The language is, “From the date of the rendition of said judgment or decree.” That must refer to a judgment which is at once due and collectable. It can not reasonably intend a judgment which in terms is not due and collectible until a future day, without presenting the absurdity of a statute barring or running against a judgment debt before the debt is due or collectible. We are of the

¹³⁹225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945), quoting *Vanderbilt v. Atlantic Coast Line R.R.*, 188 N.C. 568, 580, 125 S.E. 387, 394 (1924); accord, *Webb v. Webb*, 222 N.C. 551, 23 S.E.2d 897 (1943). But see *Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212 (1900).

¹⁴⁰205 N.C. 286, 290, 171 S.E. 82, 84 (1933).

¹⁴¹*Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212 (1900).

opinion, therefore, that the annual sums adjudged in favor of the plaintiff which became due and collectible more than ten years before the institution of this action, are barred by The Code . . . and that those that became due within the ten years are not barred.¹⁴²

A vigorous dissent decried this exercise of judicial clemency in softening the impact of the statute of limitations as then worded.¹⁴³

13. *Equity and Probate Decrees*

The enforcement of final money judgments of sister states has been the focus of attention up to this point. The question now becomes whether the mandate of full faith and credit extends to all other sister-state judicial acts. The short answer is *no*. The leading case establishing that full faith and credit need not be extended to an equity decree of a sister state is *Fall v. Eastin*.¹⁴⁴ In *Fall* the United States Supreme Court held that Nebraska was not obliged to enforce a Washington commissioner's deed purporting to convey title to Nebraska land pursuant to a Washington divorce decree. The majority opinion held:

[W]e think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. . . .

This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any State to be given full faith and credit in the courts of every other State. This provision does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.¹⁴⁵

The Court concluded:

[T]he ruling of the [Nebraska] 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 States¹⁴⁶

In a suit by the wife to enforce an Ohio divorce decree directing a

¹⁴²*Id.* at 197-98, 37 S.E. at 214.

¹⁴³*Id.* at 199, 37 S.E. at 215. The statute, unchanged in substance in its application to foreign judgments, is now N.C. GEN. STAT. § 1-47(1) (1969).

¹⁴⁴215 U.S. 1 (1909).

¹⁴⁵*Id.* at 11-12.

¹⁴⁶*Id.* at 14.

husband to convey his interest in North Carolina land to her, and providing that if this were not done the decree itself would be the conveyance, the North Carolina court, expressly relying on *Fall v. Eastin*, dismissed the action.¹⁴⁷ This decision continues to be the law in North Carolina.¹⁴⁸

A majority of the states,¹⁴⁹ including Nebraska,¹⁵⁰ have moved away from the doctrine of *Fall v. Eastin* and, though not under full faith and credit compulsion to do so, voluntarily give res judicata effect to sister-state decrees based upon in personam jurisdiction that affect title to out-of-state lands. The trend is for the situs court to give effect to the title disposition made by the out-of-state decree, at least as between the original parties and their privies.¹⁵¹ The rationale for this practice, so far as the first state is concerned, was presented in a California divorce case when the trial court had ordered the division of community real property in North Dakota. There, Justice Traynor said:

[T]he present case is res judicata and entitled to full faith and credit in North Dakota to the extent that it determines the rights and equities of the parties with respect to the land in question. An action on that judgment in North Dakota, however, is necessary to effect any change in the title to the land there. Thus, the judgment must be affirmed to

¹⁴⁷*McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948).

The familiar principle that a court having jurisdiction of the parties may, in a proper case, by a decree *in personam*, require the execution of a conveyance of real property in another state . . . [and] enforce its order through its coercive jurisdiction or authority is not here involved. 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.

. . . Its judgment cannot have any extraterritorial force *in rem*. Nor did it create a personal obligation upon the defendant *McRary* which the courts of this state are bound to compel him to perform. At most it imposed a duty, the performance of which may be enforced by the process of the Ohio court.

Id. at 717-18, 47 S.E.2d at 30.

¹⁴⁸*Noble v. Pittman*, 241 N.C. 601, 86 S.E.2d 89 (1955).

¹⁴⁹RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971) states: "A valid judgment that orders the doing of an act other than the payment of money or that enjoins the doing of an act may be enforced in other states." Note that the language is permissive, not mandatory. Comment *d* at 311 observes that the majority and more recent cases permit the maintenance of such actions. See generally *Currie, Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1959).

¹⁵⁰*Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959).

¹⁵¹This trend has been followed by North Dakota by giving res judicata effect to a California probate decree determining rights in North Dakota land and by entering a conforming North Dakota quiet title decree. *In re Reynold's Will*, 85 N.W.2d 553 (N.D. 1957).

the extent that it declares the rights of the parties before the court and modified to the extent that it purports to affect the title to the land.¹⁵²

It is entirely possible that effective advocacy might cause the Supreme Court of North Carolina to recede from the citadel of *Fall v. Eastin* and to reconsider this whole question as one of res judicata. There is North Carolina judicial approval supporting this receptive view, although embedded in a dissenting opinion which antedates by one hundred thirty years the celebrated "modern" view expressed by former Chief Justice Traynor. In 1827 Chief Justice Taylor of the North Carolina Supreme Court reasoned:

If the assistance of this Court were sought to effectuate a decree of a foreign Court of Chancery, the merits of it would be open to examination, and we should be convinced of its justice and propriety, before we proceeded. Like a foreign judgment at law, it would be but *prima facie* evidence of the justice of the demand. But when the Constitution of the United States has declared, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" . . . I do not see how, in point of effect, a final decree can be distinguished from a judgment at law, for the term "judicial proceedings" includes both; and if this decree would in South-Carolina be deemed conclusive [*sic*] on the rights of the parties, it must be so here

In considering the effect of a judgment or decree, pronounced in another State, and duly authenticated here, it appears to me that the only question open for discussion is, whether the Court had jurisdiction of the cause and the parties. So far as the Court pronouncing them had jurisdiction, they are entitled in this Court to "full faith and credit;" the jurisdiction of the Court only, and not the merits of the judgment or decree are enquirable into.

