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THE JURISDICTION OF A COURT OF EQUITY OVER  
PERSONS TO COMPEL THE DOING OF ACTS  
OUTSIDE THE TERRITORIAL LIMITS  
OF THE STATE†

BY ERNEST J. MESSNER\*

COURTS of equity are sometimes called upon to act in cases where the subject matter is located outside the state or where the relief sought calls for the doing of acts extra-territorially. There are perhaps a greater number of cases in which equity courts have refused to act in such situations than where the desired relief was granted. This refusal to entertain jurisdiction generally has been based upon two reasons, the first, that the subject matter was beyond the jurisdiction of the court, and to act would have been an interference with the sovereignty of that state wherein the subject matter was located, and the second, that the court lacked the necessary power and machinery to enforce and carry into effect its decree.

The question that presents itself is whether, in such a situation, equity courts lack jurisdiction to act, or whether it is merely a refusal to exercise the power which is discretionary in the courts of chancery.

The primary purpose of this article will be to arrive at an answer to this question, and to accomplish this a study of the cases is essential. The cases chosen for the purposes deal with situations in which the parties are within the jurisdiction of the court, but the remedy asked or the relief sought has to do with a subject matter located outside the territorial jurisdiction of the court, or calls for the doing of or refraining from doing some act outside of the limits of the state wherein the court rendering the decree is located.

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†This is the substance of a thesis which was submitted for the degree of Master of Laws, University of Minnesota, 1929. The writer is deeply indebted to Professor H. L. McClintock of the University of Minnesota Law School, for his many helpful criticisms and suggestions in the writing of this article.

The body of this article will discuss generally the cases dealing with the following points:

(1) The power of a court of equity to restrain proceedings in a foreign tribunal.

(2) The power of an equity court to decree a conveyance of foreign lands.

(3) The power of a court of equity to restrain or compel the doing of some act outside the territorial limits of the state.

## I

### THE POWER OF A COURT OF EQUITY TO RESTRAIN PROCEEDINGS IN A FOREIGN TRIBUNAL<sup>1</sup>

It is a fundamental principle that the courts of one state can exercise no control over the courts of another state. This is so because each state within its own territorial limits is supreme. It is independent, and any attempt to interfere would be contrary to state sovereignty.<sup>2</sup> It was because of this reason that courts formerly hesitated to act when called upon to stay proceedings about to be commenced or already commenced in the courts of another state or country. Even today courts are reluctant to grant such relief unless the case clearly calls for such action.<sup>3</sup> Another objection, which was early raised, regarding the constitutionality of such action, was as to whether or not this violated the full faith and credit clause and the interstate privileges and immunities clause of the federal constitution. It has now been settled that such an exercise of power is not unconstitutional.<sup>4</sup>

It is now firmly established that the courts of equity of one state can grant an injunction to restrain the proceedings in another state without interfering with the sovereignty of that other state. The reason given for this is that the decree is not directed to the courts of that other state, and is not an attempt to control or direct the proceedings in the foreign courts, but is one in personam directed to the parties to the suit.<sup>5</sup> The theory upon which the

<sup>1</sup>(1922) 22 Col. L. Rev. 360-364.

<sup>2</sup>Story, *Equity*, 14th. ed., sec. 1224.

<sup>3</sup>*Jones v. Hughes*, (1912) 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.S.) 502; *Freick v. Hinkly*, (1913) 122 Minn. 24, 141 N. W. 1096, 46 L. R. A. (N.S.) 695.

<sup>4</sup>*Cole v. Cunningham*, (1890) 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *State ex rel. Boßung v. District Court*, (1918) 140 Minn. 494, 168 N. W. 589, 1 A. L. R. 145.

<sup>5</sup>Perhaps the best statement of the rule is found in the case of *Dehon v. Foster*, (1862) 4 Allen (Mass.) 545, where on page 550 Bigelow, C. J., says: ". . . In the exercise of this power, courts of

courts act, in granting this relief, is that they have authority to control the persons within the territorial limits of the state, and, having jurisdiction of the parties, can render a decree which the parties are bound to respect and obey, even beyond the territorial limits of the state.<sup>6</sup> So long as a citizen is a resident of a state, he owes it obedience,<sup>7</sup> and the decree, when directed to the parties to the suit, can be enforced by the court issuing it by process in personam.<sup>8</sup>

The question still remains as to when the courts of one state will take this action. No general rule can be laid down, but each case must be governed by its own circumstances. It may be stated generally that where the equities of the case demand such interference, so as to prevent a party from obtaining an inequitable advantage to the injury of the other party, and to enable the court to do justice, an injunction will be granted,<sup>9</sup> or other adequate relief given.<sup>10</sup>

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equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of the parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. . . ." See *Cole v. Cunningham*, (1890) 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. Ed. 570; *Hawkins v. Ireland*, (1896) 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534 and note; *State ex rel. Bossung v. District Court*, (1918) 140 Minn. 494, 168 N. W. 589, 1 A. L. R. 145; *Union Pacific Ry. v. Rule*, (1923) 155 Minn. 302, 193 N. W. 161; *Carson v. Dunham*, (1889) 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 203, 14 Am. St. Rep. 397.

<sup>6</sup>In *Keyser v. Rice*, (1877) 47 Md. 203, 28 Am. Rep. 448, *Bowie, J.*, at page 213 said, "The power of the state to compel its citizens to respect its laws, even beyond its own territorial limits, is supported we think by a great preponderance of precedent and authority." See *Moton v. Hull*, (1890) 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722.

<sup>7</sup>*Keyser v. Rice*, (1877) 47 Md. 203, 28 Am. Rep. 448.

<sup>8</sup>2 *Story, Equity*, 14th ed., secs. 1224-1225; 1 *Spelling, Injunctions*, 2nd. ed., sec. 49. See *Dehon v. Foster*, (1862) 4 Allen (Mass.) 545; *Harris v. Pullman* (1876) 84 Ill. 20, 28, 25 Am. Rep. 416.

<sup>9</sup>*Cunningham v. Butler*, (1886) 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657 and note; *Hawkins v. Ireland*, (1896) 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534 and note; *Freick v. Hinkly*, (1913) 122 Minn. 24, 141 N. W. 1096, 46 L. R. A. (N.S.) 695; *Wilser v. Wilser*, (1916) 132 Minn. 167, 156 N. W. 271.

<sup>10</sup>In *Hazen v. Lyndonville Nat'l Bank*, (1898) 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680, *Thompson, J.*, said, "By reason of the acts of the defendants committed since the service of process upon them, an injunction would now furnish them no relief. Whenever a court of equity has jurisdiction to entertain a bill for an injunction against the commission or continuance of a wrongful act, it may award damages in sub-

There are numerous cases and instances in which the courts of equity have granted such relief upon a proper case being made out. Ordinarily, where the purpose of the foreign suit is to evade the laws of the domicile, an injunction will be granted.<sup>11</sup> Examples of this type of cases are those in which the effect of the foreign suit is to obtain a preference which is not obtainable in the state of the domicile,<sup>12</sup> and those in which it is sought to evade the exemption laws of the domiciliary state.<sup>13</sup> It is to be noted that this difference in laws must be a difference in the substantive laws, and a difference merely in procedural laws will not be sufficient.<sup>14</sup>

Other situations in which the courts have acted and have restrained actions in a foreign court are those in which the foreign suit was contra to the settled public policy of the state;<sup>15</sup> in which the party in the suit in another state would be subjected to a liability, notwithstanding the conduct of the other party, which in the courts of their residence would be a complete bar to such liability;<sup>16</sup> in which the institution of the suit in another state was fraudulent and malicious, and was brought for the purpose of vexing harassing, and oppressing another citizen;<sup>17</sup> in which it would be a substantial and needless disadvantage to compel one to make defense by depositions, when bringing suit in a place where it can be brought without disadvantage to either party would obviate the need of defending by that method;<sup>18</sup> and in which the

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stitution for such injunction, when the defendant by his acts committed subsequent to the service of process upon him has rendered relief by injunction ineffectual."

<sup>11</sup>Spelling, *Injunctions*, 2nd ed., sec. 50. See also *Miller v. Gittings*, (1897) 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352 and note, in which Bryan, J., said "The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside."

<sup>12</sup>*Cole v. Cunningham*, (1890) 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Dehon v. Foster*, (1862) 4 Allen (Mass.) 545.

<sup>13</sup>*Moton v. Hull*, (1890) 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722; *Allen v. Buchanan*, (1892) 97 Ala. 399, 11 So. 777, 38 Am. St. Rep. 187; *Wierse v. Thomas*, (1907) 145 N. C. 261, 59 S. E. 58, 15 L. R. A. (N.S.) 1008, 122 Am. St. Rep. 446.

<sup>14</sup>*American Express Co. v. Fox*, (1916) 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B 1148; *Lancaster v. Dunn*, (1922) 153 La. 15, 95 So. 385.

<sup>15</sup>*Miller v. Gittings*, (1897) 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352 and note; *Wabash Ry. v. Peterson*, (1919) 187 Iowa 1331, 175 N. W. 523.

<sup>16</sup>*Weaver v. Alabama Great So. Ry.*, (1917) 200 Ala. 432, 76 So. 364.

<sup>17</sup>*Mason v. Harlow*, (1911) 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N.S.) 234.

<sup>18</sup>*Wabash Ry. v. Peterson*, (1919) 187 Iowa 1331, 175 N. W. 523.

facts were of such a character as to make it the duty of the court to restrain the party from instituting like proceedings in a court of that state.<sup>19</sup> The fact that the subject matter of the suit is in another state and the action, which the party is forbidden further to prosecute, is there pending, does not affect the question of the power of the court in the premises.<sup>20</sup>

As has been said before, the courts are reluctant to grant this relief, and exercise this power sparingly because of the comity which ought to prevail among sovereignties.<sup>21</sup> Hence where the other suit is prior in time, unless clear equitable grounds exist, the injunction will be denied.<sup>22</sup> An example of this would be where a contract was made in state X between A and B and, according to statute in state X, A has a good defense when sued on the contract. B sues A in state Y, where such defense does not exist by statute. If A seeks to have the courts of state X enjoin B from prosecuting this suit in state Y, solely on the ground that in state Y he has no defense, yet fails to show that state Y will not apply the laws of state X to the contract, the injunction will be denied.<sup>23</sup>

In a few cases the courts have gone so far as to say that, after suits have once been commenced in foreign courts, they will refuse to interfere because it would be inconsistent with interstate harmony that their prosecution should be controlled by the court of another state.<sup>24</sup> But this view has not been adopted

<sup>19</sup>See *French, Trustee v. Hay*, (1874) 22 Wall. (U.S.) 250, 22 L. Ed. 857; *Moton v. Hull*, (1890) 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722.

