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THE EXTRA-TERRITORIAL EFFECT OF THE EQUITABLE DECREE.

FOREIGN DECREE AS CAUSE OF ACTION.

I

ANYONE whom the study of equity has led into the by-paths of Canon Law will recall that the Sext ends with a splendid array of imposing maxims,¹ not improbably the source of the Latin maxims with which every lawyer is familiar. The inveterate habit formed by the ecclesiastics of expressing a legal principle in a short and crisp formula persisted when they came into the courts of law and is peculiarly in evidence among the chancellors of the fifteenth century.² What may at first have been merely casual became through repetition a habit and the result has been to fasten upon equity a group of maxims which, though they have long outlived the usefulness of their short day, persist vigorously in text-books and decisions. The difficulty with the maxim is not only that it expresses a result rather than a reason;³ almost without exception the maxims took shape in an environment utterly different from that of today. While equity has advanced the maxim tends to remain stationary; hence any exposition of equity through maxims involves the danger of obscuring its true development through envisaging modern equity under the limitations of its mediæval beginnings. Of all the maxims, none has a more interesting history, none speaks

¹ De Regulis Iuris [V. xii], *in sexto* (Corpus Iuris Canonici (ed. Friedberg) II: 1122.)

² Cf. Some Aspects of Fifteenth-Century Chancery, 31 Harv. Law Rev. 834.

³ "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great, but a particularly small amount of information. As often as not, the exceptions are more important than the so-called rules." Stephen, *History of the Criminal Law*, II:94, n. 1. Cf. Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 9 Harv. Law Rev. 13.

more eloquently of the vortex of jealousy, antagonism and rivalry in which chancery first formulated its doctrines, than 'Equity acts *in personam*.'

The influence of this maxim upon commentators on equity has been profound. It is the corner-stone of the theory which treats equitable interests as purely *in personam*; naturally enough Ames⁴ regarded it as the key to the mastery of equity. I do not wish to contest the validity of this generalization if it be recognized to have definite limits. The interaction between procedure and substantive right has been important in the growth of both law and equity. The peculiar process of the court of chancery and the stress which, as a 'court of conscience', it laid upon the duty of the defendant undoubtedly resulted in the imposition of an ethical standard higher than that of courts of law. But, although modern equity retains much of the machinery of the ancient court of chancery, it scarcely follows that it is subject to all the old limitations and weakness.⁵ The paradoxical contradiction between the substance of the rights equity enforces and the means of their vindication is misleading.⁶ 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,⁷ he is assuming that equity has made no progress since the time of Coke.

If, however, this maxim has tended to circumscribe equity's development, from another aspect it has conferred upon the court power not possessed by a court of law. Through the coercion of the person within the jurisdiction chancery has been able to affect indirectly the title to immovable property in a foreign⁸ jurisdiction.

⁴ The Origin of Uses, Lectures On Legal History, 233.

⁵ Langdell, while conceding that the element of weakness so evident in early equity was not necessary to the existence of the jurisdiction, believed it to be inherent. "Anyone who wishes to understand the English system of equity as it is and as it has been from the beginning (my italics), must study its weakness as well as its strength." Summary of Equity Pleading (ed. 2) p. 38, note. The assumption that equity has not changed and can never change is maintained with a curious defiance of history. The fallacy of this assumption has never been better exposed than in the well-known *dictum* of Jessel, M. R., in *Re Hallet's Estate*, 13 Ch. Div. 696, 670.

⁶ By almost insensible degrees chancery has enlarged its process until it has given specific satisfaction to a plaintiff. Ashburner, Equity, 59. In fact some courts have not waited statutory aid to enforce their decrees *in rem*. *Wait v. Kern River Co.*, 157 Cal. 16. See discussion in Huston, Enforcement of Decrees in Equity, 24 ff. Even without this, such has been the development of equity that the court of chancery does in fact, if not theoretically in law, determine the title to property. It seems therefore futile to pretend that the decree may not create a binding obligation.

⁷ Magie, J. in *Bullock v. Bullock*, 52 N. J. Eq. 561, 569.

⁸ The word "foreign," is used throughout this paper with reference to the jurisdiction or decree of, and the property situate in, a sister state. Such usage is inexact, but avoids an awkward circumlocution.

True it is that chancellors⁹ have invariably disclaimed any right to adjudicate the title to a foreign *res*; cases are confined to those in which the 'conscience of the party' within the jurisdiction is 'affected by some equity', and the foreign title is but 'incidentally involved'. Thus where the holder of the legal title is before the court, chancery may in consequence of breach of trust, breach of contract, or of fraud order him to execute a conveyance of foreign land.¹⁰ No doubt the power which the court can exert through its control over the person has sometimes led to the assumption of jurisdiction where as a matter of policy it would have been better to dismiss the bill,¹¹ but the 'jurisdiction' is now too well settled to be longer open to question. Due to the accidental conferment of jurisdiction in divorce upon courts of equity, another type of case deserves consideration. The court is frequently given power by statute to allocate the property of the parties divorced; it may therefore order one party to mortgage or convey land to the other, usually as security for, or in lieu of, alimony. If the land chanced to be in a foreign state the same problem arises as in specific performance of contract involving foreign land; for the decree is to be tested by the same tests that apply to the decree of a court of chancery.¹² A conveyance executed pursuant to such a decree (whether of specific performance or divorce) is accepted without cavil by the courts of the situs of the land. But it may happen that the defendant, of whom the court had personal jurisdiction, succeeds in evading process of enforcement, and when he is later found in the jurisdiction of the *res*, suit may be brought against him upon the former decree. The problem which I wish to consider is the effect which should be given by the courts of the situs of the land to the foreign decree ordering

⁹ *e. g.* Parker, J. in *Deschamps v. Miller* [1908], 1 Ch. 856, 863.

¹⁰ *Penn v. Lord Baltimore*, 1 Ves. Sr. 444. A collection of English cases will be found in 1 White & Tudor, Lead. Cas. Eq. (ed. 8) 814, ff. and Westlake, Private Int. Law (ed. 5) § 172. See also *Massie v. Watts*, 6 Cranch 149; *Muller v. Dows*, 94 U. S. 298; *Philadelphia Co. v. Stimson*, 223 U. S. 605. For other American cases see notes in 67 Am. Dec. 95, and 69 L. R. A. 673. The 'jurisdiction' is so well settled that citation of authority is almost needless. It has been described as anomalous (Dicey, Conflict of Laws (ed. 2) 205), but the anomaly lies in considering legal procedure as the norm.

¹¹ *e. g.* *Toller v. Carteret*, 2 Vern. 494. This decision is also open to the objection that the decree attempts to extinguish by its own force an equitable interest in foreign land. See Cook, The Powers of Courts of Equity, 15 Col. Law Rev. 134 ff. *Toller v. Carteret* was followed in *House v. Lockwood*, 47 Hun 532.

¹² *Fall v. Eastin*, 215 U. S. 1, 12; *Bullock v. Bullock*, 52 N. J. Eq. 561, 565; *Mallette v. Scheerer*, 164 Wis. 415, 418. But cf. Schofield, Full Faith and Comity, 10 Ill. Law Rev. 11, where Mr. Schofield expressed the opinion (p. 28) that the Supreme Court in *Fall v. Eastin* "missed the jurisdictional point on which the case turned." His view (that the Washington court was without jurisdiction) finds little support in authority.

conveyance. To simplify the matter I propose to exclude all cases in which both courts do not have personal jurisdiction¹⁸ of the defendant.

