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ANGEL V. BULLINGTON: TWILIGHT OF DIVERSITY JURISDICTION?

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I. INTRODUCTION

It is questionable whether Mr. Justice Brandeis, the author of the majority opinion in *Erie Railroad Co. v. Tompkins*,[1] could have foreseen the extent to which his pronouncement of a rule outlawing the doctrine of *Swift v. Tyson*[2] would be expanded in less than a decade. From a case which merely decided that a federal court sitting in New York may not, in a diversity case, apply a "federal common law,"[3] the doctrine has increased in scope to a degree where it threatents to permit a state, at least indirectly, to prescribe, limit or extend the diversity jurisdiction of the federal courts.

In *Angel v. Bullington*[4] the Supreme Court by the use of an unhappy admixture of the *Erie* rule and the res judicata concept reached this point. Any further step in the same direction may well lead to a greatly limited use of the diversity jurisdiction of federal courts.

II. PROCEDURE AND HOLDING

The plaintiff, Bullington, a citizen of Virginia, sold Virginia land to the defendant, Angel, a citizen of North Carolina. In order to secure the balance of the purchase price the defendant executed notes secured by a deed of trust on the land. Upon default of one of the notes the plaintiff, by authority of an acceleration clause in the deed, caused the remaining notes to fall due and called upon the trustees to sell the land. The sale was duly made in Virginia and the proceeds were applied to the payment of the notes. Since these were insufficient to meet the notes in full, the plaintiff sought to collect the deficiency. Action was first brought against Angel in the Superior Court of Macon County, North Carolina. The defendant demurred on the ground that a North Carolina statute, enacted prior to the transaction in question, precluded recovery

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[1] 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

[2] 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842).

[3] After categorically denying the existence of a "federal general common law," Mr. Justice Brandeis, in an opinion handed down the same day, declared that the question concerning water in an interstate stream was one "of federal common law" upon which neither the statutes nor the decisions of either state can be conclusive. Hinderlider v. LaPlata Co., 304 U. S. 92, 110, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938).

[4] 67 Sup. Ct. 657 (1947).

of such a deficiency judgment.[5] The statute relied upon, among other things, provided:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this section to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by said mortgage or deed of trust shall not be entitled to a deficiency judgment on account of said mortgage, deed of trust, or obligation secured by the same."

The demurrer was overruled by the Superior Court but upon appeal to the Supreme Court of North Carolina, the state court of last resort, the lower court was reversed, the demurrer sustained and the action dismissed.[6] The plaintiff made no effort at this time toward review in the Supreme Court of the United States of the adverse decision of the North Carolina court.

Apparently under the impression that the legislature of North Carolina by statute had closed the doors of the state courts, and the state courts only, to his right of action, Bullington brought suit against the defendant in the United States District Court for the Western District of North Carolina.

Though the defendant pleaded in bar the judgment of the North Carolina court, the District Court gave judgment for the plaintiff, Bullington,[7] and, upon appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed.[8] The Supreme Court granted certiorari[9] for the purpose of determining whether or not the North Carolina judgment precluded the right to recover on the same cause of action in the federal court. It was held in a 6-3 decision, Mr. Justice Frankfurter delivering the opinion, that the North Carolina judgment barred recovery in a federal court in North Carolina on the same right of action.[10]

III. Analysis of Case

A. *Majority Reasoning.*

Mr. Justice Frankfurter's reasoning, resulting in this conclusion, may be outlined in the following manner. Res judicata is settled law in North Carolina. The doctrine as interpreted by the courts of that state bars any future litigation between the same parties as to all issues which could have been raised. In diversity cases a federal court is "in

[5] N. C. Gen. Stat. (1943) §45-36; §1, Chap. 36, Public Laws 1933 (N. C. Code of 1939, Michie, §2593f).
[6] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411, 136 A. L. R. 1054 (1941).
[7] Bullington v. Angel, 56 F. Supp. 372 (W. D. N. C. 1944).
[8] Angel v. Bullington, 150 F. 2d 679 (C. C. A. 4th 1945).
[9] Angel v. Bullington, 326 U. S. 713, 66 Sup. Ct. 231, 90 L. Ed. 421 (1945).
[10] Angel v. Bullington, 67 Sup. Ct. 657.

effect, only another court of the State."[11] Since res judicata is a binding sanction upon North Carolina courts, it is necessarily effective upon federal courts sitting within that state. Thus res judicata bars the federal court from re-deciding an issue which was or could have been decided by the state court. Therefore, since the issues before the state court included the constitutionality of the state statute precluding an action on a deficiency, res judicata bars the later action in the federal court.