<sup>20</sup>*Hawkins v. Ireland*, (1896) 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534 and note.

<sup>21</sup>In *Bigelow v. Old Dominion, etc., Co.*, (1908) 74 N. J. Eq. 457, 71 Atl. 153, it was stated by Pitney, J., "But on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievances—the right preservative of all rights—except for grave reasons; and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised." See also *Cole v. Cunningham*, (1890) 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Jones v. Hughes*, (1912) 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.S.) 502.

<sup>22</sup>*Harris v. Pullman*, (1876) 84 Ill. 20, 25 Am. Rep. 416; *Carson v. Dunham*, (1889) 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 203, 14 Am. St. Rep. 397; *Jones v. Hughes*, (1912) 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.S.) 502.

<sup>23</sup>*Freick v. Hinkly*, (1913) 122 Minn. 24, 141 N. W. 1096, 46 L. R. A. (N.S.) 695; *Buchanan-Vaughan Auto Co. v. Woosley*, (Tex. Civ. App. 1919) 218 S. W. 554.

<sup>24</sup>*Chancellor Walworth, in Meade v. Merritt*, (1831) 2 Paige (N.Y.) 402, said, ". . . Not only comity, but public policy forbids the exercise of such power. If this court should sustain an injunction bill to restrain

by the majority of the courts of this country, and of this view Mr. Justice Fuller, in *Cole v. Cunningham*,<sup>25</sup> says:

"But this reasoning has not commended itself to the judicial mind, for the injunction is not directed to the courts of the other state, but simply to the parties litigant; and, although the power should be exercised with care, and with a just regard to the comity which ought to prevail among coordinate sovereignties, yet its existence cannot at this day be denied."

An exception to this rule is that the state will not enjoin suits in the federal courts and vice versa,<sup>26</sup> unless it is necessary to protect the jurisdiction of the court first acquiring control of the parties and the subject matter.<sup>27</sup>

A limitation on the rule is that at least the party, against whom the injunction is sought, must be a resident of the state wherein the injunction is sought.<sup>28</sup> The fact that a non-resident has brought an action in a state court does not place his person under the control of the court for all purposes, but gives the court only the right to prescribe the terms upon which he may be allowed to prosecute his action therein.<sup>29</sup> A reason suggested for such

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proceedings previously commenced in a sister state, the court of that state might retaliate upon the complainant, who was the defendant in the suit there; and by process of attachment, might compel him to relinquish the suit subsequently commenced here. By this course of proceeding, the courts of different states would indirectly be brought into collision with each other in regard to jurisdiction; and the rights of suitors might be lost sight of in a useless struggle for what might be considered the legitimate powers and rights of courts." See *Harris v. Pullman*, (1876) 84 Ill. 20, 25 Am. Rep. 416; *Carson v. Dunham*, (1889) 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 203, 14 Am. St. Rep. 397.

<sup>25</sup>(1890) 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538.

<sup>26</sup>It is stated in 2 Story, *Equity*, 14th ed., sec. 1225, that this exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.

<sup>27</sup>1 Spelling, *Injunctions*, 2nd ed., sec. 51, "... Although the constitution is silent upon the right of the courts of either of the two jurisdictions to enjoin parties from resorting to the other or proceeding with suits already begun in the courts of the other, yet a rule was early adopted, and has by frequent recognition become established, to the effect that injunctions will only be granted by a state tribunal to restrain proceedings in a federal court, and vice versa, when necessary to protect the jurisdiction of the court first acquiring control of the parties and the subject matter, and in these cases only in personam." See *Rickey Land & Cattle Co. v. Miller*, (1910) 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032; *Pitt v. Rodgers*, (C.C.A. 9th Cir. 1900) 104 Fed. 387; *Starr v. Chicago R. I. & P. Ry.*, (C.C. Neb. 1901) 110 Fed. 3.

<sup>28</sup>*Western Union Telegraph Co. v. The Pacific & Atlantic Telegraph Co.*, (1868) 49 Ill. 90; *Griffith v. Langsdale*, (1890) 53 Ark. 71, 13 S. W. 733; but see *Bigelow v. Old Dominion, etc., Co.*, (1908) 74 N. J. Eq. 457, 71 Atl. 153.

<sup>29</sup>*Carpenter, Baggott & Co. v. Hanes*, (1913) 162 N. C. 46, 77 S. E. 1101, Ann. Cas. 1915A 832.

refusal to act is that there is a lack of power to enforce the decree against a non-resident.<sup>30</sup> This reason alone should not offer serious obstacles, however, as a court of equity, acting upon the person, could demand that he put up a bond to insure compliance with the decree, or, if he has property within the jurisdiction, the court could demand that it be sequestered.<sup>31</sup> It is submitted, however, that this is not a question of jurisdiction at all, but merely a refusal to act in such a situation because, on grounds of comity, the power of one state to interfere with a litigant, who is in due course pursuing his rights and remedies in the courts of another state, ought to be sparingly exercised.<sup>32</sup> Where one of the parties is a non-resident, the reason for granting an injunction on the grounds of convenience of witnesses, expense, evasion of the laws of the domicile, and other grounds commonly invoked, will most likely be lacking, but, if the proper case is shown, there does not seem to be any objection to granting such relief, even in case one of the parties is a non-resident, provided he is subject to the jurisdiction of the court.

Under this class of cases one more question arises. In case of violation of the injunction by continuing suit or commencing suit in a foreign state, when the injunction is introduced either as a bar or defense to the action, are the courts of the other state bound to recognize it? There have as yet been only a few cases in which this question has arisen. In *Gilman v. Ketcham*,<sup>33</sup> the resident creditors of a New York corporation were enjoined by the New York court from bringing any action against the corporation for the recovery of any sum of money or from proceeding further in any action previously commenced. After this order, a New York creditor of the corporation garnished a debtor of the corporation in Wisconsin. The debtor paid the money into court, and the receiver of the New York corporation intervened and claimed the money. The receiver prevailed in this suit, and the Wisconsin court, through Mr. Justice Pinney, said:

"There is nothing in the statute of New York or in this proceeding under it, in conflict with or in contravention of the laws

<sup>30</sup>*Bank of Bellows Falls v. Rutland & Burlington Ry.*, (1856) 28 Vt. 470.

<sup>31</sup>(1922) 35 Harv. L. Rev. 610; (1921) 30 Yale L. J. 865.

<sup>32</sup>*Bigelow v. Old Dominion, etc., Co.*, (1908) 74 N. J. Eq. 457, 71 Atl. 153; *Jones v. Hughes*, (1912) 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.S.) 502.

<sup>33</sup>(1893) 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899.



or public policy of this state, nor does the present proceeding interfere, or tend to interfere with or prejudice the rights of any citizens of this state. The case concerns itself with citizens of New York alone, and is therefore free from all objection which, by the general current of authority, might prevent or induce courts of Wisconsin to refrain from giving, in a spirit of just interstate comity, the same force and effect here to the proceedings in the supreme court of the state of New York in question as would be accorded to them there. . . . The tendency of modern adjudication is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to the judicial proceedings of sister states under their statutes and rights claimed under them, simply because, technically they are foreign and not domestic."

In *Union Pacific Ry. v. Rule*,<sup>34</sup> the plaintiff, a Utah corporation, but also regarded as having a residence in Iowa, brought a bill against the defendant, a citizen of Iowa, in the Iowa district court, to restrain the defendant from prosecuting a suit in Minnesota, for a personal injury sustained in Iowa. The defendant was served, but defaulted in the Iowa action, and later commenced suit in Minnesota on the same cause of action and in violation of the Iowa injunction. The plaintiff then brought an action to restrain the defendant. The issue in the case was whether or not the Iowa decree was one which the Minnesota courts must enforce under the full faith and credit clause of the federal constitution. It was held, Mr. Justice Holt writing the opinion, although himself dissenting from it, that the Iowa injunction was not entitled to full faith and credit. The court recognizes that as to parties domiciled in a state, its courts of general jurisdiction may enjoin one from suing the other in the courts of any other state upon a cause of action suable in the courts of the state of their domicile, but says that the Iowa decree does not in any manner adjudicate or affect the defendant's cause of action, but is predicated solely on the proposition that it will impose a hardship on the plaintiff to defend in the courts of this state. The court says that a decree enjoining a party from prosecuting an action in another state does not and cannot stay the courts of that state, and also that the Iowa court has no authority to curtail by injunction the exercise of rights and privileges given to one by article 4, section 2, of the federal constitution. It was held that the Iowa decree was not an adjudication of any personal or property rights between the parties, so that

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<sup>34</sup>(1923) 155 Minn. 302, 193 N. W. 161.

by execution or other process of the court, the defendant may be compelled to render to the plaintiff money or property to which he is entitled. It can be enforced in Iowa only as for contempt. The defendant's cause of action is transitory, and the full faith and credit clause of the constitution does not require the courts of Minnesota to give credit to this decree of an Iowa court denying the right to sue in Minnesota on a transitory cause of action in Iowa.<sup>35</sup> Justices Holt and Quinn dissented from the holding on the ground that the Iowa decree determined that the plaintiff had a right to protection from suit by the defendant in Minnesota. The parties and subject matter were within the jurisdiction of the court. This right, so adjudicated, is valuable, and the decree of the Iowa court comes within the full faith and credit clause. The action is not to enforce a penalty, but is based on an adjudicated private right.

In the Wisconsin case, the New York injunction was recognized and given effect because of interstate comity. The only difference in the situation of the two cases is that in the Wisconsin case a preliminary injunction had been issued prior to bringing suit in Wisconsin, while in the Minnesota case the injunction was not issued until after the proceedings had been commenced in Minnesota, but, as has been seen, the fact that suit has been commenced in a foreign court will not prevent the injunction from being issued, provided proper equitable grounds are shown. Had the Minnesota court so wished, it clearly could have recognized the Iowa injunction on the grounds of comity, as did the Wisconsin court, because there was nothing in conflict with the public policy of the state of Minnesota. The case concerned itself wholly with citizens of Iowa, and, therefore, there were no rights of Minnesota citizens which would be prejudiced.