The solution of this problem necessarily involves the clause¹⁴ of the constitution which provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. Unfortunately the force of this clause is not universally recognized; it is still the fertile source of litigation which the decisions of the Supreme Court seem unable to set at rest.¹⁵ Long ago MARSHALL, C. J., said¹⁶ that "the judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the State where it was pronounced * * *"; a statement which, as late as 1907, was regarded as a correct exposition of the law.¹⁷ But, though one still finds a failure to discriminate between a foreign judgment and the judgment of a sister state,¹⁸ it will be generally conceded that the judgment of a competent court of one state is final and conclusive upon the merits in another,¹⁹ though it is open to attack for want of jurisdiction. Assuming for the moment that an equitable decree is within the purview of the constitutional provision, it therefore becomes necessary to examine the meaning of jurisdiction when applied to courts of equity.²⁰

At the very threshold we find a confusion in verbal usage. The term, jurisdiction, is constantly used in courts of equity as if it were synonymous with equity itself; thus it is commonly said that no jurisdiction exists if there is an adequate remedy at law. To such usage is due the tendency to confound questions of jurisdiction proper, *i. e.*, the power of the court to hear and decide, with the totally different question of the merits of the decision.²¹ Whether or no the plaintiff upon the principles of equity is entitled to a de-

¹³ *i. e.* the defendant is served personally and is present at the time the decree is made. No cases of constructive service will be considered.

¹⁴ Art. IV, sec. 1.

¹⁵ Compare *Fauntleroy v. Lum*, 210 U. S. 230 and *Kenny v. Supreme Lodge, etc.* (Ill. 1918), 120 N. E. 631. W. W. Cook, Full Faith and Credit, 28 Yale Law Journ. 422 ff.

¹⁶ *Hampton v. McConnell*, 3 Wheat. 234.

¹⁷ Mr. Justice Holmes in *Fauntleroy v. Lum*, 210 U. S. 230, 237.

¹⁸ See Note by W. W. Cook in 28 Yale Law Journ. 579.

¹⁹ 2 Black, Judgments (ed. 2) § 883.

²⁰ American state courts derive their equitable jurisdiction wholly from statute. In some states the statutory delegation of power is so comprehensive that the jurisdiction is substantially identical with that of the English court of chancery. In others the powers are much limited. The states are classified in 1 Pomeroy, Equity (ed. 3) §§ 282-288. In discussing jurisdiction I have assumed for the sake of simplicity that the 'court of equity' possesses the same powers as the ancient court of chancery.

²¹ Hohfield, Relation Between Equity and Law, 11 Mich. Law Rev. 537, 568, note 30.

cree is a question properly cognizable on appeal, but it does not involve jurisdiction as that problem is presented in collateral attack. In its proper meaning jurisdiction relates not to the right of the parties as between each other, but to the power of the court; it precedes any question of the merits, and a decision upholding the jurisdiction of the court is entirely consistent with the denial of any equity in the plaintiff.²² It depends "upon the presentation to the court * * * of a complaint setting forth facts upon which the plaintiff claims to be entitled to * * * equitable relief, but it is not dependent upon the conclusion which the judge makes upon the facts of the complaint. Whether they create an equitable cause of action, or create a case within equitable cognizance, is a judicial question to be decided by the judge to whom application is made. His power to decide does not depend upon the correctness of his decision. Jurisdiction is entirely independent of the manner of its exercise. It involves the power to decide either way upon the facts presented to the court."²³

In last analysis the question of jurisdiction²⁴ involves the "judicial competence of the sovereign." The sovereign may or may not have delegated the power to deal with a particular class of cases; thus if the court be one of limited jurisdiction, any act transcending the limits is void, because such power has not been given. On the other hand if a court of general jurisdiction is concerned, a presumption of jurisdiction exists, and the question therefore turns upon the effectiveness of the judgment. An effective judgment means a "decree which the sovereign under whose authority it is delivered has in fact the power to enforce against the person to be bound by it, and which therefore his courts can, if he chooses to give them the necessary means, enforce against such person."²⁵ The distinction here involved may be illustrated by contrasting ejectment and specific performance. No court has jurisdiction to entertain an action for the recovery of foreign lands, for the sovereign is powerless to enforce the decree. The officers of the court cannot be given authority to act upon the land and to put the plaintiff in possession. On the other hand a decree for specific performance of a contract to convey foreign land is an effective judgment, for it is within the competence of the sovereign to enforce such decree *in*

²² *People ex. rel. Gaynor v. McKane*, 78 Hun 154, 158.

²³ Brown, P. J. in *People ex. rel. Gaynor v. McKane*, 78 Hun 154, 159. See also Folger, J. in *Hunt v. Hunt*, 72 N. Y. 217, 228-230; 1 Pomeroy, *Equity* (ed. 3) § 129.

²⁴ This discussion of jurisdiction is based upon the able analysis of Professor Dicey: *Conflict of Laws* (ed. 2) pp. 40 ff.

²⁵ Dicey, *op. cit.* 41.

personam against the person of the defendant who is before the court. If the law of the country where the land is situate will not permit nor enable the defendant to perform the order of the court, no decree should be rendered;²⁶ indeed it is doubtful if jurisdiction exists.²⁷ But if the law of the situs of the land recognizes a deed made under compulsion of a decree as a valid conveyance, the decree is an effective judgment and jurisdiction unquestionably exists. The existence of jurisdiction as thus defined is independent of the propriety or impropriety of the particular decision; it is likewise independent of actual success in compelling performance. The court must indeed possess a power which will normally produce the result desired. But an obstinate defendant who prefers imprisonment to performance, does not by his contumacy oust the court of jurisdiction, nor does a furtive defendant defeat jurisdiction by successful evasion of process of enforcement. For the decree is more than a mere order to the person; it is a final determination of that person's obligation and the obligation can scarcely be extinguished by non-performance. The decree remains effective just as the judgment at law is effective though the judgment debtor is execution-proof.²⁸

The thesis I wish to present is briefly this: If the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment

²⁶ Lord Cottenham, in *Ex parte Pollard*, Mont. & Ch. 239; Westlake, *Private Int. Law* (ed. 5) § 172.

²⁷ Beale, *Equitable Interests in Foreign Property*, 20 Harv. Law Rev. 382, 392.