The Defendants were made parties to the suit in Chancery in South-Carolina, and so far as their rights were decided upon in that decree, I hold it to be of the same conclusive character, as if pronounced by a Chancery Court in this State; and that we are not permitted, under the Constitution, and the Act of Congress giving effect to it, to pronounce a different decree upon any of the rights of the parties then brought into contestation. . . . Though the decree of the Court of South-Carolina could only operate *in personam*, as to the land lying in this State, yet now that this Court is called upon to carry that decree into effect, they ought to do so, to the extent of jurisdiction possessed

¹⁵²*Rozan v. Rozan*, 49 Cal. 2d 322, 331-32, 317 P.2d 11, 16 (1957).

by the South-Carolina Court. After a minute examination of all the cases on this subject, the result is thus expressed by the Supreme Court of the United States; that in a case of fraud of trust or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that Court may be affected by the decree.¹⁵³

The language of Chief Justice Taylor, shorn of its reference to full faith and credit compulsion, presents a strong case for the voluntary recognition of sister-state equity decrees on the basis of *res judicata*.

In *Barber v. Barber*¹⁵⁴ the Supreme Court held that alimony and support decrees for past-due money payments are final money judgments for full faith and credit purposes. In a separate concurring opinion, Justice Jackson indicated his belief that such a decree was entitled to full faith and credit, even if it was not final. The constitutional mandate does not go this far, but a second state with personal jurisdiction over the defendant may adopt or modify a nonfinal decree of another state if it sees fit to do so. Thus, in *Worthley v. Worthley*¹⁵⁵ suit was brought in California not only to collect past-due separate maintenance but also to have a New Jersey decree adopted as a California decree. The trial court refused and the Supreme Court of California reversed. Its opinion, by Justice Traynor, in part said:

Since the New Jersey decree is both prospectively and retroactively modifiable . . . we are not constitutionally bound to enforce defendant's obligations under it. . . . Nor are we bound *not* to enforce them. . . . The United States Supreme Court has held, however, that if such obligations are enforced in this state, at least as to accrued arrearages, due process requires that the defendant be afforded an opportunity to litigate the question of modification. . . . It has also clearly indicated that as to either prospective or retroactive enforcement of such obligations, this state "has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." . . .

. . . California courts will recognize and give prospective enforcement to a foreign alimony decree, even though it is subject to modifica-

¹⁵³*Picket v. Johns*, 16 N.C. 123, 132-35 (1827) (Taylor, C.J., dissenting). Regarding a foreign probate decree, see *Groome v. Leatherwood*, 240 N.C. 573, 83 S.E.2d 536 (1954); cf. *Monfils v. Hazelwood*, 218 N.C. 215, 10 S.E.2d 673, *cert. denied*, 312 U.S. 684 (1940).

¹⁵⁴323 U.S. 77 (1944).

¹⁵⁵44 Cal. 2d 465, 283 P.2d 19 (1955); *accord*, *Herczog v. Herczog*, 186 Cal. App. 2d 318, 9 Cal. Rptr. 5 (1960).

tion under the law of the state where it was originally rendered, by establishing it "as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply."¹⁵⁶

The court concluded:

[W]e hold that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered.¹⁵⁷

North Carolina has clearly recognized the distinction between decrees for past-due unpaid alimony and decrees for future installments subject to modification. In *Willard v. Rodman*¹⁵⁸ the supreme court held:

[U]nder the full faith and credit clause of the Constitution of the United States, the plaintiff is entitled to a money judgment for the past due and unpaid installments which had accrued under the Florida decree at the time of the institution of this action. . . . Consequently, the judgment entered below, in so far as it relates to past due and unpaid installments, accruing under the Florida decree, will not be disturbed.

. . . .

The full faith and credit clause in our Federal Constitution does not obligate the courts of one state to enforce an alimony decree rendered in another state, with respect to future installments, when such future installments are subject to modification by the court of original jurisdiction.

The court concluded that

the plaintiff is not entitled to judgment in this jurisdiction, directing the defendant to pay future installments of alimony. She is entitled only to a money judgment for past due and unpaid installments due her under the Florida decree, which judgment is enforceable by execution and not by contempt proceedings. . . .¹⁵⁹

In 1958 North Carolina adopted an open-door policy similar to that of the *Worthley* case. In *Thomas v. Thomas*,¹⁶⁰ where personal

¹⁵⁶44 Cal. 2d at 468-69, 283 P.2d at 22.

¹⁵⁷*Id.* at 474, 283 P.2d at 25.

¹⁵⁸233 N.C. 198, 200-01, 63 S.E.2d 106, 108 (1951).

¹⁵⁹*Id.* at 202, 63 S.E.2d at 109.

¹⁶⁰248 N.C. 269, 103 S.E.2d 371 (1958).

jurisdiction over the defendant father was obtained, the court held that a modifiable Nevada decree for child support was *res judicata* as to the issues litigated unless the wife could show such changed conditions and circumstances as would justify an increase in the Nevada allowance. However, if the wife were successful in pressing her claim, the full faith and credit clause would not prevent a prospective modification of the Nevada decree, since that decree was entitled to no greater effect outside the state than it was within it.¹⁶¹

A forum court has judicial power to order persons before it to do or not to do acts in sister states¹⁶² or foreign countries.¹⁶³ A forum court may enjoin persons before it from instituting or prosecuting an action in the courts of other states.¹⁶⁴ Such injunctions traditionally have not commanded full faith and credit in other states and have not been given binding effect by courts in other jurisdictions.¹⁶⁵

The most recent *Restatement of Conflicts* adopts the speculative view that since the United States Supreme Court has never passed on the point, a sister-state judgment ordering or enjoining the doing of an act other than the payment of money may be included within the full faith and credit requirement.¹⁶⁶ In arriving at this position, the reasoning

¹⁶¹*Id.* at 272, 103 S.E.2d at 373. *Accord*, *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967); *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969).

¹⁶²*Madden v. Rosseter*, 114 Misc. 416, 187 N.Y.S. 462 (Sup. Ct. 1921). In *Madden* the New York court ordered defendant to deliver to plaintiff a race horse physically present in California. The court observed: "The courts of sister States may be relied upon to aid in serving the ends of justice whenever our own process falls short of effectiveness." *Id.* at ____, 187 N.Y.S. at 463.

¹⁶³*United States v. First Nat'l City Bank*, 379 U.S. 378 (1965). In this case the defendant New York bank was enjoined from paying out funds on deposit in a customer's account in the Montevideo, Uruguay branch of the bank.