It is clear that the Iowa court had jurisdiction over the parties so as to render a decree binding on the persons. In the suit for the injunction the Iowa court determined that the equities of

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<sup>35</sup>It would seem that the majority opinion in this case is justified under section 493, Comment b, of the Restatement of the Conflict of Laws, Tentative Draft No. 5, which is to the effect that an injunction not going to the merits does not have any effect on the rights of the defendant in another state. Illustration: "A in state X brings a bill against B to enjoin his suing A on a certain alleged cause of action in any other state than X. B sues A on the cause of action in state Y, and A sets up the injunction in X as a defense. The defense will be disallowed."

the case were such as to entitle the plaintiff to an injunction. The Iowa court adjudicated the private rights of the parties. It is to be noted that the Iowa court had previously expressed itself, in *Jones v. Hughes*,<sup>36</sup> as being reluctant to interfere with the right of a resident to go into the courts of another state to secure such relief as may there be available to him, and would only interfere where the facts of the case demanded it. Here the Iowa court had acted and interfered, and had determined that the plaintiff had a right to be protected from suit by the defendant in Minnesota. The question, then, is, should the Minnesota courts give full faith and credit to this decree, which determined the equities and private rights of the parties. Mr. Justice Holmes, in *Michigan Trust Co. v. Ferry*,<sup>37</sup> said, in discussing the jurisdiction of a court of equity over a person:

"If a judicial proceeding is begun with jurisdiction over the person, it is within the power of a state to bind him by every subsequent order in the cause."

In discussing the effect of the decree rendered, he said:

"The decree in this case was made with full jurisdiction and (apart from the insanity of the defendant, who by the decree was required to account) could be sued on, and was entitled to full faith and credit."

He further states that a decree in equity against a defendant who had left the state after service on him, and who had taken all of his property with him, would be entitled to full faith and credit where he was found. In *Burnley v. Stevenson*,<sup>38</sup> the Ohio court, in referring to a Kentucky decree concerning lands in Ohio, said that a decree rendered by a court of a sister state having jurisdiction of the parties and subject matter, is entitled to the same force and effect which it had in the state where pronounced. The Ohio court further said that this Kentucky decree, when pleaded in Ohio courts as a cause of action, or as a defense, must be regarded as conclusive of all the rights and equities which were adjudicated therein. In *Fall v. Fall*,<sup>39</sup> wife and husband were divorced in Washington. By the decree, certain property owned by them jointly in Nebraska was to go to the wife. The husband was ordered to convey his share, but refused, and a commissioner then executed a deed of his share. The husband later conveyed his share to a purchaser with notice.

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<sup>36</sup>(1912) 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.S.) 502.

<sup>37</sup>(1912) 228 U. S. 346, 33 Sup. Ct. 550, 57 L. Ed. 867.

<sup>38</sup>(1873) 24 Ohio St. 474, 15 Am. Rep. 621.

<sup>39</sup>(1905) 75 Neb. 104, 113 N. W. 175, 121 Am. St. Rep. 767.

The wife brought suit in Nebraska, claiming title by virtue of the Washington decree, and sought to have her title quieted, and to have the deed by the husband to the purchaser with notice declared void. The Nebraska court decided against her claim. Chief Justice Sedgwick, in his dissenting opinion, said:

"When, however, issues are presented to a court of competent jurisdiction and the court having jurisdiction of the parties and of the issues so presented determine such issues, and the equitable rights of the parties in lands in another state depend upon the facts so determined, that determination of the equities of the parties may be relied upon in any litigation that may arise between the same parties and full faith and credit must be given to such adjudication of the rights of the parties."<sup>40</sup>

In the appeal of this case to the United States Supreme Court, under the name of *Fall v. Eastin*,<sup>41</sup> the court cited with favor the case of *Burnley v. Stevenson*,<sup>42</sup> but affirmed the judgment on the sole ground that neither the decree itself nor any conveyance under it, except by the person in whom title is vested, can operate beyond the jurisdiction of the court. Mr. Justice Holmes, concurring specially in this decision, said that the Washington decree established a personal obligation between the parties; that a personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do; that the Washington decree was entitled to full faith and credit in Nebraska, but that the Nebraska court carefully avoids saying that the decree would not be binding between the original parties had the husband been before the court; that the decision is affirmed because they regard the decree as imposing no obligation upon a purchaser with notice; and that the decision, even if wrong, did not deny the Washington decree its full effect.

In view of these cases, it is hard to reconcile the decision of the Minnesota case with the idea that a court of general jur-

<sup>40</sup>In *Dobson v. Pearce*, (1854) 12 N. Y. 156, 1 Abb. Prac. 97, 62 Am. Dec. 152, the assignor of the plaintiff secured a judgment against the defendant in New York by fraud. When he sued the defendant on it in Connecticut, the defendant had the action enjoined in a court of equity in that state. The assignor appeared in that suit and it was found that the judgment was fraudulently obtained in New York. After plaintiff acquired the claim by assignment, he sued on it in New York and the question was as to the effect of the Connecticut decree. The New York court recognized the Connecticut decree as conclusive of the rights of the parties.

<sup>41</sup>(1909) 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853.

<sup>42</sup>(1873) 24 Ohio St. 474, 15 Am. Rep. 621.

isdiction, having jurisdiction of the persons, has power to determine the equities and private rights of the parties, and that once determined, these equities and private rights are entitled to full faith and credit. It would seem as though a possible solution of the Minnesota case could be worked out in the following manner. The Minnesota court would recognize the Iowa injunction had it been granted upon facts which the Minnesota courts would recognize as constituting grounds for an injunction in Minnesota. The Minnesota courts would grant full faith and credit to the Iowa decree as to its determination of the facts, and would then apply Minnesota law to those facts as found by the Iowa court. If, according to Minnesota law, grounds existed for an injunction, full faith and credit would be given to the decree. If, however, those facts would not entitle one to an injunction in Minnesota, the court would not be bound to recognize the Iowa decree, as its law necessarily cannot operate and have any extra-territorial effect. In this way, full faith and credit would not be denied to the Iowa decree.<sup>43</sup>

In the *Rule Case*, Iowa had a statute<sup>44</sup> prohibiting citizens of Iowa from bringing suit in a foreign court on a cause of action suable in the courts of Iowa. Since Minnesota has no corresponding statute, since the Minnesota courts hesitate to curtail, by injunction, the exercise of rights and privileges given to one by article 4, section 2, of the federal constitution, and since they have given full faith and credit to the findings of fact of the Iowa court, they would not be bound to give full faith and credit to the injunction. Applying Minnesota laws to those facts, an injunction will not issue. Consequently, Minnesota was not obligated to recognize the legal conclusion drawn from those facts by the Iowa court.

The Restatement of the Conflict of Laws<sup>45</sup> does not specifically deal with the power of courts of equity to restrain pro-

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<sup>43</sup>The Restatement of the Conflict of Laws, Tentative Draft No. 5, would seem to hold this a valid method under Comment a, section 485, which says, "An act is ordered or enjoined by a court of equity as its discretionary remedy for a proved wrong. A court of equity will not allow itself to be deprived of the opportunity to exercise its discretion, both as to whether it shall admit the plaintiff to sue in equity and as to what remedy it shall decree, by the action of a court in another state. It will, however, allow suit on the original claim and will give the effect of res judicata to the findings of fact in the prior suit between the parties, reserving for its own discretion the relief to be afforded."

<sup>44</sup>Iowa, Acts 1917, chap. 293.

<sup>45</sup>The American Law Institute, Conflict of Laws, Restatement No. 2.

ceedings in a foreign tribunal, but it would seem as though this point would come within the general language of section 101, in which it is stated that a state can exercise, through its courts, jurisdiction to forbid a person who is subject to its jurisdiction to do an act in another state.

## II

### THE POWER OF AN EQUITY COURT TO DECREE A CONVEYANCE OF FOREIGN LANDS<sup>46</sup>

Another type of case in which equitable relief is frequently sought is that in which complainant seeks a conveyance of lands situated outside the territorial limits of the court and in another state or country.

It is a fundamental proposition that real property is subject to the exclusive jurisdiction of the courts of the state or country in which it is located,<sup>47</sup> and title to the property and the validity or invalidity of every devise, transfer, or conveyance thereof, must depend upon the *lex rei sitae*.<sup>48</sup> This is based upon the independent and exclusive sovereignty of each state over immovables located therein.<sup>49</sup>

It necessarily follows that any decree by a court in a state wherein the land is not located, cannot have the effect of an in rem decree so as to operate *ex proprio vigore* upon those lands in another jurisdiction, and create, settle, transfer or vest a title.<sup>50</sup> But it does not necessarily follow that an equity court is wholly without jurisdiction merely because the subject matter

<sup>46</sup>Goode, *Jurisdiction in Equity Over Foreign Lands*, (1919) 3 St. Louis L. Rev. 127.

<sup>47</sup>2 Black, *Judgments* 2nd ed., sec. 872; 1 Wharton, *Conflict of Laws*, 3rd ed., sec. 289a. In *Davis v. Headley*, (1871) 22 N. J. Eq. 115, the chancellor said, "It is a well settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations, (and thus part of the *jus gentium*.) that immovable property, known to the common law as real estate, is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws can affect it."

<sup>48</sup>*Watkins v. Holman*, (1842) 16 Pet. (U.S.) 25, 10 L. Ed. 873; *Hawley & King v. James*, (1838) 7 Paige (N.Y.) 213, 32 Am. Dec. 623; *Fall v. Fall*, (1905) 75 Neb. 104, 113 N. W. 175, 121 Am. St. Rep. 767; *Caldwell v. Newton*, (1917) 99 Kan. 846, 163 Pac. 163.

<sup>49</sup>*Bullock v. Bullock* (1894) 52 N. J. Eq. 561, 30 Atl. 676.