²⁸ Confessedly this is not the conventional exposition of jurisdiction; for it is usual to say that the court must have jurisdiction of the subject-matter of the suit. The expression, subject-matter, is so elusive that it seems desirable to avoid it. The uncertainty of definition will be apparent to everyone who follows the cases. It may simply apply to the remedy; thus if the plaintiff seeks an injunction, the court has jurisdiction of the subject-matter. *People ex rel. Gaynor v. McKane*, 78 Hun 154, 158. Again it may be taken to mean that "the court has cognizance of the class of cases to which the one adjudged belongs." *Forrest v. Price*, 52 N. J. Eq. 16, 24. But as equity is a constantly expanding system the 'subject-matter' should become sufficiently elastic to admit new classes of cases from time to time. At all events the proper method of controlling the expansion of equity is through direct and not collateral attack upon the decree. In *In re Sawyer*, 124 U. S. 200, the Supreme Court permitted a *habeas corpus* proceeding to be used as a means of reviewing a decree upon the merits. If the Court will adhere to this doctrine, the position I have taken must be qualified; but it is submitted that the dissenting opinion of Mr. Justice Harlan in that case (p. 223) is thoroughly sound. Cf. Mr. Justice Holmes in *Lamar v. United States*, 240 U. S. 60, 64. So far as the cases considered in the present paper are concerned, jurisdiction of the subject-matter will be found to exist where the court has power to render an effective judgment. For, though it be said that the determination of the title to a foreign immovable is beyond the jurisdiction of the court because of the subject-matter, this is subject to the well recognized exception that jurisdiction of the person confers upon a court of equity power to deal incidentally with a foreign title.

and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land. Normally the decree will be made to effectuate some antecedent equity, growing out of trust or contract. But the constitutional effect of the decree should be independent of the ground upon which it is made; for a personal decree is equally within the competence of a court which has the defendant within its power, whatever its ground, and however erroneous.²⁹ Such a decree may perhaps be attacked upon the ground that its enforcement would violate some fundamental policy of the laws of the state where the land is situate, but such a question of policy should not be confused with jurisdiction. As a preamble to a detailed consideration of these several problems, it may be convenient to notice some of the more conspicuous decisions in detail.

II.

Burnley v. Stevenson (1873), 24 Oh. St. 474.

A agreed to convey to B certain land in Ohio. A died without making the conveyance, and B thereupon brought suit in Kentucky in a court having general equity jurisdiction against the heirs of A. The court having jurisdiction of the persons of the heirs, entered a decree ordering them to convey the land to B, and in default thereof directing a master of the court to make conveyance. D, who succeeded to the rights of B, obtained possession of the land to which he claimed title through the decree and master's deed. P, claiming in right of the heirs of A, brought an action in Ohio to recover possession of the land. D in his answer set up the Kentucky decree and master's deed. Held, a good equitable defense. MCLLWAINÉ, J.: "This decree was *in personam* and bound the consciences of those against whom it was rendered. In it the contract of their ancestor to make the conveyance merged. The fact that the title which had descended to them was thus held by them in trust for Evans [B] was thus established by a court of competent jurisdiction. Such decree is record evidence of that fact and also of the fact that it become (*sic*) and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment for contempt; and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree in so far as it determined

²⁹ Per Mr. Justice Holmes, *Fall v. Eastin*, 215 U. S. 1, 15.

the equitable rights of the parties in the land in controversy. In our judgment the parties, and those claiming under them with notice, are still bound thereby. * * * The courts of this state cannot enforce that decree by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless impeached for fraud."⁸⁰

Bullock v. Bullock (1894), 52 N. J. Eq. 561.⁸¹

In suit for divorce brought in New York the court, having jurisdiction of the cause and the parties, decreed: (1) dissolution of the marriage; (2) that the husband [H] should pay the wife [W] \$100 per month as alimony; (3) That H should execute a mortgage to W upon land in New Jersey as security for payment of alimony. H failed to execute the mortgage as ordered, and made various mortgages and conveyances of said lands for the purpose of defeating W's rights under the decree. W brought suit against H in New Jersey, claiming an equitable lien upon the New Jersey lands by virtue of the New York decree and praying that H be ordered to execute a mortgage as ordered by the New York decree. H appeared and moved to dismiss the bill. Bill dismissed.

MAGIE, J., said that the decree could not create a lien upon the New Jersey lands, but confessed that that did not dispose of the question. The real problem, which he faced frankly, was whether the decree created a binding obligation which the courts of New Jersey were bound to respect. The decree was conclusive upon the status of the parties and if, by the direction to pay alimony an indebtedness should arise, an action at law would lie. But he denied that the decree, so far as it ordered the execution of a mortgage could create any obligation. "It is a misuse of terms to call the burden thereby imposed upon respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process, or to make our decrees operate as process." It is plain that what led Justice MAGIE to this conclusion was his view that a state must have absolute control of land within its territorial limits and that to recognize a foreign decree as a personal obligation would impair the integrity of this principle. For he says: "It is scarcely necessary to observe that a court of New York could not be em-

⁸⁰ *McCune v. Goodwillie*, 204 Mo. 306, *accord*.

⁸¹ Affirming the decision of Bird, V.-C. in 51 N. J. Eq. 444.

powered to affect by its decree or judgment lands lying within another state. For no principle is more fundamental and thoroughly settled than that the local sovereignty by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty nor the judicial proceedings, decrees and judgments of its courts can in the least degree affect such lands and immovable property."

GARRISON, J., concurred in the result but not for the reasons set forth above. He conceded that any judicial determination which possessed "the quality of judgment" was under the constitution a binding adjudication.³² But "the Supreme Court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases."³³ The order, therefore, for the execution of the mortgage was mere process and "did not possess any element of a judgment upon the issue submitted to the court for decision * * *".

VAN SYCKEL, J., dissented. As the New York court had jurisdiction of the husband and the subject-matter, its judgment was conclusive "on the right of the wife to have the husband execute a mortgage upon the New Jersey lands. * * * As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here. * * * The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered: the obligation follows him into this state."

Five judges concurred with MAGIE, J., and five with VAN SYCKEL, J. GARRISON, J., who cast the deciding vote, placed his decision upon a peculiar ground. Stress may be laid upon this fact, for the case is commonly quoted as authority for the proposition that an equitable decree ordering the conveyance of land does not create a binding obligation.³⁴

Subsequently W brought an action at law in New Jersey upon the New York decree to recover alimony accrued. Judgment was given

³² It is noteworthy that Justice Garrison drew no distinction between legal judgments and equitable decrees.

³³ The pleasing epithetical solution may be left for those whom it satisfies. But why did the 'sentence of the law upon the record' cease with the judgment dissolving the marriage with the incident of alimony?

³⁴ *e. g.* Beale, Summary of The Conflict of Laws, § 82, Cases, Conflict of Laws III: 537; Note in 21 Harv. Law Rev. 210.

for W, the court citing with approval the opinion of MAGIE, J., in the present case.³⁵ The consistency of the two decisions is open to question.³⁶

Dunlap v. Byers (1896), 110 Mich. 109.

Suit was brought in Ohio for the dissolution of a partnership. The court, having jurisdiction of the parties, decreed that the partnership be dissolved, appointed a receiver and directed him to sell certain lands in Michigan which were held to be partnership assets. The decree required the partners to quitclaim to the purchaser from the receiver. One partner died without complying with the decree and his heirs brought ejectment in Michigan to recover possession of the land from the purchaser. The latter promptly brought suit in equity to enjoin the heirs from prosecuting the action of ejectment and to compel them to transfer to him the legal title in accordance with the Ohio decree. Decree, according to the prayer in the bill. It was contended by the defendants that the decree and sale thereunder were null and void for want of power in the Ohio court to make such decree and that such sale could have no effect in Michigan. LONG, C. J.: The Ohio court "acquired jurisdiction not only over the parties but the subject-matter, and had the power to adjudicate the rights of the parties in all the property belonging to the partnership, although a portion of the same was real estate in the State of Michigan. * * * While the decree itself * * * would not directly effect the transfer of title, the decree of the court would bind the consciences of the parties and could be enforced by a court within the territory where the property was located." (pp. 116, 117).

Fall v. Fall (1905), 75 Neb. 104, 75 Neb. 120.