United States v. Imperial Chemical Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952). The response of the British courts to this effort to enforce United States antitrust law by requiring a reconveyance of patent rights in England was to ignore it. Regarding this effort, Lord Justice Denning, in *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19 (1952) said: "The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here." The United States constitutional full faith and credit clause, of course, had no applicability to England.

¹⁶⁴*James v. Grand Trunk W. R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858 (1958).

¹⁶⁵*Id.*

¹⁶⁶RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, Comment c at 307 (1971), observes that the Supreme Court has not had occasion to determine whether such decrees must be enforced by sister states. Arguments therein stated in favor of such enforceability are based on two points: First, the full faith and credit clause speaks to "judicial proceedings" without limitation to money judgments; second, a majority of state courts enforce sister-state judgments ordering the conveyance of land.

of the *Restatement* is remarkably similar to that used by Chief Justice Taylor in his dissent in *Picket v. Johns*.¹⁶⁷

North Carolina has defined the circumstances under which it will enjoin litigation elsewhere. In *Carpenter, Baggott & Co. v. Hanes*,¹⁶⁸ the court observed:

There are many cases that hold that courts of a State where both parties are domiciled may restrain the prosecution of suits between such parties in a foreign jurisdiction. . . . But even in such cases, the power should be exercised sparingly and only to suppress manifest injustice and oppression, and not from any arrogant sense of greater ability to do justice to either party or because of more favorable laws, or of convenience of the parties. . . .

But such powers cannot be exerted to enjoin parties who are not domiciled in the jurisdiction of the court, merely on the ground that the party has come into court by bringing an action herein.

In *Evans v. Morrow*¹⁶⁹ the North Carolina Supreme Court reiterated this reluctance to enjoin the prosecution of litigation in other states. Despite the fact that both parties were citizens of North Carolina, the court declared that it devolved upon the plaintiff to establish an equity superior to the defendant's legal right to litigate elsewhere. The court then listed the following examples of "inferior" equities:

1. A court of equity will not restrain a citizen from invoking the aid of the courts of another state simply because it may be somewhat more convenient or somewhat less expensive to his adversary to compel him to carry on his litigation at home. . . .

2. A court of equity will not grant an injunction against an action in another state on the ground that the rules of practice and procedure in the state where the injunction is asked may differ from those which obtain in the state where the action is brought. . . .

3. A court of equity will not enjoin judicial proceedings in the court of another state through distrust of the competency of such court to do justice in cases within its jurisdiction.¹⁷⁰

In *Childress v. Johnson Motor Lines, Inc.*¹⁷¹ the court expanded upon these aforementioned principles.

¹⁶⁷16 N.C. 123 (1827). See text accompanying note 153 *supra*.

¹⁶⁸162 N.C. 46, 48, 77 S.E. 1101 (1913).

¹⁶⁹234 N.C. 600, 68 S.E.2d 258 (1951).

¹⁷⁰*Id.* at 605, 68 S.E.2d at 261-62.

¹⁷¹235 N.C. 522, 531, 70 S.E.2d 558, 565 (1952).

It is fundamental that a court of one state may not restrain the prosecution of an action in a court of another state by order or decree directed to the court or any of its officers. . . .

Nevertheless, it is well established that "a court . . . which has acquired jurisdiction of the parties, has power, on proper cause shown, to enjoin them from proceeding with an action in another state . . . , particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to a foreign court." . . .

However, the rule is that this power of the court should be exercised sparingly, and only where "a clear equity is presented requiring the interposition of the court to prevent the manifest wrong and injustice."

Instances where a plaintiff's equity would be deemed superior to the defendant's right to litigate in another state were also enumerated in *Childress*.

[A]n action or proceeding in another state ordinarily may be enjoined where it is made to appear that its prosecution will interfere unduly and inequitably with the progress of local litigation or with the establishment of rights properly justiciable in the local court; or that it is unduly annoying, vexatious, and harassing to the complainant, and reasonably calculated to subject him to oppression or irreparable injury.¹⁷²

Thus, in *Thurston v. Thurston*,¹⁷³ the court, having personal jurisdiction over both parties, affirmed an order enjoining the defendant from instituting a divorce action in any state other than North Carolina pending the final determination of the North Carolina action. In so doing, the court observed:

"The plaintiff in a pending divorce action may, when jurisdiction over the defendant has been obtained, be entitled to an order enjoining the defendant from prosecuting a subsequent action for divorce in another state before the former action is determined."

The order issued by Judge Copeland is not directed against any foreign court. It is not directed against any official of such court. It is directed only against the defendant in this action who has been personally served with process in a proceeding involving the marital rights and obligations of the parties whose domicile has been Wilson County since

¹⁷²*Id.*

¹⁷³256 N.C. 663, 124 S.E.2d 852 (1962).

their marriage in 1935. The purpose of the order is to prevent the defendant from going to a foreign jurisdiction and instituting an action for absolute divorce requiring the plaintiff to contest the action if she is able to find out where it is brought or compelling her to challenge the judgment by overcoming its *prima facie* effect under the full faith and credit clause of the United States Constitution. The defendant should be required to set up and litigate in North Carolina any defense he may have to the action pending here. . . . It would be inequitable for the defendant to be permitted to delay the plaintiff's day in court and defeat any just claim she may be able to establish by acquiring a "quickie" divorce elsewhere.¹⁷⁴

A different facet of the problem of restraining the prosecution of an action in another state is provided by *Amos v. Southern Railway Co.*¹⁷⁵ In *Amos* the plaintiff, a resident of North Carolina, instituted an action in a Missouri state court under the Federal Employers' Liability Act for injuries incurred in the course of his railroad employment in North Carolina. Later he filed an identical suit in North Carolina. Despite the fact that the defendant would not have been entitled to restrain the plaintiff from suing in Missouri in the first instance, the court held that the plaintiff's subsequent filing in North Carolina entitled the defendant to a restraining order for as long as the plaintiff continued to invoke the jurisdiction of the North Carolina courts.¹⁷⁶

From these authorities it is manifest that the power of North Carolina courts to enjoin litigation elsewhere rests within their wide equity

¹⁷⁴*Id.* at 668-69, 124 S.E.2d at 855.

¹⁷⁵237 N.C. 714, 75 S.E.2d 908 (1953).

¹⁷⁶*Id.* at 718, 75 S.E.2d at 912.