<sup>50</sup>1 Wharton, *Conflict of Laws*, 3rd ed., sec. 289a; *Watts v. Waddle*, (1832) 6 Pet. (U.S.) 389, 8 L. Ed. 437; *Corbett v. Nutt*, (1870) 10 Wall. (U.S.) 464, 19 L. Ed. 976; *Hart v. Sansom*, (1884) 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; *Carpenter v. Strange*, (1891) 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.

is located outside the territorial limits of the state. This has not been seriously doubted since the celebrated case of *Penn v. Lord Baltimore*,<sup>51</sup> in which Lord Hardwicke, in England, decreed specific performance of an agreement concerning boundaries to lands situated in America. In the opinion, Lord Hardwicke says that, though a court cannot enforce its own decree in rem, this is no objection to making the decree, for the strict primary decree of a court of equity is in personam and could be enforced by process of contempt in personam and sequestration, which is the proper jurisdiction of a court of equity.

A good statement of the jurisdiction of the equity courts is found in *Mitchell v. Bunch*,<sup>52</sup> in which Chancellor Walworth said:

"The original and primary jurisdiction of this court was in personam merely. The writ of assistance to deliver possession and even sequestration to compel the performance of a decree are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties, to compel obedience to its decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitae*."

Because of the principle that equity acts in personam, where the decree rendered will directly affect only the persons before it, in cases of fraud, trust, or contract, which are cases properly calling for equitable relief, the court can render a decree which indirectly affects foreign lands.<sup>53</sup> It is undoubtedly a settled

<sup>51</sup> (1750) 1 Ves. Sr. 444, 2 White & T., Lead. Cas. Eq. 923.

<sup>52</sup> (1831) 2 Paige (N.Y.) 606, 22 Am. Dec. 669.

<sup>53</sup> Pomeroy, Equity Jurisprudence, 4th ed., sec. 1318, "Where the subject matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts towards it, and it is thus ultimately but indirectly affected by the relief granted." See *Massie v. Watts*, (1810) 6 Cranch (U.S.) 148, 3 L. Ed. 181; *Hart v. Sansom*, (1884) 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; *Carpenter v. Strange*, (1891) 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; *Schmaltz v. York Mfg. Co.*, (1902) 204 Pa. St. 1, 53 Atl. 522.

principle in our courts, today, that courts of equity in proper cases, having personal jurisdiction of the parties, may decree a conveyance of land in another state or country.<sup>54</sup>

These decrees are directed to the parties to the suit,<sup>55</sup> and are not binding upon persons who were not within the jurisdiction of the court.<sup>56</sup> Neither are they an invasion of the sovereignty of the state wherein the lands are located.<sup>57</sup> The decree itself, however, will not pass title to land so located, and without a conveyance by the party who has the legal title, will be of no force and effect.<sup>58</sup>

The court has it in its power to accomplish full relief in such cases, because of its personal jurisdiction over the parties, and to enforce its decree by commanding the defendants to execute a conveyance which will pass a good title to those lands according to the *lex loci rei sitae*.<sup>59</sup> This decree can be enforced by means of sequestration, injunction, and attachment for contempt, or other process against the defendant's person.<sup>60</sup>

<sup>54</sup>1 Wharton, *Conflict of Laws*, 3rd ed., sec. 289a; *Corbett v. Nutt*, (1870) 10 Wall. (U.S.) 464, 19 L. Ed. 976; *Muller v. Dows*, (1876) 94 U. S. 444, 449, 24 L. Ed. 207; *Gardner v. Ogden*, (1860) 22 N. Y. 327, 78 Am. Dec. 192.

<sup>55</sup>*Pardee v. Aldridge*, (1903) 189 U. S. 429, 433, 23 Sup. Ct. 514, 47 L. Ed. 883; *Schmaltz v. York Mfg. Co.*, (1902) 204 Pa. St. 1, 53 Atl. 522.

<sup>56</sup>*Blackman v. Wright*, (1896) 96 Iowa 541, 65 N. W. 843.

<sup>57</sup>In *Farley v. Shippen*, (1794) *Wythe (Va.)* 135, the court said: "Some of the defendants' counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. To this shall be allowed the full force of a good objection, if those who urge it will prove that the sovereignty of that state would be violated by the Virginia Court of Equity decreeing a party within its jurisdiction, to perform an act there, which act voluntarily performed anywhere, would not be such violation." See *Hotchkiss v. Middlekauf*, (1899) 96 Va. 649, 655, 32 S. E. 36, 43 L. R. A. 806.

<sup>58</sup>1 Wharton, *Conflict of Laws*, 3rd ed., sec. 289a. In *Watkins v. Holman*, (1842) 16 Pet. (U.S.) 25, 10 L. Ed. 873, McLean, Justice, at page 56 said, "But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." See *Corbett v. Nutt*, (1870) 10 Wall. (U.S.) 464, 19 L. Ed. 976; *Fall v. Eastin*, (1909) 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853; *Froelich v. Swafford*, (1914) 35 S. Dak. 35, 150 N. W. 476, 893.

<sup>59</sup>In *Phelps v. McDonald*, (1878) 99 U. S. 298, 25 L. Ed. 473, Mr. Justice Swayne said, "Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him." See *Mitchell v. Bunch*, (1831) 2 Paige (N.Y.) 606, 22 Am. Dec. 669; *Meade v. Merritt*, (1831) 2 Paige (N.Y.) 402; *Winn v. Strickland*, (1894) 34 Fla. 610, 16 So. 606.

<sup>60</sup>In *Muller v. Dows*, (1876) 94 U. S. 444, 449, 24 L. Ed. 207, Mr.



It is equally clear that, in case the defendant is recalcitrant or leaves the jurisdiction without executing the conveyance required, the court cannot execute a deed to this land which will pass a good title, or which will be recognized by the courts of the *loci rei sitae*.<sup>61</sup> Likewise a deed by a commissioner, appointed by the court to execute the conveyance of the property, will be of no effect.<sup>62</sup>

As between the parties to the suit, however, in case there is no conveyance, the decree is conclusive of all the rights and equities of the parties adjudicated therein, when pleaded in the courts of the state in which the land is located, as a cause of action or as a defense to a suit.<sup>63</sup>

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Justice Strong said, "It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title." See *Penn. v. Lord Baltimore*, (1750) 1 Ves. Sr. 444, 2 White & T., Lead. Cas. Eq. 923; *Newton v. Bronson*, (1856) 13 N. Y. 587, 67 Am. Dec. 89.

<sup>61</sup>*Watkins v. Holman*, (1842) 16 Pet. (U.S.) 25, 10 L. Ed. 873; *Corbett v. Nutt*, (1870) 10 Wall. (U.S.) 464, 19 L. Ed. 976; *Seixas, Syndic. v. King, Jr.*, (1887) 39 La. Ann. 510, 2 So. 416; *Winn v. Strickland*, (1893) 34 Fla. 610, 16 So. 606.

<sup>62</sup>In *Watts v. Waddle*, (1832) 6 Pet. (U.S.) 389, 8 L. Ed. 437, Mr. Justice McLean in commenting about a deed given by a commissioner of the court, at page 399, said, "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." See *Watkins v. Holman*, (1842) 16 Pet. (U.S.) 25, 10 L. Ed. 873; *Corbett v. Nutt*, (1870) 10 Wall. (U.S.) 464, 19 L. Ed. 976; *Fall v. Eastin*, (1909) 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853.

<sup>63</sup>2 Black, Judgments, 2nd ed., sec. 872, ". . . A chancery court in one state, having acquired jurisdiction over the persons of the litigants, may enforce a trust, or the specific performance of a contract, in relation to lands situate in another state, and although the decree in such case, or the deed of a master executed in pursuance thereof, cannot operate to transfer the title of such lands, yet the decree is binding upon the consciences of the parties, and it concludes them in respect to all matters and things properly adjudicated and determined by the court and when the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense, in the courts of the state where the land is situated. And it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." See also, (1919) 17 Mich. L. Rev. 527.

In *Burnley v. Stevenson*, (1873) 24 Ohio St. 474, 15 Am. Rep. 621, the court held that as to the decree directing the heirs to convey, the court had jurisdiction over the parties, and the decree was in personam and bound the consciences of those against whom it was rendered. They were bound to

The Restatement of the Conflict of Laws<sup>64</sup> adopts the following statement of this power:

"A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, although to carry out the decree may affect a thing in another state."

The following comments are listed under this statement:

"(a) A court may order a party who is subject to its jurisdiction to execute and deliver a deed of land situated in another state."<sup>65</sup>

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convey, and this duty might have been enforced by the Kentucky court by attachment as for contempt. The fact that the conveyance was not made does not affect the validity of the decree so far as it determined the equitable rights of the parties to the land. The court also held that a decree, rendered by a court of a sister state having jurisdiction of the parties and the subject matter, is entitled to the same force and effect which it had in the state where pronounced. The court then said that the courts of Ohio could not enforce the performance of the decree by compelling the conveyance through its process of attachment; but said that when pleaded in the Ohio courts as a cause of action, or as a defense, it must be regarded as conclusive of all the rights and equities which were adjudicated therein. See *Dull v. Blackman*, (1898) 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733.

Justice Mabry, in *Winn v. Strickland*, (1894) 34 Fla. 610, 16 So. 606, said, "Although the decree in such case cannot of itself operate to transfer the title to lands situated out of the state, yet it is binding upon the consciences of the parties, and may conclude them in respect to all matters properly adjudicated and determined by the court. Such is the effect given to foreign judgments and decrees by the constitution of the United States in providing that full faith and credit shall be given in each state to the judicial proceedings of another state and the act of congress directing the manner in which such proceedings shall be proved, and the effect thereof." See *Seixas, Syndic. v. King, Jr.*, (1887) 39 La. Ann. 510, 2 So. 416.

*Dunlap v. Byers*, (1896) 110 Mich. 109, 67 N. W. 1067, holds that the questions which were adjudicated cannot be reopened in the courts of the state wherein the land is located and the findings of the court are res adjudicata. See *Vaught v. Meador*, (1901) 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

In Justice Holmes' special concurring opinion to the case of *Fall v. Eastin*, (1909) 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853, he says that the Washington decree established a personal obligation between the parties. "A personal decree is equally within the jurisdiction of a court having the persons within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska, but the Nebraska court carefully avoids saying that the decree would not be binding between the original parties had the husband been before the court." He then says that the decision is affirmed because they regard the decree as imposing no obligation upon a purchaser with notice, and that the decision, even if wrong, did not deny the Washington decree its full effect. See dissenting opinion of Chief Justice Sedgwick in *Fall v. Fall*, (1905) 75 Neb. 104, 113 N. W. 175, 121 Am. St. Rep. 767; but see *Froelich v. Swafford*, (1914) 35 S. Dak. 35, 150 N. W. 476 & 893.