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

In suit for divorce in Washington the court, having jurisdiction of the cause and the parties, decreed: (1) dissolution of the marriage; (2) that certain property in Nebraska be set aside as the separate property of the wife [W] and that the husband [H] convey such property to her. In default of performance by H a commissioner of the court by its authority executed a deed to W, who obtained possession of the land. H executed a mortgage and deed of the premises to D.³⁷ W brought an action in Nebraska, setting up the decree and deed and prayed that the mortgage and deed be cancelled

³⁵ *Bullock v. Bullock*, 57 N. J. L. 508. (Opinion by Justice Van Syckel.)

³⁶ Justice Van Syckel is himself perfectly consistent; for he dissented in the first case.

³⁷ Whether or not D had notice does not clearly appear, but the opinion in *Fall v. Eastin* seems to proceed upon the assumption of notice.

as casting a cloud on her title and that title be quieted in her. Relief granted. Affirmed on appeal. Reversed on rehearing.

The reasoning of the court is not entirely clear, but great stress seems to be laid on the fact that H had conveyed to a third party and that the decree could have no binding effect on such third party. The court does not explicitly deny that the Washington decree could create an obligation binding upon H.³⁸

Upon writ of error to the Supreme Court the final judgment in *Fall v. Fall* was affirmed. (*Fall v. Eastin*). Justices HARLAN and BREWER dissented. The majority opinion by Justice MCKENNA is disappointing. It discloses a tendency to treat a suit for specific performance as a real action (pp. 11-12), and great emphasis is placed on the fact that a domestic decree can have no direct effect upon foreign land. It is a little surprising to find the court citing the discredited case of *Hart v. Sanson*³⁹ with approval. Doubt is thrown on *Burnley v. Stevenson* and it is suggested that the cases cited do not sustain it, though the court feels it unnecessary to "stop to review them."⁴⁰ (p. 14).

Justice HOLMES concurred specially. He regarded the Washington decree as creating a personal obligation binding upon the husband and entitled to full faith and credit in Nebraska. He then continued:⁴¹

"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. The ground on which it goes is that to allow the judgment to affect the conscience of the purchasers would be giving it an effect *in rem*. It treats the case as standing on the same footing as that of an innocent purchaser. Now if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. I do not see why it is not within the power of the State to do away with equity or with the equitable doctrines as to purchasers with notice

³⁸ See report at p. 132, where it is said that neither the opinion of the majority nor of the minority in *Bullock v. Bullock* would warrant granting the relief sought.

³⁹ 110 U. S. 151. The Supreme Court felt it necessary to "explain" *Hart v. Sanson* in *Arndt v. Griggs*, 134 U. S. 316. Cf. Putnam, J. in *Savirgs Bank v. Abbot*, 131 Fed. at p. 980: "*Hart v. Sanson* has never been taken seriously since it was announced."

⁴⁰ The lack of clarity in the majority opinion may account for the fact that the case has been cited as authority for the proposition that a foreign decree ordering a conveyance is an adjudication binding on the courts of the situs. *Lamkin v. Lovell*, 176 Ala. 334, 343.

⁴¹ 215 U. S. at p. 15.

if it sees fit. Still less do I see how a mistake as to notice could give us jurisdiction. If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by the obligation imposed by equity upon a purchaser with notice. The ground of the decision below was that there was no such obligation. The decision, even if wrong, did not deny to the Washington decree its full effect."

Mallette v. Scheerer (1916) 164 Wis. 415.

In suit for divorce in Illinois the court, having jurisdiction of the cause and the parties dissolved the marriage and ordered the husband H to convey to the wife W real estate in Wisconsin in full settlement of alimony. During the pendency of the action H conveyed the land to D who took with notice. Suit by W in Wisconsin against H and D, setting up the Illinois decree and praying that the deed from H to D be cancelled and that H be required to convey to W. H made default in appearance, but D appeared and demurred. Demurrer overruled.

The court treated the Illinois decree as entitled to the same respect as a legal judgment. Decisions upon judgments and decrees for money were held to apply equally to decrees ordering the conveyance of land. (pp. 419-420). "The judgment exhibited by the plaintiff directs Carpenter (H) to convey the title to the Wisconsin real estate to satisfy the judgment for alimony awarded plaintiff. This method of satisfying a judgment is recognized in this state. We are led to the conclusion that plaintiff is entitled to the relief in the courts of this state of enforcing the Illinois decree by the judgment of our courts."

Both sides of the problem are developed in these cases and the question therefore remains whether *Burnley v. Stevenson* or *Bullock v. Bullock* presents the sounder view.⁴² We may perhaps come nearer a solution by examining the objections made to the thesis which has been advanced. It is sometimes said that a court of equity is "without power to enforce any but its own decrees, nor can it adjudge the decree of any other court binding or punish the violation of any but its own."⁴³ Such an objection is believed to be frivolous.⁴⁴ The court is not asked to enforce a foreign decree; it is asked to recognize such decree as affording a binding equitable obligation upon

⁴² Decisions precisely on the question at issue are few in number, but if *dicta* be considered the preponderance of judicial opinion is against the thesis advanced in this paper.

⁴³ *Adams v. Knapp*, 213 Pa. St. 567.

⁴⁴ Cf. Lord Brougham in *Houlditch v. Donegal*, 8 Bligh N. S. 307.

which a new decree may be founded. Certainly if it has power to enforce its own decrees founded upon contract it has power to enforce its own decrees founded upon something else. Objections of this type serve only to obscure the real issue and deserve no serious consideration. It will appear, however, from the foregoing cases that there are two principle objections: (1) that an equitable decree ordering the doing of an act does not create a binding obligation; (2) that a fundamental policy dictates that each state have absolute control of immovable property situate within its territorial limits, and to admit the binding effect of a foreign decree would impair the integrity of this principle. Let us look at each in turn.

III

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. Considerations of convenience have compelled the courts to extend the doctrine of *res adjudicata* to decrees in equity;⁴⁵ but though it may now be conceded that a decree is to some extent *res adjudicata*, it may still be denied that a decree creates an obligation. It therefore becomes important to examine the support upon which the proposition rests. We may not unjustly suspect the influence of Sir Edward Coke. "This Court of Equity," he wrote,⁴⁶ "proceeding by English Bill is no Court of Record and therefore it can bind but the person only and neither the estate of the Defendant's lands nor the property of his goods and chattels." The two cases⁴⁷ cited to support this conclusion have received a prominence they scarcely deserve. Extracts from them follow: "A decree is not like a judgment of the King's Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right but only the person to

⁴⁵ Where the question is discussed in general terms, a decree in chancery, rendered upon the merits, is said to be conclusive upon parties as to issues directly involved. 2 Black, Judgments (ed. 2) § 517. It is said to be "to every intent as binding as would be a judgment of a court of law." *Pennington v. Gibson*, 16 How. at p. 76. See also *Brown v. Lexington etc. Co.*, 13 N. J. Eq. 191 (Bill of Account dismissed because the same matter had been adjudicated in New York in equity.); *Dobson v. Pearce*, 12 N. Y. 56 (foreign decree determining conclusively that a domestic judgment was obtained by fraud); *French v. Harding*, 235 Pa. St. 79 (foreign decree determining insolvency of a corporation and making assessments on stockholders held conclusive so far as the insolvency and foundation of the assessment were concerned). Among the more recent cases there is observable a tendency to hold that a decree may be *res adjudicata* in a court of law. *Tew v. Webster*, 118 Minn. 375.

⁴⁶ 4 Inst. 84.