However, in *Sloan v. McDowell*, 75 N.C. 29 (1876), without inquiring into the residence of the parties, the court refused to bar a counterclaim in a North Carolina suit, because of a prior pending suit on the same cause of action between the same parties in a federal court in Georgia. The court said:

The provision . . . allowing as cause for demurrer that there is another action pending between the same parties for the same cause must be confined to the Courts of the State, where the remedies are precisely the same; the object being to protect parties from vexation and the Courts from multiplicity of suits. But in different States or governments the remedies are not the same, and there may be reasons why our courts should not take notice of proceedings outside of the State which would not be applicable to our own Courts.

Id. at 33. Thus it was held that a "race to judgment" was permissible.

Where two identical actions between the same parties are pending in different North Carolina courts, normally the second in point of time will be dismissed on motion, or by the court *ex mero motu*. *Jones Constr. Co. v. Hamlet Ice Co.*, 190 N.C. 580, 130 S.E. 165 (1925).

discretion. It is also apparent that this power is sparingly used and that the supreme court is reluctant to reverse trial court determinations. Finally, although the power is not expressly couched in terms of *forum non conveniens*, such an approach is in fact used to a substantial extent to guide the discretion of the courts. Perhaps, similar broad equitable principles might apply where the act sought to be restrained in another state did not involve foreign litigation.¹⁷⁷

Apparently North Carolina has not expressly ruled on the efficacy of an out-of-state injunction seeking to halt litigation pending in North Carolina courts. However, from the holding of the majority in *Picket v. Johns*¹⁷⁸ and from the language used in *Thurston v. Thurston*,¹⁷⁹ it seems clear that binding effect would not be given to such a decree. On the other hand, the out-of-state injunction might be treated as a factor to be considered by the North Carolina court in determining the equities between the parties. Specifically, it might bear upon the issue of whether a stay of proceedings or a *forum non conveniens* dismissal might be appropriate.

14. Status Determinations

Status determinations judicially declared elsewhere are, as a matter of practice, usually accorded full faith and credit in sister states.¹⁸⁰ However, this is not normally required by federal mandate. It has been expressly held that full faith and credit is not obligatory upon other

¹⁷⁷See note 162 *supra*.

¹⁷⁸16 N.C. 123 (1827). See text accompanying note 153 *supra*.

¹⁷⁹256 N.C. 663, 124 S.E.2d 852 (1962). See text accompanying note 173 *supra*.

¹⁸⁰The child will usually be held legitimate if this would be his status under the local law of the state where either (a) the parent was domiciled when the child's status of legitimacy is claimed to have been created or (b) the child was domiciled when the parent acknowledged the child as his own.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287(2) (1971).

A state usually gives the same incidents to a status of legitimacy created by a foreign law under the principles stated in § 287 that it gives to the status when created by its own local law.

Id. § 288.

An adoption rendered in a state having judicial jurisdiction under the rule of § 78 will usually be given the same effect in another state as is given by the other state to a decree of adoption rendered by its own courts.

Id. § 290.

RESTATEMENT OF JUDGMENTS § 74 (1942) states:

(1) In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status.

states as to adoption¹⁸¹ or legitimation decrees.¹⁸² On the other hand, it has been federally determined that custody decrees must be given full faith and credit by sister states until there is a showing of a change of circumstances that affects the interests of the child. In *Kovacs v. Brewer*¹⁸³ the United States Supreme Court reversed a North Carolina custody decree that disregarded an earlier Virginia custody decree and remanded for a determination by the North Carolina courts of whether there had been such a change of circumstances after the entry of the Virginia decree. The North Carolina court tersely stated:

The child was adopted according to the law of Virginia and we must give under the U.S. Constitution, Article IV, section 1, "full faith and credit." This case is controlled not by the statutes and decisions of this State, but according to the laws of Virginia, in which state the judgment was rendered and we must give under the Constitution "full faith and credit" to same.¹⁸⁴

A North Carolina statute requires that "[a] child, adopted . . . in accordance with the applicable law of any other jurisdiction . . . [is] entitled by succession to any property . . . from his adoptive parents . . . the same as if he were the natural legitimate child of the adoptive parents."¹⁸⁵ Another requires that "[a] child . . . who shall have been

(2) A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

¹⁸¹*Hood v. McGehee*, 237 U.S. 611 (1915). Possibly, this case simply accords supremacy with respect to interests in realty to the law of the situs of the land in which children adopted elsewhere claim an interest. See *Anderson v. French*, 77 N.H. 509, 93 A. 1042 (1915). The majority opinion in part says:

The legality of the adoption is decided by the law of the state where the adoption took place; but that relation or status having been established, what the adopted child shall inherit should be determined in the case of personalty by the *lex domicilii* of the owner at the time of his decease, and real estate by the *lex rei sitae* [at the date of death].

Id. at 511, 93 A. at 1043.

¹⁸²*Olmstead v. Olmstead*, 216 U.S. 386 (1910). In *Olmstead* it was held that a New York court was not required to give full faith and credit to a Michigan statute that legitimated children whose parents subsequently married. *But cf. McNamara v. McNamara*, 303 Ill. 191, 135 N.E. 410 (1922). In *McNamara* the Illinois court recognized a California judgment which held that a natural son had been legitimated by recognition by the father in California. Despite the fact that the methods of legitimation differed in California and Illinois, the court declared that the public policy underlying the result in the two states was the same. Hence, the California judgment would be enforced.

¹⁸³356 U.S. 604 (1958), *vacating and remanding* 245 N.C. 630, 97 S.E.2d 96 (1957). For a discussion of this case in a choice of law context, see Wurfel, *supra* note 1, at 301.

¹⁸⁴*In re Osborne*, 205 N.C. 716, 719, 172 S.E. 491, 492 (1933).