<sup>64</sup>Restatement No. 2, Conflict of Laws, sec. 102, p. 80.

<sup>65</sup>Illustration: "A brings suit against B in New York for specific performance of a contract to convey land in Connecticut, and B is served with process. The court may order the conveyance."

"(b) If the land can be transferred only by act done by the defendant within the state where the land is,<sup>66</sup> the court of another state has no jurisdiction to order him to transfer the land."<sup>67</sup>

"(c) A court will not order a conveyance of land in another state if, as a preliminary to the conveyance, the court must, according to its laws, order an inspection or valuation."<sup>68</sup>

In regard to the application of the full faith and credit clause to equitable decrees for the conveyance of foreign land, two different views have been taken by the writers. The old orthodox view, that an equitable decree only binds the person to obedience to the court and does not operate at all upon the matter in question, and that the equitable decree is not by law equal to a judgment, is taken by one group,<sup>69</sup> while the other view, that a court of equity is a legal tribunal with power to adjudicate and settle controversies as finally as a court of law,<sup>70</sup> is taken by some modern writers who are anxious to get away from the old dogma.

The orthodox view<sup>71</sup> concedes that a decree for the payment of money will be recognized and enforced in another state for the amounts already due, but, as to future payments, such present decree is not conclusive, for there is no debt and, consequently, there are no existing rights of action.<sup>72</sup>

As to the power of equity courts to decree a conveyance of foreign lands, this view limits the power to those situations in which there is an antecedent obligation by the law of the situs,

<sup>66</sup>As to whether a court of equity, having personal jurisdiction over the defendant, could order him to perform an act in another state, see a discussion of the principles involved under topic 3 of this article.

<sup>67</sup>Illustration: "Land in state X can be transferred only by livery of seisin where the land lies. A sues B in state Y for specific performance of a contract to convey land in X, and B is served with process. The court will not order the conveyance." It is to be noted that no court will knowingly make a decree which is contrary to the laws of the *lex loci rei sitae*. *Waterhouse v. Stansfield*, (1852) 10 Hare 254; see also (1922) 35 Harv. L. Rev. 610.

<sup>68</sup>Illustration: "A petition is filed in a court of state X for partition of lands in state Y. By the law of X a partition is granted only after an officer of the court has viewed and appraised the land and recommended a division of the land or a sale. The court will not order a partition."

<sup>69</sup>Langdell, *Summary of Equity Pleading*, 2nd ed., (1883) 37, sec. 43, n. 4.

<sup>70</sup>Barbour, *The Extra-Territorial Effect of the Equitable Decree*, (1919) 17 Mich. L. Rev. 527; Cook, *The Powers of Courts of Equity* (1915) 15 Col. L. Rev. 37, 106, 228.

<sup>71</sup>See (1908) 21 Harv. L. Rev. 210.

<sup>72</sup>The Restatement of the Conflict of Laws, Tentative Draft No. 5, has apparently adopted the orthodox view. In sec. 483 it is stated that no right created by a judgment, except a judgment for the payment of money, will be enforced in another state by action on the judgment.

as otherwise the decree would be without force, for it cannot create an obligation as to land outside its jurisdiction. The enforcement of a contract to convey specific land and the enforcement of a trust in regard to specific land are examples of antecedent obligations. There exists little dispute about an equity court's power to act in these situations. An example of an obligation which is not antecedent would be where a court, in a divorce proceeding, orders one of the parties to convey foreign lands. It is at this point that the dispute arises.

Professor Ernest G. Lorenzen, in an article discussing the relative merits of the two views,<sup>73</sup> says that the full faith and credit clause applies only to substantive rights and not to matters of procedure, so that, if the equitable decree does not establish an obligation, that is, a right-duty relation, but is merely a method for enforcement of existing legal relations, the decree does not come within the purview of the full faith and credit clause. In this article, an early statement by Professor Beale is cited,<sup>74</sup> in which he takes the position that an equitable decree, which does not rest upon an antecedent obligation, does not create substantive rights, but creates only a personal duty toward the court rendering the decree.

This view has been criticized by Professor Barbour<sup>75</sup> and by Professor Cook,<sup>76</sup> on the theory that to adopt this view is to assume that equity has made no progress since the time of Coke.

Professor Lorenzen, citing cases and authority, proceeds to show that equitable decrees for the payment of money have been recognized in other states as *res judicata*, as merging the original cause of action, and as creating an equitable right which may be enforced in other jurisdictions by a new suit. Those subscribing to the orthodox view contend that effect is given to foreign

<sup>73</sup>(1925) 34 Yale L. J. 591.

<sup>74</sup>3 Beale, Summary of the Conflict of Laws, Cases on the Conflict of Laws, (1902) 536, 537.

<sup>75</sup>(1919) 17 Mich. L. Rev. 528, 539, 544: "When a judge sitting in equity today declares that a foreign decree ordering the conveyance of land creates no obligation, but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke. . . ." "The notion that an equitable decree which orders the conveyance of land cannot create a binding obligation is the last survival of an old dogma which is today shorn of most of its force. . . ." "So far then as the power of a court of equity is concerned, there appears to be no reason why a foreign decree should not create a binding obligation though it concern mediately domestic land."

<sup>76</sup>(1915) 15 Col. L. Rev. 228, 233.

equitable decrees for the payment of money, because, by legislation, they have been placed upon the same footing as judgments at law and not because the new obligation created by the equitable decree arises from principles of equity.

Professor Lorenzen cites cases which uphold the position that since 1873 decrees for the conveyance of land have been regarded by our courts as *res judicata*, and that, if pleaded as a basis or cause of action or defense in the courts of other states, they are entitled to the force and effect of record evidence of the equities therein. These decrees create equitable duties which will be recognized and enforced in other states, including the state in which the land is situated. Because the decree is conclusive evidence of the defendant's duty to convey, and binding on the defendant, whether right or wrong, he says that it is the foreign decree itself which is being enforced in the other state, and not the original cause of action.<sup>77</sup> He further says that since actions at law lie to enforce legal obligations created by foreign judgments, there is no inherent reason why a bill in equity should not be available to enforce obligations created by foreign equitable decrees, since in modern law they create equitable rights.

After submitting that Mr. Justice Holmes, in *Fall v. Eastin*,<sup>78</sup> gives the key to the final solution of the problem,<sup>79</sup> Professor Lorenzen says that under the full faith and credit clause, the obligation imposed by a foreign decree is, as between the parties, binding upon the courts of sister states, but not binding, under the federal constitution, upon third parties including third parties with notice of the foreign decree. Whether foreign equitable decrees will be recognized by the courts of the situs as to such third parties will depend upon the policy of the particular state.

Since there is no inherent difference between equitable decrees for the payment of money and equitable decrees for the doing of some other act, since between courts of this country, as much effect should be given to judgments or decrees of a sister state, apart from the requirements of the full faith and credit clause, as is consistent with the interests of the forum, and since a conveyance of lands, made under the compulsion of a decree of a court of equity of another state, is recognized, it would seem as though the decree itself should be recognized in the state

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<sup>77</sup>But see (1908) 21 Harv. L. Rev. 210.

<sup>78</sup>(1909) 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853.

<sup>79</sup>See note 63.

wherein the land is located, in cases where the defendant has left the state without complying with it. He has had his day in court and there is no reason for allowing him to litigate the matters over again.<sup>80</sup>

### III

#### THE POWER OF A COURT OF EQUITY TO RESTRAIN OR COMPEL THE DOING OF SOME ACT OUTSIDE THE TERRITORIAL LIMITS OF THE STATE

The Restatement is in accord with the proposition that equity courts have power to enjoin trespass on foreign lands. The rule adopted therein is that a state can exercise, through its courts, jurisdiction to forbid a person who is subject to its jurisdiction to do an act in another state.<sup>81</sup> The comment<sup>82</sup> on this rule is that the decree can be obeyed by remaining within the state which issues the decree, and, therefore, the decree will not at all affect conditions in the other state.

In an article<sup>83</sup> by Professor Beale<sup>84</sup> the same view is expressed. As examples of this view he cites the case of *Alexander v. Tolleston Club*,<sup>85</sup> in which an injunction was issued by the Illinois court preventing the defendant from interfering with a right of way claimed by the plaintiff over lands in Indiana; the case of *Philadelphia Co. v. Stimson*,<sup>86</sup> in which an injunction was granted restraining the defendant from causing criminal proceedings to be instituted in Pennsylvania against the plaintiff; and *French v. Maguire*,<sup>87</sup> in which the defendant was enjoined from exhibiting a drama in California in violation of plaintiff's rights in that drama.

Other cases in support of this doctrine are *Great Falls Manufacturing Co. v. Worster*,<sup>88</sup> in which a citizen of New Hampshire was restrained from going into Maine and there committing acts injurious to the property of plaintiff situated there; *Munson*

<sup>80</sup>These conclusions are in substance those adopted by Professor Lorenzen.

<sup>81</sup>Restatement No. 2, Conflict of Laws, sec. 101, p. 87; see also (1918) 31 Harv. L. Rev. 646.

<sup>82</sup>Restatement No. 2, Conflict of Laws, p. 87.

<sup>83</sup>(1913) 26 Harv. L. Rev. 283, 293 et seq.

<sup>84</sup>Reporter of Restatement of the Conflict of Laws.

<sup>85</sup>(1884) 110 Ill. 65.

<sup>86</sup>(1912) 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570.

<sup>87</sup>(1878) 55 How. Pr. (N.Y.) 471.

<sup>88</sup>(1851) 23 N. H. 462.

*v. Tryon*,<sup>89</sup> where defendant was restrained from committing acts of trespass and waste on lands outside the jurisdiction of the court; and *Jennings v. Beale*,<sup>90</sup> where the defendant, because of a contract with the plaintiff, was enjoined from committing trespass upon mining lands located outside the jurisdiction of the court.