⁴⁷ Y. B. B. 37 H. VI. 13. 3. (part of this case is printed by Ames (Cas. Eq. I:1) as *J. R. v. M. P.*); 27 H. VIII. 14. 6.

obedience, so that if the party will not obey then the Chancellor may commit him to prison until he will obey, and this is all that the Chancellor can do."⁴⁸ "For the Common Law proceeds upon fixed and invariable rules; the Chancery proceeds upon the discretion of a good man. A decree there binds the person to obedience, but it does not operate at all upon the matter in question."⁴⁹ It will be noted that one of these statements is but the fragment of an argument, while the other comes from a court of law.⁵⁰ If there is danger in interpreting equity through the medium of the common law, that danger becomes infinitely greater when reliance is placed upon the observations of common law sergeants of four centuries ago. The old antagonism which moved their speech is passed away. Chancery has long been a court of record, and it would be difficult to find a modern judge in equity who would admit that he sat in a court of conscience,⁵¹ or gave colour to Selden's vivacious criticism. Had this ancient authority been left in the peaceful security of Year Book French, we might not be troubled by it today, but the indefatigable industry of Coke found vent in Institutes and Chancellor KENT caught hold of his words. "A court in chancery, on its equity side, is not strictly a court of record. * * * The reason why courts of law would not take cognizance of decrees is * * * to be deduced from the history and peculiar jurisdiction of the court of chancery; and although the reason of the rule may not now be applicable to some of its decrees, yet we are not at liberty at this day to set aside the rule. We are bound to declare the law as it has been handed down to us and the symmetry of our system of jurisprudence will be best preserved by resisting innovation."⁵² Kent's view did not prevail in New York but it found ready acceptance in New Jersey. For when a statute was there passed giving like effects to decrees for money as

⁴⁸ Ames, Cas. Eq. I:2, n. 1. This extract is from Y. B. 27 H. VIII. 14. 6, the second of the cases cited by Coke. The statement is made *arguendo* by Knightly in answer to the argument of Chomley that as the court of chancery had previously made a decree in the same cause, it could not reverse its own decree. Deinshill supported Chomley. Knightly was plainly in the minority. But before the discussion had proceeded far, the court interrupted them and bade them cease talking of the jurisdiction of the court. (*Le Secretary luy interrupt et dit, ne parlez puis de l'autorite de cest Court.*) The statement quoted is very slender authority.

⁴⁹ Jenk. Cent. Cas. 108, pl. 9, Ames, Cas. Eq. I:2, n. 1. This is but a summary of Coke's first case.

⁵⁰ It is somewhat strange that Ames overlooked the statement of Rohun. In his *Cursus Cancellariae* (1715), a decree is defined: "A Decree is a final Sentence or Order of Court determining the Right of Matters in Question, according to Equity * * *". (ed. 2, p. 351).

⁵¹ Buckley, J. in *In re Telescriptor Syndicate Limited* [1903], 2 Ch. 174, 195: "This Court is not a Court of conscience * * *."

⁵² *Post v. Neafie*, 3 Cai. (N. Y.) 22, 35-36.

to judgments, the court relying upon Kent's opinion, held that a foreign decree would not support an action of Debt and that the statute had made no difference in the law.⁵³ Turning to modern text-writers, we find that Langdell⁵⁴ has carried the proposition to its logical conclusion; " * * * a decree in chancery has not in itself (i. e. independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law and judgment recovered, the original debt is merged in the judgment and extinguished by it, and the judgment creates a new debt of a higher nature and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree."⁵⁵ From this it is but one step to the final dogma: "The decree is in its nature not the establishment of an obligation, but a method of enforcing an obligation,—a mere form of execution."⁵⁶

The broad distinction between decrees on the one hand and legal judgments on the other finds little support in the cases. To be sure it was held in *Carpenter v. Thornton*⁵⁷ that an action of Debt would not lie upon a decree of chancery, the decree being a domestic decree, but the decision is generally regarded as unsatisfactory⁵⁸ and is much qualified by the remarks of Lord Tenterden in a subsequent case.⁵⁹ As a court of chancery has adequate means of enforcing its own decrees and does not require the assistance of a court of law in the same jurisdiction, this precise question is unlikely to arise today.⁶⁰ But in case of the foreign decree the problem is very important. In *Henderson v. Henderson*⁶¹ an action of Debt was brought in England upon a decree on the equity side of the Supreme Court of Newfoundland. The defendant objected that a "decree for the payment of money by a Court of Equity is not a declaration

⁵³ *Van Buskirk v. Mulock*, 18 N. J. L. 184.

⁵⁴ Summary of Equity Pleading (ed. 2) § 43, n. 4 (on p. 37).

⁵⁵ Langdell does not in this passage explicitly deny that a decree may create an equitable obligation, but such a denial is implicit in his argument.

⁵⁶ Equitable Decree as Cause of Action in Another State, 25 Harv. Law Rev. 653, 654.

⁵⁷ 3 B. & Ald. 52.

⁵⁸ See the careful analysis of this decision by Professor Cook, *The Powers of Courts of Equity*, 15 Col. Law Rev. 237, ff.

⁵⁹ *Henley v. Soper*, 8 B. & C. 16.

⁶⁰ Some courts, however, accept a domestic decree for money as the basis of an action of Debt or some similar action. Hohfeld in 11 Mich. Law Rev. 568, citing: *Ames v. Hoy*, 12 Cal. 11, 20; *Howard v. Howard*, 15 Mass. 196; *Dubois v. Dubois*, 6 Cowan 493, 496.

⁶¹ 6 Q. B. 288.

that the plaintiff has any legal right to the money, but only that, upon certain views peculiar to that Court, the payment ought to be made." Neither Coke nor Langdell would take exception to such an argument. But it failed to meet the approval of Lord DENMAN, C. J., who said:

"The decrees of foreign Courts of Equity may indeed in some instances be enforceable nowhere but in the Courts of Equity, because they may involve collateral and provisional matters to which a court of law can give no effect; but this is otherwise where the Chancery suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that the individual must pay it. The circumstances by which the Court arrives at that conclusion do not affect the right of suing in a court of law, which grows out of the legal duty to pay. An award to pay money, made under a submission of reference, may possibly be founded exclusively on equitable considerations; but *the parties bound to perform it, owe the money.*"⁶²

In this country there is no longer the slightest doubt that a decree of one state for a sum certain will support an action at law in another. The pioneer decision of *Post v. Neafie*,⁶³ despite KENT'S vigorous dissenting opinion, changed the current of authority.⁶⁴ The position of the Supreme Court⁶⁵ upon this question is clear. Nor does it matter whether the decree be founded upon some antecedent right or equity; for where the right exists solely by virtue of the decree, the obligation is none the less conclusive and binding.⁶⁶ Certain decrees, therefore, create obligations, legal as well as equitable, and the old distinction is gone.

It is gone, but in its place we find another. From its very nature the typical equitable decree cannot be equated to a legal judgment. In *Pennington v. Gibson*⁶⁷ the court merely went so far as to say that "in every instance in which an action of debt may be maintain-

⁶² My italics.

⁶³ 3 Cai. (N. Y.) 22.

⁶⁴ See authority collected in 5 Enc. Pl. & Pr. 1069; 2 Black, Judgments (ed. 2) § 869. *Mutual National Bank v. Moore*, 50 La. Ann. 1332; *Storage Co. v. Gottstein*, 123 Iowa 267.