¹⁸⁵N.C. GEN. STAT. § 29-17(a) (1966).

legitimated in accordance with . . . the applicable law of any other jurisdiction [is] . . . entitled by succession to property . . . from his father and mother . . . the same as if born in lawful wedlock"¹⁸⁶

An adoption decree, foreign or domestic, is subject to collateral attack if the court granting it did not have personal jurisdiction of the necessary parties. In *Truelove v. Parker*¹⁸⁷ a purported adopted daughter was held not entitled to inherit from an adopting parent when her natural parents had not been made parties to the proceedings. The court reasoned:

[N]either the father nor the mother of Irma Johnson was a party to the adoption proceeding . . . and . . . the clerk had no jurisdiction of their person. Having no jurisdiction of their person he had no jurisdiction of the subject-matter: Consent is essential to the order of adoption . . . and when the statute requires it to be given jurisdiction of the subject-matter cannot be acquired without it.¹⁸⁸

In North Carolina legitimacy is a status and accompanies the child wherever he goes. In *Fowler v. Fowler*¹⁸⁹ the court held that it was obliged to recognize the legitimacy of a child whose parents had married in Illinois. Even though the laws of North Carolina did not then provide for the legitimation of children by the subsequent marriage of their parents, the court held that "[t]he parties were domiciled, according to the complaint, at the time of the child's birth and up to the time of the marriage, in Illinois, and it is well settled that the child, being still a minor, its legitimacy then accrued and accompanies it wherever it goes."¹⁹⁰

Since 1917 a North Carolina statute has provided that the subsequent marriage of the parents legitimates their child and gives him all rights of descent and distribution as though he had been born in lawful wedlock.¹⁹¹ Under this statute, when such marriage occurred after the

¹⁸⁶N.C. GEN. STAT. § 29-18 (1966).

¹⁸⁷191 N.C. 430, 132 S.E. 295 (1926). *Truelove* was cited and followed in *In re Shelton*, 203 N.C. 75, 164 S.E. 332 (1926), when the mother who had not been made a party to the purported adoption was held in a habeas corpus proceeding to be entitled to the custody of her illegitimate child.

¹⁸⁸191 N.C. at 439, 132 S.E. at 299.

¹⁸⁹131 N.C. 169, 42 S.E. 563 (1902); Comment, *Domestic Relations—Illegitimacy in North Carolina*, 46 N.C.L. REV. 813 (1968).

¹⁹⁰131 N.C. at 171, 42 S.E. at 564. In dealing with statutory proceedings in other states it is important to determine precisely what status is thereby conferred, since it is that status that will be recognized elsewhere. See *Pfeifer v. Wright*, 41 F.2d 464 (10th Cir. 1930).

¹⁹¹N.C. GEN. STAT. § 49-12 (1966). *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961).

mother had consented to an adoption of the child, it was held that this marriage changed his status so as to render him ineligible for adoption.¹⁹² This result has been changed by subsequent statutes that provide that under these circumstances the consent of the father is not necessary and the adoption may proceed.¹⁹³

The North Carolina rule regarding the recognition of foreign custody decrees complies with the federal mandate of *Kovacs v. Brewer* that they must be given full faith and credit until a change in circumstances is alleged and proved but that upon such showing the original custody award may be changed.¹⁹⁴ Evidence of such change is usually available.

The basic rule that a marriage valid where performed will be recognized elsewhere¹⁹⁵ is the law in North Carolina. This is so, at least as to persons who were nonresidents at the time of the marriage, even if the marriage is not one that would be valid if performed in North Carolina. Thus, a marriage of a black and a white in South Carolina, then valid in South Carolina, was upheld at a time when such a marriage was void in North Carolina.¹⁹⁶ Moreover, a common law marriage entered into in South Carolina has been recognized in North Carolina, although North Carolina domestic law does not recognize common law marriages.¹⁹⁷

Recognition of foreign divorces and their effect on status has been discussed in a separate article.¹⁹⁸

15. *In Rem and Quasi in Rem Proceedings*

Status determinations and, on occasion, support decrees are referred to as being *in rem*.¹⁹⁹ Since status has been separately considered,

¹⁹²*In re Adoption of Doe*, 231 N.C. 1, 56 S.E.2d 8 (1949).

¹⁹³N.C. GEN. STAT. §§ 48-6(a), 49-13.1 (Supp. 1969).

¹⁹⁴*In re Marlowe*, 268 N.C. 197, 150 S.E.2d 204 (1966), discussed in Wurfel, *Conflict of Laws, Survey of N.C. Case Law*, 45 N.C.L. REV. 842, 848 (1967). See note 183 and accompanying text *supra*.

¹⁹⁵RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) states:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage.

¹⁹⁶*State v. Ross*, 76 N.C. 242 (1877).

¹⁹⁷*Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962).

¹⁹⁸Wurfel 294-97.

¹⁹⁹*Hoskins v. Currin*, 242 N.C. 432, 438, 88 S.E.2d 228, 232 (1955). "An action which relates to the custody of a child is in the nature of an *in rem* proceedings [*sic*]. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order."

the focus of this section will be on other in rem and quasi in rem proceedings.

A lucid discussion of the distinction between actions in personam, in rem, and quasi in rem appears in *Bernhardt v. Brown*.²⁰⁰ The court said:

“Due process of law” requires that service of process shall always be made. There are three modes in which this can be done.

1. By actual service (or, in lieu thereof, acceptance of service or a waiver of service by an appearance in the action)

2. By publication of summons in cases in which it is authorized by law, in proceedings *in rem*. In these cases the Court already has jurisdiction of the *res*, as to enforce some lien or a partition of property in its control, or the like, and the judgment has no personal force, not even for the costs being limited to acting upon the property.

3. By publication of the summons, in cases authorized by law, in proceedings *quasi in rem*. In those cases the court acquires jurisdiction by attaching property of a nonresident or of an absconding debtor, and in similar cases, and the judgment has no personal efficiency, extending no farther than its enforcement out of the property seized by attachment.

. . . In proceedings . . . *in rem* . . . it is not necessary, as in proceedings *quasi in rem*, to acquire jurisdiction by actual seizure or

Accord, *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948). *Cf.* *McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948).

Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965) said:

The sole question . . . is whether or not a wife may institute an action for the custody, support and maintenance of the minor children born of the marriage, and for alimony without divorce, and procure an *in personam* judgment against her defendant husband by service of process on her non-resident husband outside the State, pursuant to the provisions of G.S. 1-104. The answer must be in the negative.

Id. at 468, 139 S.E.2d at 722.

We hold . . . the defendant was a nonresident of North Carolina at the time service of process was made upon him outside the State and that the judgment entered against the defendant . . . was not a judgment *in personam*, and that the orders adjudging the defendant in contempt for failing to comply therewith were improvidently entered and are hereby reversed and set aside.