In *Western Union Telegraph Co. v. Western and Atlantic R. R.*,<sup>91</sup> plaintiff sought to restrain the defendant from connecting wires to plaintiff's poles and lines running from Tennessee to Georgia. The court granted the relief in so far as the defendant or its agents were within the state of Tennessee, but refused it as to the part in Georgia, saying that it would not make a decree which it could not enforce by its own authority, and which would be mere words, having no sanction by way of making them effective. It is submitted, however, that the court could have compelled the defendant to execute a bond,<sup>92</sup> or could have sequestered the defendant's property within the state of Tennessee. Therefore, the court would not be powerless to punish for contempt as it assumed that it was. It is also submitted that lack of power to enforce the decree may be a reason against entertaining jurisdiction, but it has nothing to do with the validity of the decree when made.<sup>93</sup> In order to compel performance of the decree, it is not necessary that the defendant have property within the state which could be sequestered,<sup>94</sup> nor is it necessary that the court have power to enforce the decree in rem.<sup>95</sup>

An injunction was sought in *Kirklín v. Atlas Savings and Loan Association*<sup>96</sup> to restrain defendant from interfering with plaintiff's possession of lands in Georgia, and for the removal of its claims as a cloud upon their right thereto. The dictum of Wilson, J., was to the effect that the mere fact that the land was in Georgia interposed no objection to granting the relief

<sup>89</sup>(1867) 6 Phila. Rep. 395.

<sup>90</sup>(1893) 158 Pa. St. 283, 27 Atl. 948.

<sup>91</sup>(1874) 8 Baxter (Tenn.) 54.

<sup>92</sup>(1921) 30 Yale L. J. 865.

<sup>93</sup>*Michigan Trust Co. v. Ferry*, (1912) 228 U. S. 346, 33 Sup. Ct. 550, 57 L. Ed. 867; *Frick v. Hartford Life Ins. Co.*, (1922) 98 Conn. 251, 119 Atl. 229; *March v. Eastern Ry.*, (1860) 40 N. H. 548, 77 Am. Dec. 732; but see *White v. White*, (1835) 7 G. & J. (Md.) 208.

<sup>94</sup>*Arglasse v. Muschamp*, (1682) 1 Vern. 77, 135; but see *Wicks v. Caruthers*, (1884) 13 Lea (Tenn.) 353.

<sup>95</sup>*Massie v. Watts*, (1810) 6 Cranch (U.S.) 148, 3 L. Ed. 181; *Penn v. Lord Baltimore*, (1750) 1 Ves. Sr. 444, 2 White & T., Lead. Cas. Eq. 923; *Johnson v. Kimbro*, (1859) 3 Head (Tenn.) 557, 75 Am. Dec. 781.

<sup>96</sup>(1900) (Tenn. Chan. App. 1900) 60 S. W. 149.

sought, the court having jurisdiction over the person of the defendant. He said:

. "In other words, where the proper parties are before the court, and a proper case is made out by the evidence, it is no objection to its action that the res, the subject matter of the controversy, whether it be real or personal property, is without the state; and it has the power to compel the defendant to do all things appropriate to carry out its decree."

The relief was refused in this case because the evidence did not warrant it.

*Butterfield v. Nogales Copper Co.*,<sup>97</sup> was a case where the relief sought was that defendant be enjoined from selling, encumbering, and in any manner disposing of property situated in Mexico. Sloan, J., said:

"It is a settled doctrine that a court of equity, having acquired jurisdiction over the person of the defendant, has jurisdiction to enter any decree which may concern or affect lands situated in a foreign state to the same extent and as fully as though these were situated within the state where the court has its situs." In another case<sup>98</sup> an injunction was granted restraining the defendant from interfering with plaintiff's right to cut and remove timber in Arkansas.

In a discussion<sup>99</sup> of the situation where courts of equity are called upon to enjoin a foreign trespass, the case of *Lindsley v. Union Silver Star Mining Co.*,<sup>100</sup> is discussed. Relief, in this case, was refused on the ground that possession of a foreign mining lode was the foundation of the controversy and was not merely incidental to the enforcement of a contract, or trust, or relief from fraud. Since the property, the possession of which was in controversy, was located in another state, the action, in its essence, was local. In the discussion the view is taken that the case is based upon the analogy of an almost universal rule of law, which has its origin in a distinction between local and transitory actions, that an action will not lie for injuries to foreign real estate.<sup>101</sup> The result is criticised inasmuch as the plaintiff is greatly hindered in ob-

<sup>97</sup>(1905) 9 Ariz. 212, 80 Pac. 345.

<sup>98</sup>*Anderson-Tully Co. v. Thompson*, (1915) 132 Tenn. 80, 177 S. W. 66.

<sup>99</sup>(1902) 15 Harv. L. Rev. 579.

<sup>100</sup>(1901) 26 Wash. 301, 66 Pac. 382.

<sup>101</sup>The Restatement of the Conflict of Laws, Tentative Draft No. 5, Sec. 624, apparently with reluctance, adopts the rule that no action can be maintained in one state to recover compensation for a trespass upon or injury to land in another state. But see, *Little v. Chicago, etc., Ry.*, (1896) 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421. See also (1920) 5 MINNESOTA LAW REVIEW 63.



taining adequate remedy, and it is deemed wiser to disregard the common law rule, to which equity is not generally committed, and to grant the relief which equity has power to give.

A more serious problem is encountered when a court of equity is called upon to make a decree which by its terms is to be carried out in another state.

The Restatement expressly says that a state cannot exercise, through its courts, jurisdiction to make a decree which by its terms is to be carried out in another state, except in cases where it orders a person subject to its jurisdiction to institute proceedings in a court or other governmental agency in another state, or to defend or appear in such proceedings.<sup>102</sup>

It is at this point that the authorities differ. Two conflicting views are expressed, the one adopted by the Restatement, that an equity court lacks jurisdiction to act; the other that it is merely a matter of discretion in the court as to whether they will act or not and that it is not at all a question of jurisdiction.

The reason given by the Restatement in support of the view there adopted is that, if the court commands an act to be done, it expressly interferes with the course of conduct in the territory of another state.<sup>103</sup> Professor Beale in his article<sup>104</sup> expresses the same view as that adopted by the Restatement, saying that, according to the generally accepted doctrine, a court of equity will order no act, not even a ministerial act, to be done outside the territory over which the court has power.

As has been stated before, the reasons given for refusing to order a positive act in another state are, first, the inability to enforce the decree, and, second, the interference with the sovereignty of the other state.<sup>105</sup>

It has been contended<sup>106</sup> that interference with the sovereignty of the other state is a circumstance appealing to the discretion of the chancellor rather than a bar to the jurisdiction, and although in a particular case it may be so great as to be a ground for denying relief, it should not be used as a solving phrase. As solutions to the objection that the court is unable to enforce the decree, it has been suggested that the act be done by agent, that the defendant's property within the state be sequestered, and that the defendant

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<sup>102</sup>Restatement No. 2, Conflict of Laws, Sec. 99, p. 84.

<sup>103</sup>Commentaries on Conflict of Laws, Restatement No. 2, p. 27.

<sup>104</sup>(1913) 26 Harv. L. Rev. 283, 293 et seq.

<sup>105</sup>(1922) 35 Harv. L. Rev. 610; (1917) 31 Harv. L. Rev. 646.

<sup>106</sup>(1922) 35 Harv. L. Rev. 610.

put up a bond to secure performance.<sup>107</sup> It is submitted that any of these methods will enable the court sufficiently to enforce its decrees to the plaintiff's satisfaction.

To determine which of these two positions is the correct one, a study of the cases, in which such relief was asked, is essential, a study not only of the cases in which positive action was asked, but also of those in which, to carry out effectively the terms of the decree, a positive act in another state was necessary.

*Madden v. Rosseter*<sup>108</sup> was a case in which the plaintiff, a resident of New York, and the defendant, a resident of California, were joint owners of a thoroughbred stallion. The defendant had the possession and use of the stallion in California during the seasons of 1919 and 1920 under an agreement whereby plaintiff was to have him for use in Kentucky during the seasons of 1921 and 1922. At the opening of the 1921 season plaintiff sued in New York praying a mandatory injunction ordering the defendant to ship the stallion to Kentucky, and the appointment of a receiver with power to proceed to California to get the stallion. The defendant was personally served with process in New York and appeared by an attorney. In granting the relief sought, Ford, J., said:

"Plaintiff's rights have been prejudiced, and further irreparable damage is threatening him. There must be a remedy, and I do not believe this court is powerless to give it to him. The relief prayed for seems to be the most practicable and appropriate which is available to him."

As to the difficulty of enforcing this decree, should the defendant refuse to comply with it, the court said that the courts of sister states may be relied upon to aid in serving the ends of justice whenever its own process falls short of effectiveness. In a review of this case<sup>109</sup> the view is taken that where the defendant would be required to go into a foreign jurisdiction, and there do affirmative acts, relief may be denied upon the grounds of expediency, since interference with a foreign sovereignty is undesirable, and since theoretically the decree would become unenforceable upon the departure of the defendant, though the latter difficulty may be eliminated by requiring him to act by agent or by requiring bond. The writer further states that the more recent tendency

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<sup>107</sup>(1921) 30 Yale L. J. 865; (1922) 35 Harv. L. Rev. 610.

<sup>108</sup>(1921) 114 Misc. Rep. 416, 187 N. Y. S. 462, aff'd (1921) 196 App. Div. 891, 187 N. Y. S. 943.

<sup>109</sup>(1921) 30 Yale L. J. 865.

is to attach less weight to these difficulties.<sup>110</sup> Another writer<sup>111</sup> justifies the case because of the peculiar facts in the case which warranted the relief, and because of the fact that had application been made to the California courts for a decree to deliver the stallion in Kentucky, it would be just as objectionable as that of the New York court, since to compel the defendant to do his full duty would have been to command an act in another state.

In *Kempson v. Kempson*,<sup>112</sup> plaintiff and defendant, wife and husband, had a matrimonial domicile in New Jersey. The defendant left New Jersey and went to North Dakota for the purpose of obtaining a divorce, and there falsely stated that he had resided there for three months. The plaintiff sought to enjoin further prosecution of the action, and the New Jersey court issued the injunction, yet the defendant disregarded it, and later obtained a decree in North Dakota. Later he was attached in New Jersey, fined for contempt, and put in jail. The decree required the defendant to present the truth to the North Dakota court which rendered the decree, and in good faith urge that its decree be set aside. This case has been criticized as being an unwarranted departure from the settled principle,<sup>113</sup> and has been justified by the Restatement, under section 100,<sup>114</sup> which is to the effect that a state can exercise, through its courts, jurisdiction to order a person subject to its jurisdiction to institute proceedings in a court or other governmental agency in another state, or to defend or appear in such proceedings.<sup>115</sup>

In both of the above cases it cannot be denied that the court commanded the defendant to do affirmative acts in another state. In *Madden v. Rosseter*,<sup>116</sup> the defendant was ordered to ship the

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<sup>110</sup>See also (1917) 31 Harv. L. Rev. 117.