⁶⁵ *Pennington v. Gibson*, 16 How. 65.

⁶⁶ *Lynde v. Lynde*, 162 N. Y. 405 (affirmed 181 U. S. 183); *Sistare v. Sistare*, 218 U. S. 1, 29 L. R. A. (N. S.) 1068. It is now well settled that a foreign decree for alimony creates a binding obligation upon which suit may be brought. If, however, the decree is subject to modification, it is not a final judgment within the 'full faith and credit' clause. But suit on such a decree was allowed in *Wagner v. Wagner*, 26 R. I. 27.

⁶⁷ 16 How. at p. 77.

ed upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount * * *." Hence it is still possible to distinguish between decrees and to argue that the admission that the decree for money creates an obligation does not extend to the decree ordering the conveyance of land. There appears to be no sensible reason for this distinction. The decree assumes substantially the same form⁶⁸ whether it be for the payment of money or the conveyance of land; it is *formally* but an order to the defendant to do an act, which may be the payment of \$1,000 or the execution of a deed to Blackacre. Likewise in the matter of enforcement, aside from statutory innovations, the method is the same in both types of decrees. Any argument drawn from the form of the decree or the means by which it is enforced applies equally to the decree for money.⁶⁹

Nor do courts of equity when speaking of their own decrees feel the need of any such distinction. This may be due to the fact that attention is directed primarily to the power to enforce the decree, and compelling the conveyance of land is no more difficult than compelling the payment of money. But courts go even further and disclose an innocent belief that foreign courts of equity will recognize their decrees as valid obligations binding at the situs of the *res*. So where a decree is made for the conveyance of foreign land, it is said that the courts of the situs "will treat such a decree as valid so far as it defines the rights of the parties and will enforce it."⁷⁰ Again: "Such decree although no conveyance has been executed may be pleaded as a cause of action or as a ground of defence 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."⁷¹ Likewise in a suit in New York for strict foreclosure of a mortgage on lands in Illinois, the court declares that its decree will 'settle the rights in the property' and that the courts in Illinois will be bound to give it full faith and credit.⁷² While such confidence in foreign courts is misplaced in view of the common interpretation placed upon *Fall v. Eastin*, this has no bearing upon the point under

⁶⁸ 1 Seton, Decrees (ed. 3) 607, ff.

⁶⁹ This is enforced by the fact that the ancient distinction between judgments and decrees applied equally to all decrees. See an admirable statement in Ashburner, Equity, 34.

⁷⁰ McBride, C. J. in *Williams v. Williams* (Ore. 1917), 162 Pac. 834, 836.

⁷¹ Cardwell, J. in *Vaught v. Meader*, 99 Va. 569, 574.

⁷² *House v. Lockwood*, 47 Hun 532.

consideration. Regarding their own decrees, courts place orders to pay money and to convey land upon the same basis.

But we may go further. There appears to be no difficulty in recognizing the binding force of a foreign decree if a domestic *res* is not directly involved. A noteworthy example is the well-known case of *Dobson v. Pearce*,⁷³ where a New York court admitted a Connecticut decree enjoining suit on a New York judgment, as a valid equitable defence to an action upon that judgment. The decree was conclusive evidence that the judgment was obtained by fraud and determined the obligation not to enforce the judgment even when asserted by the creditor's assignee. So too in Arkansas,⁷⁴ a decree of Nebraska dismissing a bill to set aside a deed to domestic land was held conclusive. The same principle applies where the foreign decree directs the doing of an act, even the conveyance of land. Thus is the decree of a court of chancery in Ontario ordering the conveyance of land in Ontario recognized as creating a good equitable cause of action in New York.⁷⁵ Even New Jersey, which will probably be the last state in the union to admit that a foreign decree can create a binding obligation where its own land is involved, finds no difficulty in accepting a foreign decree ordering the conveyance of foreign land.⁷⁶ It seems evident therefore that courts of equity in their attitude toward their own decree and toward foreign decrees which do not involve a domestic *res*, brush aside this distinction and recognize the decree for conveyance as a binding obligation.

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; such seems to be the plain result of *Burnley v. Stevenson* and *Dunlap v. Byers*. But at this point it becomes necessary to notice an ingenious attempt to explain away the effect of those cases; for it is maintained that they are not inconsistent with *Bullock v. Bullock*. In the first two cases, so it is said, the obligation grew out of contract and partnership and the decree was merely conclusive of such antecedent obligation which existed by the law of the situs; in the last the foreign court attempted to create an obligation by its own decree and when "no antecedent obligation exists by the law of the situs, a decree of another state is without force, for it cannot create such an obligation as to land outside its

⁷³ 12 N. Y. 156.

⁷⁴ *Fromholz v. McGahey*, 120 Ark. 216.

⁷⁵ *Roblin v. Long*, 60 How. Pr. 200.

⁷⁶ *Bennett v. Piatt*, 85 N. J. Eq. 436.

jurisdiction."⁷⁷ This argument possesses a certain plausibility but it is believed to be unsound. It does violence to the decisions discussed; for the obligation recognized in both *Burnley v. Stevenson* and *Dunlap v. Byers* was the new obligation created by the foreign decree. That is the position taken by other courts. Further, even had the decree been accepted ostensibly as only conclusive evidence of the obligation, it would be mere play of words to pretend that the obligation recognized was not the obligation arising from the decree. A rule of evidence which makes a decree conclusive is in truth a rule of substantive law.⁷⁸

It is difficult to see why in such a matter as this the effect of an equitable decree should be different from that of a legal judgment. The doctrine that a cause of action is extinguished by or merged in a legal judgment results from the policy that there be an end of litigation. The same considerations of policy demand that equal effect be given to the equitable decree, and it is believed that this conclusion finds adequate support in the cases.

In the first place the now universal acceptance of the foreign decree for money can not be rationally explained upon any other ground. If the doctrine applies to decrees of this type it should extend to decrees ordering a conveyance. Such was the real basis of decision in *Mallette v. Scheerer*. In the second place, if a cause of action survives a decree, the decree ought not to be a bar to a new suit upon the old cause of action in another jurisdiction. But in *Harrington v. Harrington*⁷⁹ the foreign decree was held to be a bar and the same result was reached in the Arkansas case already cited.⁸⁰ Finally we may put this theory to an extreme test if a case be found where the foreign decree was based upon a cause of action invalid by the law of the forum. The question is no longer open in the matter of legal judgments, and it is believed that the doctrine of *Fauntleroy v. Lum*⁸¹ should apply to decrees in equity. Mr. Justice HOLMES, the author of the opinion in that case, has indicated⁸² that

⁷⁷ Note in 21 Harv. Law Rev. 210.

⁷⁸ If this distinction possesses real validity it must apply equally to decrees for money. But even the courts of New Jersey accept the foreign decree for money, whether or no it be founded upon an antecedent obligation. *Bullock v. Bullock*, 57 N. J. L. 508. What the domestic court is asked to recognize is not the old obligation, if one there be, but the new obligation created by the foreign decree.

⁷⁹ 154 Mass. 517. The decree was held a bar to an *action at law*. It should be noted that the courts of New Jersey will recognize *their own decrees* as bars. *Wooster v. Cooper*, 59 N. J. Eq. 204, 222.

⁸⁰ *Supra*, n. 74.

⁸¹ 210 U. S. 230.