Id. at 470, 139 S.E.2d at 723. *See* *Church v. Miller*, 260 N.C. 331, 132 S.E.2d 688 (1963); *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

Cf. *Walton v. Walton*, 178 N.C. 73, 100 S.E. 176 (1919), in which the court upheld an attachment of the defendant's property to secure a judgment for subsistence when finally rendered. The court held that the statute granting subsistence to a wife who had been abandoned provided a remedy in rem, as well as in personam, and that attachment served both to secure the property pending final judgment and to provide a basis for service by publication.

See RESTATEMENT OF JUDGMENTS § 74 (1942).

²⁰⁰118 N.C. 700, 24 S.E. 527 (1896); *accord*, *Stevens v. Cecil*, 214 N.C. 217, 199 S.E. 161 (1938).

attachment of the property, but "it may be done by the mere bringing of the suit in which the claim is sought to be enforced, which in law . . . is equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."²⁰¹

In *Bernhardt* there had been no personal service, either in or out-of-state, on the nonresident corporate defendant. It was held that a parcel of land subject to a mechanic's lien passed to the purchaser at an execution sale, even though there had been no previous attachment by the lienor. However, as to three other parcels of land that were sold on execution to satisfy a judgment for money claims not protected by a lien and when there had been no prior attachment, it was held that the interest of the non-resident defendant had not been extinguished and that a subsequent judgment creditor in a suit commenced by personal service prevailed. This case was decided long before the day of widened personal jurisdiction under long-arm statutes, but its definitions of in rem and quasi in rem actions continue to be valid.²⁰²

In *Peebles v. Patapsco Guano Co.*²⁰³ suit was brought in North Carolina to recover damages for breach of warranty as to the quality of guano purchased from a Virginia vendor. Previously, after attaching the plaintiff's cotton in Virginia, the vendor had sued the plaintiff there and had recovered one hundred thirty dollars of the unpaid purchase price. In the North Carolina case, the plaintiff was awarded this same one hundred thirty dollars plus another seventy-two dollars "actual damages." In modifying this judgment on appeal to seventy-two dollars, the court observed that the Virginia judgment was conclusive on the issue of the debt to the extent of the value of the property attached (130 dollars). Consequently, to allow the plaintiff to recover that sum would

²⁰¹18 N.C. at 705-06, 24 S.E. at 528. See Mangum, *Mechanics' Liens in North Carolina*, 41 N.C.L. REV. 173 (1963); cf. Rutherford v. Ray, 147 N.C. 253, 61 S.E. 57 (1908).

²⁰²RESTATEMENT OF JUDGMENTS § 73 (1942) provides:

(1) In a proceeding in rem with respect to a thing the judgment is conclusive upon all persons as to interests in the thing.

(2) A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

Sections 75-76 contain comparable provisions regarding judgments quasi in rem and proceedings begun by attachment or garnishment. For an example of the rule contained in section 73(1), see *Corpening v. Kincaid*, 82 N.C. 202 (1880).

²⁰³77 N.C. 233 (1877).

be equivalent to reversing the Virginia judgment, thereby denying it the full faith and credit to which it was due.²⁰⁴

In *Smith v. Gordon*,²⁰⁵ suit was brought in North Carolina on a West Virginia quasi in rem judgment that had been obtained by attachment proceedings in the absence of the defendant. The North Carolina suit was filed more than three years after the debt in West Virginia became due. The trial court held that the three-year statute of limitations on contract obligations, and not the ten-year statute on judgments, was applicable. In affirming the judgment for the defendant, the court cited *Peebles* for the proposition that the West Virginia judgment was merely conclusive evidence of the validity of the debt to the extent of the value of the property attached. Consequently, the plaintiff's suit had to be based upon the debt itself rather than the judgment upon the debt.²⁰⁶

Facts determined in an in rem proceeding are not res judicata in other litigation as to parties not brought within the in personam jurisdiction of the first court. This principle is illustrated by *Cannon v. Cannon*.²⁰⁷ In *Cannon* suit had been brought to construe a will as to the point in time when the value of certain annuities should be determined and when their payment should be commenced. The testatrix had previously established a revocable trust with a New York bank as trustee. The same persons were beneficiaries under both the will and the trust. The trustee had brought an earlier action in New York to determine the same questions regarding the annuities under the trust in which only one of the beneficiaries was personally served. This New York decree was pleaded as binding in the North Carolina action and was so treated by the trial court. The supreme court reversed, saying:

No incidental construction of the trust agreement for the purpose of its administration could have any *in rem* effect on the will or any *in personam* effect on its beneficiaries. Considered within the framework of such a proceeding, a fact found as an inducement to a conclusion with respect to the *rem* would not necessarily estop a party to another collateral proceeding where the fact is more directly involved, as that would make the judgment *in rem* operate as a judgment *in personam*. . . . "A judgment *in rem* binds all the world, but the facts

²⁰⁴*Id.* at 237-38.

²⁰⁵204 N.C. 695, 169 S.E. 634 (1933). Subsequently, *Smith* was cited with approval by Judge Augustus Hand in *McQuillen v. Dillon*, 98 F.2d 726, 729 (2d. Cir. 1938).

²⁰⁶204 N.C. 695, 697, 169 S.E. 634, 635 (1933).

²⁰⁷223 N.C. 664, 28 S.E.2d 240 (1943).

on which it necessarily proceeds are not established against all the world."²⁰⁸

In *Harris v. Upham*²⁰⁹ suit was brought by a resident of South Carolina against a resident of the District of Columbia for specific performance of a contract to convey North Carolina land. Although notice was given by substituted service, the action was held to be in rem, thereby giving the court jurisdiction to vest title to the land without prior attachment.²¹⁰ This in rem jurisdiction, however, is not completely unlimited. Thus, it has been held that in a proceeding under the Torrens system, the North Carolina court was without jurisdiction to render a judgment vesting title to lands covered by navigable waters in a private owner.²¹¹

In an action quasi in rem against a nonresident defendant on a cause of action not covered by the long-arm statute, it is necessary to a valid service of process by publication that the defendant have property in the state and that such property be actually attached.²¹² It has been held that title to tobacco warehoused in North Carolina, the negotiable warehouse receipts for which were attached in New York and under court compulsion there indorsed by the necessary parties, passed under the judgment of the New York court.²¹³

In *Lane Trucking Company v. Haponski*²¹⁴ on substituted service of process the North Carolina trial court issued an order permanently enjoining the defendant in Florida from exercising control over property of the plaintiff located in Florida and refused to dismiss the proceeding on defendant's special appearance to contest jurisdiction. Upon defendant's failure to comply with the decree, the court cited him for contempt. The North Carolina Supreme Court reversed, holding that an injunction is an equitable remedy to be exercised in personam and not in rem.²¹⁵

²⁰⁸*Id.* at 670-71, 28 S.E.2d at 244.