<sup>111</sup>(1922) 35 Harv. L. Rev. 610.

<sup>112</sup>(1902) 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682.

<sup>113</sup>(1913) 26 Harv. L. Rev. 283, 293 et seq.

<sup>114</sup>Restatement No. 2, Conflict of Laws, sec. 100, p. 86.

<sup>115</sup>In the Commentaries on Conflict of Laws, Restatement No. 2, sec. 100, p. 27, it is stated, "Where, however, a state opens its tribunals to all parties who have suffered legal wrong or who have a claim upon things within the state, it is no international offense to that state to order a person to take advantage of the offer of the state and enter the tribunal. It has therefore always been held that a court may properly order a defendant to institute a suit in the court of another state or to make any proper application to that court."

<sup>116</sup>(1921) 114 Misc. Rep. 416, 187 N. Y. S. 462, aff'd. (1921) 196 App. Div. 891, 187 N. Y. S. 943.

stallion from California to Kentucky, which was the principal relief sought. The incidental relief granted was that a receiver be appointed with power to proceed to California to get the stallion. The *Kempson Case*<sup>117</sup> can be explained upon the principle adopted by the Restatement, although it clearly appears that the defendant will have to do affirmative acts in North Dakota to comply with the decree. It is interesting to note that in the *Kempson Case* the court merely required the effort on the part of the defendant to comply with the terms of the decree.<sup>118</sup>

The relief sought in *People of New York v. Central R. R.*<sup>119</sup> was abatement of a nuisance in New Jersey. The New York court refused to abate the nuisance<sup>120</sup> on the ground that, if it granted the abatement order, and New Jersey refused to comply with the terms, it would then have to send a sheriff to execute the judgment and it could not protect him or punish persons who resisted him. The court then said that such a judgment must be utterly void for want of jurisdiction in the court to render the same.<sup>121</sup> If the only objection to the jurisdiction in this case is the lack of power to enforce the decree, it seems as though this could be obviated. Since the court had personal jurisdiction over the defendant, it could order the defendant to act by agent, sequester its property within the state, or compel it to execute a bond to secure performance of the decree.

In a number of the western states, in cases involving rights to water from interstate streams for irrigation purposes, the relief granted frequently called for affirmative acts in another state. In *California Development Co. v. New Liverpool Salt Co.*, (*The Salton Sea Cases*),<sup>122</sup> the defendant negligently constructed intakes

<sup>117</sup>(1902) 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682.

<sup>118</sup>Dixon, J., said, "Only the court that rendered the decree can vacate it. True, if a party be commanded by the court to do a certain thing, and afterwards he satisfies the court that he has not the power to do it, the court will ordinarily relieve him from the order. But when it appears at the outset that the thing to be done is not within the control of the party to be enjoined, but yet that his effort may induce its accomplishment, a more reasonable course for the court is to require the effort, not the result. We therefore think that this part of the order should be modified so as to require the defendant to present the truth to the court of North Dakota, and in good faith urge that its decree be set aside. When that is shown to have been done, and the fine and costs have been paid, the defendant should be released."

<sup>119</sup>(1870) 42 N. Y. 283. See (1918) 31 Harv. L. Rev. 646.

<sup>120</sup>See *Mississippi & Missouri R. R. v. Ward*, (1862) 2 Black (U. S.) 845.

<sup>121</sup>See (1904) 17 Harv. L. Rev. 572.

from the Colorado river both in California and Mexico, so that, when heavy rains and floods came, the lands of plaintiff, located in the Salton Basin, were flooded, and he was damaged. Plaintiff sought an injunction to restrain the defendant from diverting said waters unless suitable headgates were provided. The court enjoined the defendant from taking any more water than was necessary and from permitting waste waters to run back into the Salton Basin. The defendant objected to the court's jurisdiction to require it to erect headgates in Mexico, which was the only effective and permanent means of controlling the river. Morrow, J., said:<sup>123</sup>

"The injury charged in the present case was an injury to property within the jurisdiction of the court, and the party charged with the commission of the injury was also within the jurisdiction of the court. The cause of the injury was not serving a useful purpose for any one, and the relief asked for was that the party causing the injury might be enjoined from continuing to injure complainant's property within the jurisdiction of the court. Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

The Restatement justifies this case by saying that an injunction may be granted against the doing of an act within the state, even though the party enjoined can obey the injunction by acting in another state or causing an act to be done there.<sup>124</sup> Professor Beale, adopting a similar view, said, in a review of this case:<sup>125</sup>

"The case seems rightly decided on the facts; and it is no real extension of principle. The relief asked is an injunction; and, as has been seen, an injunction may always be granted against doing an act abroad. Here the act abroad injures land within the jurisdiction of the court, and the act is therefore tortious by our law. If in such a case the defendant has by his wrongful conduct put himself into a position where he cannot refrain from further tort, except by doing some act abroad, it is his own affair; the court merely enjoins the continuance of the tort."

<sup>122</sup>(C.A.A. 9th Cir. 1909) 172 Fed. 792, certiorari denied, 215 U. S. 603, 30 Sup. Ct. 405, 54 L. Ed. 345.

<sup>123</sup>At p. 813.

<sup>124</sup>Restatement No. 2, Conflict of Laws, sec. 102, sub. sec. c, p. 90.

<sup>125</sup>(1913) 26 Harv. L. Rev. 283, 293 et seq.

As to the power of the courts to grant such relief under such circumstances and facts there can be little doubt. On principle, such decree is necessary to protect property within the jurisdiction of the court, and also to do justice in the case.

Still another explanation has been made of the court's jurisdiction to render the decree in the *Salton Sea Cases*. Advocates of this view take the position that the decree was negative in its nature,<sup>126</sup> and, therefore, the limitation on the jurisdiction of the court was merely a question of expediency.<sup>127</sup> The question which presents itself under this position is whether the jurisdiction is to be determined by the form of the decree. If the decree must be expressed in the affirmative, and calls for the doing of affirmative acts outside the jurisdiction of the court, is that a limitation on the jurisdiction of the court? If the decree can be expressed in the negative, even though to carry out the decree affirmative acts have to be performed outside the jurisdiction, is it merely a matter of discretion as to whether the court will act or not, and not a question of jurisdiction at all? Could it be possible that in order to protect local property from injury, where such injury could only be remedied by the doing of some affirmative act outside the state, that the decree would be void if it expressly ordered such act to be done, yet good if it merely ordered the defendant to refrain from committing the injury to this land, although the only possible way of complying with the decree would be by some act which the court ordered in granting the affirmative relief? Could a difference in the form of the decree determine the jurisdiction of the court to act under such circumstances? It is submitted that it could not, and that the form of the decree is not a test of the jurisdiction of the court.

In *Rickey Land and Cattle Co. v. Miller & Lux*,<sup>128</sup> the plaintiff owned lands in Nevada and used the water from the Walker river for irrigation purposes. The defendant owned lands in California

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<sup>126</sup>(1918) 31 Harv. L. Rev. 646; (1910) 23 Harv. L. Rev. 390.

<sup>127</sup>In (1910) 23 Harv. L. Rev. 390, it was said, "So the defendant in the suit could not successfully plead lack of jurisdiction; and the prevention of local injury fully justified a decree which the court knew would indirectly lead to affirmative action in Mexico. It is seen, therefore, that the limitation on the power of a court of equity arising from a foreign situs of the property in controversy is, in cases of affirmative relief, absolute, because of the resulting lack of jurisdiction in the sovereign state; while if negative relief is sought, the limitation becomes a mere question of expediency."

<sup>128</sup>(C.C.D. Nev. 1904) 127 Fed. 573; (C.C.D. Nev. 1906) 146 Fed. 574; (C.C.A. 9th Cir. 1907) 152 Fed. 11.

and used water from this same river. The plaintiff brought suit in the federal court in Nevada, seeking to enjoin the defendant from diverting water from the said river above the points where the plaintiff so diverts the same in such manner or to such extent as to deprive plaintiff of any of the water which he claimed by prior appropriations. The defendant's defense was that he had a right by the law of riparian rights existing in California and by appropriation. After a temporary injunction had been issued against him, he brought suit in California against the plaintiff, to establish his prior right. Plaintiff then brought suit in the federal court in Nevada to enjoin prosecution of this suit, and the injunction was granted on the ground that the issues presented were the same and the Nevada federal court had acquired jurisdiction before the California action was begun. On the appeal of this case to the United States Supreme Court,<sup>129</sup> the decision was affirmed. Mr. Justice Holmes said:

"We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seised should proceed to the determination without interference, on the principles now well settled as between courts of the United States and of the state."

In the Nevada federal court, the basis of the decision was that this was a wrongful diversion of the water by the plaintiff in California,<sup>130</sup> and it is upon this ground that the Restatement justifies the case. Under section 102, which deals with a case where a court makes an order which is practically certain to involve the doing of an act in another state, it is said:<sup>131</sup>

"If, however, the act must be done simply because the defendant had, by his own wrong, put himself in a position where he cannot avoid acting in the other state or doing a wrong in the state where the court sits, that court should not be ousted of its jurisdiction to prevent a wrong being committed within its territory merely because the defendant is likely, in obeying the injunction, to do an act elsewhere. It is not really the court which orders the act, but the defendant's illegal act which has placed him in an unfortunate position."<sup>132</sup>

The Supreme Court, in its decision, did not pass upon the question as to whether or not the act was wrongful, but affirmed

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<sup>129</sup>(1910) 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032.

<sup>130</sup>(C.C.D. Nev. 1904) 127 Fed. 573, 586.

<sup>131</sup>Commentaries on Conflict of Laws, Restatement No. 2, sec. 102, p. 27.

<sup>132</sup>See also (1913) 26 Harv. L. Rev. 283, 293 et seq.

the decision on the sole ground that where there was concurrent jurisdiction the first to acquire jurisdiction retained it.