⁸² *Fall v. Eastin*, 215 U. S. 1, 15.

he would so apply it, and in a recent decision⁸³ in the Circuit Court of Appeals, SANBORN J. said:

"The Supreme Court has conclusively determined that in a suit upon a judgment or decree of the court of another state, the same credit and effect must be given to it by the court in which the suit upon the judgment or decree is brought as would be given to it in the foreign state, although the judgment or decree is founded upon a contract, or transaction or action good in the foreign state, but contrary to the policy of and forbidden under penalties in the state in which suit upon the judgment is brought."

A somewhat extended search of the authorities has failed to reveal more than two cases which bear directly upon this question. Suit on a foreign decree, founded upon a cause of action invalid by the law of the forum was sustained in *Beal v. Carpenter*.⁸⁴ The converse of this situation was presented in *Roller v. Murray*,⁸⁵ in which suit was brought for specific performance of a contract to convey lands in West Virginia. The contract also involved land in Virginia and a previous suit had been litigated between the same parties in Virginia. The Virginia court dismissed the bill,⁸⁶ holding that the contract was champertous and therefore could not be enforced. The Virginia decree was set up as an answer to the suit for specific performance in West Virginia. To this the complainant objected that the contract, while invalid in Virginia, was valid by the law of West Virginia, and therefore the decree was not a bar. The court conceded that the contract, independent of the Virginia decree, was valid, but held that the foreign decree was conclusive upon the parties. Here in other words the complainant's cause of action, otherwise valid in West Virginia, was extinguished by the former decree. The court further expressed the view that were a Virginia decree based on a cause of action invalid by the law of West Virginia made the basis of a suit in West Virginia, it would be entitled to full faith and credit.

It is believed therefore that the principle involved in *Burnley v. Stevenson* and *Mallette v. Carpenter* is one and the same and that these decisions, so far as the power of a court of equity to create a binding personal obligation by its decree, find good support in the

⁸³ *Beal v. Carpenter*, 235 Fed. 273. Cf. *Roller v. Murray*, 234 U. S. 738, 745.

⁸⁴ 235 Fed. 273.

⁸⁵ 71 W. Va. 161.

⁸⁶ *Roller v. Murray*, 107 Va. 527.

books. In fact it will be very generally conceded that the decree may create an obligation, if the enforcement of that obligation does not in any way affect title to domestic land. It is the anxious fear that the State may be deprived of control over its own land which leads to the denial of power in the foreign court. If this fear is not justifiable the last objection will be removed.

IV

The status of and title to immovable property is 'exclusively within the control' of the state in which the property is situate. A typical expression of this principle was quoted in discussing *Bullock v. Bullock*.⁸⁷ Others follow: "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, * * * 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 or courts can affect it."⁸⁸ "The transfer and devolution of title to real estate within the limits of a state are entirely subject to the laws of that state and no interference with it can be permitted by other states."⁸⁹ As a corollary to these propositions it is asserted that a foreign decree cannot have any direct effect upon domestic land, neither altering title nor creating a lien, legal or equitable.⁹⁰ This truism is often enunciated with great solemnity.⁹¹ Harmless in itself it is made the basis of the further declaration that "the courts of one state or country are without jurisdiction over title to lands in another state."⁹² True as this statement may be it almost inevitably leads to the treatment of a foreign suit in equity as an action *in rem*. Probably this process of reasoning is unconscious and no court would make so bald a statement; but the space devoted to the discussion of real actions in these decisions seems explicable only upon the basis of some confusion in the minds of the judges.

In fact what is asserted to be necessary to preserve 'exclusive control' of land really involves two propositions: (1) that the law of the situs governs the title to land; (2) that no foreign court may apply the law of situs to any given state of facts and thereby determine a personal obligation. Let us concede at once that the laws of the

⁸⁷ *Supra*, p. 534.

⁸⁸ *Davis v. Headley*, 22 N. J. Eq. 115.

⁸⁹ *Fall v. Fall*, 75 Neb. at p. 132.

⁹⁰ *Carpenter v. Strange*, 141 U. S. 87.

⁹¹ *e. g.* *Lindley v. O'Reilly*, 50 N. J. L. 636.

⁹² *Ibid.*, p. 642.

situs of the *res* have the final determination of the nature of the interests in land, the *quantum* of estates, the mode of devolution. Let us concede also that "it is not within the power of one state to prescribe the mode by which real property shall be conveyed in another."⁹³ But the second proposition is not involved in these concessions.⁹⁴ The mechanical iteration of statements which no one contests does not dispose of the question under consideration. Nervous emphasis upon the word 'title,' and exaggeration of merely formal elements may obscure the real issue. For although it be admitted that the legal title is governed by the law of the situs and is not altered by the foreign decree, it by no means follows that the foreign court may not apply that law and that the decree may not mediate determine that title. This mediate effect may be realized in a number of ways. In a well-known passage Mr. Justice BREWER said:⁹⁵ "if all parties interested in the land were before the court of another State, its decree would be conclusive upon them, and thus in effect determine the title." That is the precise application which I am interested in urging.⁹⁶

We need not say that the foreign decree should *ex proprio vigore* affect title to domestic land; all that is contended is that the courts of the situs should recognize such a decree as a final determination of a personal obligation to convey, an obligation analogous to that arising from a valid contract. It should be accepted as a valid cause of action in the jurisdiction of the situs, and if suit be brought upon it and personal jurisdiction obtained of the person bound, a new decree should be rendered. But, it is said,⁹⁷ "the doctrine that jurisdiction respecting lands in a foreign state is not *in rem* but only *in personam* is bereft of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the situs." If this means that the courts of the situs cannot be compelled to issue process upon a foreign decree, no one will dissent; but if it implies that the foreign decree cannot be made the foundation of a new decree without violent infraction of settled doctrines, it may well give us pause. Would such acceptance of the foreign decree violate any sound policy of the sovereignty of the situs? Does the dogma

⁹³ McLean, J. in *Watts v. Waddle et al.*, 6 Peters 389.

⁹⁴ Cf. *The Earl of Kildare v. Eustace*, 1 Vern. 405, 419, where it was said with reference to a trust of Irish land that "the judges of England were proper expositors of the Irish laws."

⁹⁵ *Dull v. Blackman*, 169 U. S. 243, 246.

⁹⁶ The principle was accepted in *Swaisie v. Swaisie*, 31 Ont. 324; *Niles v. Lee*, 169 Mich. 474, 483; and in *Burnley v. Stevenson*, *Dunlop v. Byers*, and *Mallette v. Schecrer*, which have already been considered.

⁹⁷ Magie, J. in *Bullock v. Bullock*, 52 N. J. Eq. at p. 569.

that a foreign decree cannot affect the title to domestic land mean anything more than that it must first be established as a 'judgment' in a court where the land lies? Does any court maintain in its integrity the doctrine that real property is 'exclusively within the control' of the local sovereignty? Let us see.