²⁰⁹244 N.C. 477, 94 S.E.2d 370 (1956).

²¹⁰Attachment would be necessary if the suit involved matters aside from the land itself. But where the controversy involves the title to or interest in land, the bringing of the action in the jurisdiction where the land lies is sufficient to enable the court to exercise dominion over it.

Id. at 478, 94 S.E.2d at 372.

²¹¹*Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).

²¹²*Stevens v. Cecil*, 214 N.C. 217, 199 S.E. 161 (1938).

²¹³213 *Webb v. Friedberg*, 189 N.C. 166, 126 S.E. 508 (1925).

²¹⁴260 N.C. 514, 133 S.E.2d 192 (1963).

²¹⁵*Id.* at 516, 133 S.E.2d at 194.

According full faith and credit to challenged in rem and quasi in rem judgments of sister states involves two steps: first, the court must ascertain whether the requirements of the judgment state for the exercise of such jurisdiction were present; secondly, it must determine whether federal due process requirements were satisfied by the state requirements. If these prerequisites are met, then the sister-state judgment is entitled to full faith and credit, but only as to its effect on the res upon which it operates.

II. RECOGNITION OF FOREIGN COUNTRY JUDGMENTS

Research efforts have failed to disclose a North Carolina decision dealing expressly with the treatment to be accorded to a foreign country judgment, as distinguished from a judgment of a sister state. However, at least two early dicta pronouncements are available. In an 1827 dissent dealing with a South Carolina probate decree, Chief Justice Taylor said *obiter*:

If the assistance of this Court were sought to effectuate a decree of a foreign Court of Chancery, the merits of it would be open to examination, and we should be convinced of its justice and propriety, before we proceeded. Like a foreign judgment at law, it would be but *prima facie* evidence of the justice of the demand.²¹⁶

Following this statement seventy-three years elapsed before the court again spoke on the question of recognition of foreign-country judgments. *Arrington v. Arrington*²¹⁷ contains this dictum: "Whatever regard for [foreign nation judicial proceedings] has been shown is the result of treaty, or mere comity."²¹⁸

Since the full faith and credit mandate of the Federal Constitution does not apply to foreign-country judgments, the issue of their recognition rests entirely in comity.²¹⁹ Three views on this subject are possible: (1) no recognition will be given to the judgment of a foreign country

²¹⁶*Picket v. Johns*, 16 N.C. 123, 132 (1827).

²¹⁷127 N.C. 190, 37 S.E. 212 (1900).

²¹⁸*Id.* at 193, 37 S.E. at 213.

²¹⁹The Court in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) said:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

unless a treaty between the two nations concerned expressly provides for such recognition; (2) recognition will be extended on a basis of reciprocity; and (3) recognition will be accorded in all cases without regard to reciprocal treatment being extended by the law of the judgment nation. The first view is the rule in France and a few other civil law countries.²²⁰ The second is the federal rule as enunciated by the Supreme Court in *Hilton v. Guyot*,²²¹ and the third is the New York conflict of laws rule on the point.²²²

²²⁰See *Denton & Hall v. Bouillon*, [1873] Sirey Recueil General II. 18 (Court of Appeal, Toulouse). This case affirmed the duty of the French court to review on the merits an English judgment rendered by the Court of Exchequer for attorneys' fees. M. KATZ & K. BREWSTER, *INTERNATIONAL TRANSACTIONS AND RELATIONS, CASES AND MATERIALS* 446 (1960), contains the following translated excerpt from the opinion in *Denton & Hall*:

[T]o judge is to know, to verify, and to decide after a full examination of the case.

"Considering, moreover, that the doctrine of the right of review is consistent with the structure of our legal system; that Article 14 (of the Civil Code), which allows a French national to summon a foreigner before a French court and which therefore departs from the rule of the law of nations *actor sequitur forum rei*, is stamped with the mistrust of foreign justice that is embedded in our laws, and that it would be contradictory to hold that it was intended that the protection granted to French nationals by Article 14 be withdrawn by Article 2123 and that they be subject to foreign judgments without the guarantee accorded by review; that it must after all be recognized that the complete guarantees offered by the French judicial system are not offered by the judicial systems of all other countries of the world, nor even of all countries of Europe
 . . . [T]he right . . . belongs to the sovereign to grant *res judicata* effect to foreign judgments by treaties based on an agreed reciprocity [. . .] [I]n face of the conflict of contrary opinions as to the effect of foreign judgments in France, the controlling and decisive consideration must be that the *res judicata* effect of foreign judgments cannot cross the frontiers of the sovereignty from which they issue"

But see *Charr v. Hasim Ulusahim*, [1956] *Receuil Dalloz of Surey, Jurisprudence* 61, Paris Ct. of App. (1st Ch.), noted in *Nadlemann, Recognition of Foreign Money Judgments in France*, 5 *AM. J. COMP. L.* 248 (1956).

See also *Nadlemann, French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 *AM. J. COMP. L.* 72 (1964). Due to the civil law doctrine that judicial decisions do not generally constitute legal precedent, it is difficult to reach a firm conclusion. Many of those concerned proceed on the assumption that the pronouncement in *Denton & Hall* continues to be the French rule. There is no treaty between France and the United States regarding recognition of the judgments of their respective courts.

²²¹159 U.S. 113 (1895); *accord*, *Gull v. Constam*, 105 F. Supp. 107 (D. Colo. 1952), noted in 38 *CORN. L.Q.* 423 (1953) (lack of reciprocity must be pleaded by the party seeking to avoid the conclusive effect of the foreign judgment).

On the same day it decided *Hilton*, the Supreme Court in *Ritchie v. McMullen*, 159 U.S. 235 (1895), enforced an Ontario judgment without an examination of its merits, since Ontario would give conclusive effect to a United States court judgment.

²²²*Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284 (1927), *aff'd per curiam*, 246 N.Y. 603, 159 N.E. 669 (1927). In *Cowans* a Quebec judgment was given conclusive effect, even though the law of Quebec did not give recognition to foreign judgments. See *Watts v. Swiss Bank*, 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970). "Under the principles of comity the courts should give full effect to a judgment rendered by a French court of competent jurisdiction." *Id.* at 279, 265 N.E.2d at 744, 317 N.Y.S.2d at 322.