The objection to holding this to be a wrongful act is that it assumes the whole question of jurisdiction. According to California law, the plaintiff's acts were not wrongful, and to say that they were is to assume that Nevada had jurisdiction over the whole matter. Clearly, according to Nevada law, the plaintiff was entitled to have the defendant enjoined from diverting water in California from this stream. To accomplish this result, it was necessary for the defendant to do affirmative acts in California. If there had been a direct injury to this land in Nevada, caused by a wrongful act of the defendant outside the state, the case could be explained in the same way as the *Salton Sea Cases*—that to prevent an injury to land within the state, caused by the wrongful conduct of defendant outside the state, the defendant can be enjoined from further tort, even though it will require positive action by him in another state. Here, of course, it can be argued that local land is injured because of its depreciation in value caused by the defendant's acts in California, but there is not a direct positive injury to lands as in the *Salton Sea Cases*. We then have a situation in which a court of equity is asked to prevent an injury to local land caused by a rightful act in another state. It would be clear that had this act by defendant in California been wrongful, the Nevada court, having jurisdiction over the parties, could enjoin such wrongful act, even to the extent of causing defendant to do positive acts in another state. It has been stated that had two states similar laws as to the rights to water from interstate streams, it would clearly be within the jurisdiction of the court of the state in which the injury occurred to determine the parties' rights in the case,<sup>133</sup> as in that case the relative rights of appropriators of water from interstate streams would be the same.<sup>134</sup>

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<sup>133</sup>(1911) 73 Cent. L. J. 189, 190.

<sup>134</sup>No attempt is here made further to explain this case, as to do so would be to go into the whole law of water rights in the western states to determine finally who shall say whether an act is wrongful, and, as between upper and lower states, which rights shall be superior. It will suffice to state the problem in connection therewith.

In the western states there exist two systems of water law:

(1) The riparian system, which holds that each riparian owner has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian owners likewise to make



*Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.*,<sup>135</sup> was a suit commenced in Idaho to determine conflicting water rights alleged by the parties to have been acquired by prior appropriations. It appears that the defendant's land was situated in Nevada and the plaintiff's in Idaho. The defendant challenged the court's jurisdiction to decree that they use the waters only upon certain lands; that they install automatic measuring devices in their canals and ditches; that plaintiffs shall have the right perpetually to go upon defendant's land in Nevada for the purpose of inspecting such devices; and that defendant keep records of the amount of water diverted. It was held that where the defendant has been personally served and appears in the court he may be enjoined from doing things in another state to the detriment of plaintiff's rights, and although the court by its decree cannot directly affect the property in Nevada, it can, acting in personam, coerce action respecting it. Wolverton, J., said:<sup>136</sup>

"It is furthermore necessary, to protect the plaintiff against encroachments of the defendant, that the water be measured. The proper measurement is a duty personal to the defendant. It is altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and, for the protection of the plaintiff, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam and not

a reasonable use. This does not depend upon priority of time.

(2) The appropriation system, which holds that the water user who first puts to beneficial use the water of a stream acquires thereby the first right to the water, to the extent reasonably necessary to his use, and that he who is second to put water to beneficial use acquires second right, and so on.

The question then is, in case of dispute between two states having conflicting systems or even the same systems of water law, who is to decide as to the use of water from an interstate stream? It is doubtful if Congress has the authority to establish a principle for the settlement of an interstate stream controversy, because of the constitutional limitations on its power. The Supreme Court of the United States, by reason of the power given it by the constitution, has jurisdiction over the controversies between states, and necessarily is the tribunal which must finally determine the relative rights to the use of water from interstate streams by citizens of different states. For a discussion of this problem and of the cases of *Kansas v. Colorado*, (1907) 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, and *Wyoming v. Colorado*, (1922) 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999, see (1923) 36 Harv. L. Rev. 960.

<sup>135</sup>(C.C.A. 9th Cir. 1917) 245 Fed. 9.

<sup>136</sup>*Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.*, (C.C.A. 9th Cir. 1917) 245 Fed. 9, 29.

directly upon the res, and were and are within the courts equitable jurisdiction to determine and declare."

It has been contended<sup>137</sup> that the rule against interfering with a foreign sovereign precludes a court of equity from ordering affirmative action outside its jurisdiction, but that this case is a real exception, where the court, to prevent a domestic tort, ordered the defendant to take affirmative action in a foreign jurisdiction as the only efficient means of prevention. After stating that the case represents a culmination of a tendency evinced in the decisions of the federal courts for the past decade to disregard state lines when, in the interest of efficient administration of justice, it is necessary to do so, the writer said that that part of the decree which gave the plaintiff a right to go on lands and inspect the meters was an *in rem* decree affecting a foreign res directly, and was an interference with a foreign sovereign, and could not be supported.

The question which arises here is whether plaintiff, while in the act of inspecting the meters on land of defendant in Nevada, would have a good defense to an action of trespass brought against him by the defendant in Nevada. If he set up the decree of the Idaho court as a defense to the action, would the Nevada courts be bound to recognize it and give it full faith and credit? As has been previously pointed out, the effect of an equitable decree in a suit for the conveyance of foreign lands, as between the parties, is conclusive of all the rights and equities of the parties adjudicated therein, when pleaded in the courts of the state in which the land is located, either as a cause of action or as a defense to a suit.<sup>138</sup>

A decree in the present case certainly does not interfere with the sovereign's exclusive jurisdiction over land situated within its territorial limits any more than does a decree by a court commanding a conveyance of title to foreign land. If the courts of the *loci rei sitae* are bound, under the full faith and credit clause, to give effect to the rights and equities of the parties adjudicated in this latter case, why should they not be equally bound when the decree of another court is introduced as a defense, and shows that the equities determined in the suit in the other state entitle the plaintiff to go on the lands without subjecting himself to an action of trespass?

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<sup>137</sup>(1918) 31 Harv. L. Rev. 646.

<sup>138</sup>See note 63 above. See also (1911) 73 Cent. L. J. 189.

In *Consolidated Rendering Co. v. Vermont*,<sup>139</sup> the defendant was ordered to produce books of the company which were at the time in another state. The defendant refused and was fined for contempt. To the objection that due process of law was denied the defendant because the statute authorized the infliction of a fine by the court for failure to perform an act outside the state, Mr. Justice Peckham said, "There can surely be no illegality in providing that a corporation doing business in the state and protected by its power may be compelled to produce before a tribunal of the state material evidence in the shape of books or papers kept by it in the state, and which are in its custody and control, although for the moment outside the borders of the state."<sup>140</sup> Here, then, was a case which called for the doing of an act outside the limits of the state, and the enforcement of the decree offered no difficulties as the defendant was within the jurisdiction and did business therein.

In another case<sup>141</sup> the defendant, a resident of the District of Columbia, was ordered by the Maryland court to deliver up some silver plate located in the District of Columbia. Another case<sup>142</sup> granted the plaintiff specific performance of certain contracts which were to be performed outside of the district of the court and enjoined the defendant from violating any of the provisions which the court ordered the defendant specifically to perform.<sup>143</sup> The court quoted from *Phelps v. McDonald*,<sup>144</sup> in which Mr. Justice Swayne said:<sup>145</sup>

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all

<sup>139</sup>(1908) 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327.

<sup>140</sup>But see *Port Royal R. R. v. Hammond*, (1877) 58 Ga. 523, where the Georgia court refused specific performance of a contract to keep open ditches and maintain and erect cattle guards in South Carolina, on the ground that the Georgia corporation was an artificial person and could not be compelled to do acts in a state where it has no legal existence to perform the same.

<sup>141</sup>*Carrol v. Lee*, (1832) 3 G. & J. (Md.) 504, 22 Am. Dec. 350.

<sup>142</sup>*Western Union Telegraph Co. v. Pittsburgh, C. C. & St. L. Ry.*, (C.C.N.D. Ill. 1905) 137 Fed. 435.

<sup>143</sup>See also *Wilhite v. Skelton*, (C.C.A. 8th Cir. 1906) 149 Fed. 67, where Judge Sanborn said, "The court had jurisdiction of the defendants, and thereby had plenary power to compel them to act in relation to the leasehold without its jurisdiction which they owned and to which the contract related."

<sup>144</sup>(1878) 99 U. S. 298, 25 L. Ed. 473.

<sup>145</sup>*Phelps v. McDonald*, (1878) 99 U. S. 298, 308, 25 L. Ed. 473.

things necessary according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him."<sup>146</sup>

From the foregoing cases, it can be seen that courts of equity frequently render decrees which, if complied with, necessarily call for the doing of some act outside the territorial limits of the court, and occasionally render decrees affirmatively ordering some act to be done in another state.

The tendency of the modern decisions is to pay less attention to the state lines, which formerly were considered insurmountable barriers, and, when the court has personal jurisdiction over the parties to the suit, to render any suitable decree, directed to and binding upon the parties to the suit, even to the extent of directing an act to be done outside of the state.

### CONCLUSIONS

The preceding discussion warrants the following tentative conclusions.

(1) Where the equities are such as to demand interference, so as to prevent a party from obtaining an inequitable advantage to the injury of the other party, and to enable the court to do justice, an equity court, having personal jurisdiction over a resident defendant, can enjoin proceedings instituted by him in a foreign tribunal.

(2) Courts of equity, having personal jurisdiction over the parties, in cases calling for equitable relief, can decree a conveyance of foreign land.

(a) The decree of itself will not pass title to land, and a deed must be given by the party who has the legal title.

(b) In case the party to whom the decree is directed refuses to convey, the decree can be set up as a cause of action in the state wherein the land is located, and will there be recognized as conclusive of all the rights and equities adjudicated therein.

(c) It is not necessary that there exist an antecedent obligation on the part of the defendant to convey those lands to entitle the equitable decree to full faith and credit in the state wherein the land is located.

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<sup>146</sup>In *French, Trustee v. Hay*, (1874) 22 Wall. (U.S.) 250, 22 L. Ed. 857, Mr. Justice Swayne said, "The court having jurisdiction in personam had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory."

(3) Courts of equity have power to restrain or compel the doing of acts outside the territorial limits of the state.

(a) If a positive act in another state is necessary in order to comply with the decree, that fact alone is not enough to defeat the jurisdiction of the court which directs its decree to the parties.

(b) Where the relief sought calls for the doing of some act in another state, where the court has personal jurisdiction over the parties, it is not a question of jurisdiction at all, but is merely a question of expediency as to whether or not in the particular case the court will exercise the power which is discretionary in all courts of equity.