In *Fall v. Fall*⁹⁸ the court said: "If Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under threat of contempt proceedings, or after duress of imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he possessed at the time of the execution of the deed." The same concession will be made by other courts which refuse to accept the foreign decree. In fact it is believed that no decision will be found in which a deed, made under the compulsion of a foreign decree, was for that reason held invalid by a court of the situs of the land.⁹⁹ Undoubtedly such an enforced admission is disconcerting. It is responsible for our last and most desperate distinction: 'it is the conveyance, not the decree, which affects the title to domestic land.'¹⁰⁰ But if the decree did not deal rightfully and constitutionally with the title to domestic land, the deed would be voidable for duress.¹⁰¹ The validity of the deed cannot be admitted without an implicit acceptance of the decree; for the validity of the conveyance involves the same considerations which determine the validity of the foreign decree itself to fix equities in domestic land so as to be binding upon the person.¹⁰² How then can any court which accepts the deed deny that the decree determined an obligation? What becomes of the vaunted declaration that the foreign decree cannot affect domestic land? Unless comfort can be found in a formal lifeless distinction, the inconsistency will inevitably demand an abandonment of the position. The decree is valid, if by process of coercion a deed is produced; it is invalid, if no deed. In other words the success or failure of the coercive process determines the validity of the de-

⁹⁸ 75 Neb. at p. 128.

⁹⁹ In *Steele v. Bryant* (Ky. 1909), 116 S. W. 755, such a deed was upheld as a valid conveyance.

¹⁰⁰ Fuller, C. J., in *Carpenter v. Strange*, 141 U. S. 87, 106; Zabriskie, C. in *Davis v. Headley*, 22 N. J. Eq. 115, 120; Magie, J. in *Bullock v. Bullock*, 52 N. J. Eq. 561, 566. This artless explanation must excite eternal wonder.

¹⁰¹ In *Gilliland v. Inabit*, 92 Iowa 46, a deed to Iowa land was sought to be avoided on the ground of duress. The grantor was ordered by a court of equity of Kentucky to execute the deed. For refusing so to do he was committed for contempt and after several days' imprisonment executed the deed as required by the decree. The court held that as the Kentucky court had jurisdiction of the person of the grantor, the deed made under compulsion of its decree was not made under duress.

¹⁰² Sedgwick, C. J. in *Fall v. Fall*, 75 Neb. at p. 150; 70 Cent. Law Journ. 2.

decree. As for the policy of the state,¹⁰³ it can have no interest in the forms of procedure; all that the state can be legitimately interested in is that no change is made in its law of property, and that the mode of transfer complies with its laws. Its exclusive control is exclusive in name only, so long as it admits the deed; for the state is no more deprived of control of its property by acceptance of the foreign decree than by admission of the deed. The foreign decree is like the foreign judgment in that it requires a new adjudication to give it extra-territorial effect. The domestic court is required simply to enforce its own decree by process conforming to the laws of the forum. The foundation of the decree, it is true, is the personal obligation created by a foreign decree; but the fact that this obligation concerns domestic land is no obstacle, unless the court is prepared to hold that no similar obligation can be created by contract or trust made beyond the territorial boundaries of the state.

V

The history of this small problem is characteristic of the development of equity. Chancery begins with an ill-defined and uncertain jurisdiction; its doctrines are challenged as vague and variable. The common lawyer would fain put a curb on the chancellor's power, and he seizes on the fact that chancery is not a court of record to distinguish rigidly between decrees and judgments. The distinction as it first appears is fundamental and in its way logical. But what is perhaps appropriate in the seventeenth century becomes incongruous in the nineteenth. The transition is well stated by Mr. Justice DANIELL:¹⁰⁴

“We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors or in the administration of estates; but these opinions, the fruits of jealousy in the old common lawyers, would now hardly be seriously urged, and much less seriously admitted, after a practice so long and so well settled, as that which confers on courts of equity in cases of difficulty and intricacy in the administration of estates, the power of marshalling assets, and in the exercise of that

¹⁰³ In an obscure passage in the majority opinion in *Fall v. Eastin*, 215 U. S. at p. 10, it seems to be recognized that the acceptance of the foreign decree would do no violence to the policy of the state.

¹⁰⁴ *Pennington v. Gibson*, 16 How. 65, 76.

power the right of controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts and the binding effect of their decrees, when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question."

The recognition of the decree for money came as the culmination of a long struggle; it involved a breach with the classic tradition. Once the tradition was broken, recognition might well have been extended to the decree for conveyance. It would require no logical extension and, as we have seen, some courts have not failed to perceive that a due recognition of equity demanded it. But the jealous solicitude of the courts in 'protecting' a domestic *res* from interference by a foreign court, and the tendency to regard the legal judgment as the norm and the equitable decree as anomalous, combined to produce a distinction between decrees.

Distinctions are necessary and inevitable in any legal system, especially one founded upon precedent, but it is perilous to preserve distinctions for themselves alone, for the delight in legal subtlety. If a generalization may be attempted, with full knowledge that all generalizations are imperfect, we may say that the development of Anglo-American law exhibits progressively the annihilation of arbitrary distinctions. It was only through the overriding of a myriad local customs that England evolved a common law, and the spirit of Bracton, its greatest expositor, is antipathetic to artificial, arbitrary distinctions which sacrifice the protection of rights to the preservation of the forms of remedy.¹⁰⁵ Later the law crystallizes and the Year Books are full of wearisome technical disputations, but when Assumpsit finally triumphed over Debt a multitude of distinctions went down. The eighteenth century shows faint sympathy for the "diversities" that so delighted Littleton and Coke; it was a contemporary of Lord Mansfield who remarked pointedly that courts "ought not to listen to nice distinctions that savour of the sophistry of schools, but be guided by true good sense and manly reason."¹⁰⁶

I have endeavored to show that the rejection of the foreign decree for conveyance rests upon arbitrary and unnecessary distinctions. It is not warranted by logic nor policy. Much effort has been spent in depicting the evil consequences that will follow the admission of the foreign decree. It is no coincidence that the courts

¹⁰⁵ Cf. Bracton, f. 413b: "*Tot erunt formulae brevium quot sunt genera actionum.*"

¹⁰⁶ Wilmot, J. in *Zouch v. Woolston* (1761), 2 Burr. 1136, 1147.

of New Jersey, which are now so concerned in the protection of their land, resisted stoutly the acceptance of the foreign decree for money and pictured in melancholy tones the disastrous results of a different view.¹⁰⁷ It is believed that the danger involved in accepting the decree, where the deed is now accepted is equally imaginary.

But it is not simply a question of logic and consistency. This is after all one country although there are separate states.¹⁰⁸ So far as possible remedial agencies should be unified by making them operate throughout the land. That one may escape the operation of a judicial decree by going into another state is surely a reproach to any system of legal administration. If the passage of events has taught us the advantage of unity, no agency albeit unspectacular which makes for such an end, should be despised. The recognition of the decree of one state throughout the union would not alone carry out the true idea of a common country,¹⁰⁹ but would at the same time give due recognition to equity as a co-ordinate part of one legal system. Considerations of policy as well as logic and history seem to demand it. This would be so if the constitution were silent, but in view of the express provision it would seem to be beyond question.¹¹⁰

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¹⁰⁷ e. g. *Van Buskirk v. Mulock*, 18 N. J. L. 184.

¹⁰⁸ Cf. Note in 31 Harv. Law Rev. 646, where in commenting on a recent decision it is said: "The case represents the culmination of a tendency evinced in decisions of 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. While the principle is undoubtedly contrary to classical thought on the subject, it should be welcomed by progressive jurists as a wholesome innovation."

¹⁰⁹ Cf. Stiness, C. J. in *Wagner v. Wagner*, 26 R. I. 27, 28.

¹¹⁰ See W. W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 Yale Law Journ. 421. If Congress can be induced to exert the power which Professor Cook has shown very clearly it possesses by virtue of the clause referred to, the recognition of the equitable decree may be made mandatory.