The 122 pages of argument and opinions in *Hilton* contain a number of propositions that are undoubtedly good law. These include:

Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings and notice will be assumed. It will also be assumed that they are untainted by fraud

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. . . .

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. . . .

. . . [A] judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. . . .

Other foreign judgments which have been held conclusive of the matters adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. . . .²²³

The Court continued:

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. 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. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound.²²⁴

The Supreme Court summarized its holding in *Hilton* as follows:

[J]udgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

. . . [W]e do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad

²²³159 U.S. at 166-68.

²²⁴*Id.* at 170.

ground that international law is founded upon mutuality and reciprocity²²⁵

The *Restatement of Conflicts* shrinks *Hilton* in its comments thereon in this manner:

In *Hilton v. Guyot* . . . the Supreme Court of the United States held in a 5-4 decision that in one isolated situation a judgment rendered in a foreign nation would be subjected by the federal courts in this country to a reexamination on the merits if an American judgment would be given similar treatment in the foreign nation involved. This situation is where a citizen or resident of the foreign nation brings the suit there against a foreigner and obtains a judgment in his favor.²²⁶

The rule laid down by the *Restatement* essentially embraces the New York rule. It provides: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."²²⁷

Hilton, decided in 1895, came long before *Erie R.R. v. Tompkins*²²⁸ and *Klaxon Co. v. Stentor Electric Manufacturing Co.*²²⁹ These decisions now require federal courts in diversity cases to apply the conflict of laws rules of the state in which they are sitting. Whether *Erie* here applies or the treatment to be accorded to a foreign country judgment is so essentially a part of international relations as to present a federal question to be determined by federal law is considered in two federal district court decisions. The first was a case in which a Swedish bank brought a diversity suit in Massachusetts against a Massachusetts resident to recover on a Swedish judgment. In *Svenska Handelsbanken v. Carlson*,²³⁰ the court held that *Erie* governed and that, as a result, the rule to be applied was that of the state in which it sat. In this case the state rule only accorded the foreign judgment prima facie effect as to proof of the underlying claim. A like result was subsequently reached in *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,²³¹ a diversity ac-

²²⁵*Id.* at 227-28.

²²⁶RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, Comment *e* at 299-300 (1971).

²²⁷*Id.* § 98.

²²⁸304 U.S. 64 (1938).

²²⁹313 U.S. 487 (1941).

²³⁰258 F. Supp. 448 (D. Mass. 1966). "[M]assachusetts, rather than federal law seems to be properly applicable here. . . . There is no [Massachusetts] decision that would support giving a conclusive effect to the Swedish judgment" *Id.* at 450-51.

²³¹318 F. Supp. 161 (E.D. Pa. 1970). This case is pending appeal in the circuit court.

tion brought in Pennsylvania to enforce a default judgment obtained in England. The district court first found, from a complicated set of procedural facts, that the defendant corporation had entered a general appearance in the English court and had thereafter defaulted on the merits. It then cited *Erie, Klaxon Co.*, and *Svenska Handelsbanken* and held: "The issue of whether or not a foreign judgment will be enforced by a federal district court, having jurisdiction by means of diversity, is governed by the law of the state where the federal court is located."²³² Regarding reciprocity, the court in *Somportex* found that if presented with the issue the Pennsylvania courts would refuse to follow *Hilton* and would enforce the English judgment without regard to reciprocity.²³³ The Supreme Court has not yet decided the point. However, it seems probable that an applicable treaty dealing with judgment recognition would present a federal question which would preempt state law.

Any of the three rules regarding recognition could conceivably be adopted by North Carolina in the absence of a treaty between the United States and the country concerned which expressly required recognition. Adoption of the severe French view seems unlikely. The requirement of reciprocity in the limited factual circumstances found in *Hilton* is a possibility and would be consistent with the language of the two North Carolina dicta. This view has not been favored by most legal writers,²³⁴

²³²*Id.* at 164.

²³³In support of this holding the court said:

[W]e do not find the teaching of *Hilton* on reciprocity to be controlling in this case. The *Hilton* decision was a pre *Erie R.R. Co. v. Tompkins* case and it has never been suggested that it was constitutionally dictated and therefore binding on the states. It is clear . . . that the law governing the enforceability of foreign judgments by a federal court is the law of the state where the court is located. Therefore, the issue, as this Court perceives it, is whether the courts of Pennsylvania would hold that reciprocity is a necessary precondition to the enforcement of foreign judgments. . . .

. . . The Court finds that the concept of reciprocity is a provincial one, one which fosters decisions that do violence to the legitimate goals of comity between foreign nations. Therefore, absent a positive showing that Pennsylvania would follow the *Hilton* decision with respect to reciprocity, this Court will not presume that it would adhere to such an undermined concept. This Court finds that if presented with the issue, the Pennsylvania courts would follow its neighboring state of New York and expressly reject this concept.

Id. at 167-68.

²³⁴Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919); Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184 (1952); Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236 (1953); Nadelmann, *The United States of America and Agreements of Reciprocal Enforcement of Foreign Judgments*, 1 NETH. INT'L. L. REV. 156 (1953); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Note, *The Enforceability of Foreign Judgments in American Courts*, 37 NOTRE DAME LAW. 88 (1961).

but in the international community there is merit to the reciprocity concept that the golden rule should cut both ways. Finally, North Carolina could follow the New York conflicts rule that if the jurisdictional foundation upon which the foreign-country judgment is based is not successfully attacked,²³⁵ it will be given full credit in the forum without review of the merits.

Prophecy as to which solution will ultimately be adopted in North Carolina would be sheer speculation, and occasion to resolve the question seems to be slow in coming. If the established period of seventy-three years between dicta on the point remains constant, another North Carolina *obiter* statement may be anticipated in 1973.

²³⁵In determining the sufficiency of the jurisdictional foundation for a foreign country judgment, American courts tend to apply their own jurisdictional standards and United States constitutional concepts of due process of law. See *Scott v. Scott*, 51 Cal. 2d 249, 331 P.2d 641 (1958), discussed in Comment, *Mexican Divorces: Are They Recognized in California?*, 4 Cal. W.L. Rev. 341, 349 (1968).