It should be noted that the decision is not one resting solely upon the principle of res judicata. Rather, as Mr. Justice Rutledge in a dissenting opinion aptly puts it, it is an " 'and/or' hodgepodge of res judicata and *Erie* doctrines."[12] The majority opinion takes the res judicata concept, joins it with the *Erie* doctrine, and the result of this union is a half-breed, not too like either of its progenitors, whose future interpreters may discern more resemblance to one or the other of its antecedants.

A critical analysis of the majority view may be interesting and, perhaps, somewhat helpful in forecasting the degree to which the Supreme Court may extend the *Erie* rule.

Mr. Justice Frankfurter begins his task with the statement that the settled rule in North Carolina is that "an adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised"[13] citing as authority therefor several North Carolina cases.[14] Neither the North Carolina cases cited nor none found deal with the precise type of situation here involved. Rather, they are concerned with judgments rendered upon the "merits" of the cause. It is extremely doubtful whether North Carolina considers that an adjudication "on the merits" results from a refusal to exercise jurisdiction. It is the traditional view that for a judgment to have the effect of res judicata, i.e., to be final and conclusive as to the issues, it must be "on the merits."[15] The dogma is that judgments of dismissal are not "on the merits" and do not operate as a bar in subsequent litigation which involves the same matters.[16]

[11] Guaranty Trust v. York, 326 U. S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231 (1945).

[12] Angel v. Bullington, 67 Sup. Ct. 657 at 667.

[13] *Id.* at 659.

[14] Southern Distributing Company v. Carraway, 196 N. C. 58, 60, 61, 144 S. E. 535; Moore v. Harkins, 179 N. C. 167, 101 S. E. 564.

[15] 2 FREEMAN, JUDGMENTS 1531 (5th ed. 1925).

[16] "There can be no doubt that the dismissal of an action or denial of relief for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it." *Id.* at 1546. Also, "Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what was actually decided . . .

The Court admits that had the North Carolina action been dismissed because it was brought in an improper North Carolina court, it could then have been brought in the proper North Carolina court or in a North Carolina federal court.[17] The Court is thus saying that there is no adjudication "on the merits" when jurisdiction is refused as to some of the state courts but that there is such an adjudication as would bar future litigation when all state action is precluded. Why is this true in the second case while not in the first?

It seems that the majority reasoned syllogistically that "the power of the state to limit its jurisdiction is subject to the Constitution";[18] the State of North Carolina has, by statute, limited its jurisdiction; the refusal of the State court to take jurisdiction is, of itself, the adjudication of the constitutionality of the state statute, a federal question; therefore, this determination acts as a bar to collateral litigation. Following this reasoning it is apparent that in the first situation, where jurisdiction is refused as to some of the state courts, no constitutional question has been adjudicated. On the other hand, by precluding recovery in any or all state courts the constitutional question of power so to limit has necessarily been litigated.[19]

B. *Erie Rule: Erie to Angel v. Bullington.*

Being satisfied that there had been an adjudication of the issue of constitutionality of the statute by the North Carolina court, Mr. Justice Frankfurter continues:

> "For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State.' "[20]

citing as authority the recent case of *Guaranty Trust Co. v. York.*[21]

At this point a very brief outline pointing out the developments leading to the *Guaranty* case should be beneficial. The demise of *Swift v. Tyson*[22] and the case overruling it, *Erie Railroad Co. v. Tompkins,*[23]

if a contract is valid in the State in which it is made, but in an action on the contract in another State judgment is given for the defendant on the ground that it is against the policy of that State to enforce the contract, this will not preclude the plaintiff from maintaining an action on the contract in the State in which it was made or in a third State in which the enforcement of the contract is not against the policy of the State." RESTATEMENT, JUDGMENTS, §49 (1942).

[17] Angel v. Bullington, 67 Sup. Ct. 657 at 659.

[18] *Id.* at 660, citing McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 233, 54 Sup. Ct. 690, 691, 78 L. Ed. 1227. "While Congress has not attempted to compel States to provide courts for the enforcement of the Federal Employers' Liability Act . . . the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law."

[19] An erroneous judgment is of the same effectiveness as one which might not be attacked upon appeal. *Cf.* Philbrook v. Newman, 148 Cal. 172, 82 Pac. 772; Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 Sup. Ct. 44, 84 L. Ed. 85 (1939); Note, 53 HARV. L. REV. 652 (1940).

[20] Angel v. Bullington, 67 Sup. Ct. 657 at 659.

[21] 326 U. S. 99 at 108.

[22] 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842).

[23] 304 U. S. 64 (1938).

marks the beginning of a line of decisions which progressively delimits the freedom of the federal courts in diversity cases to apply their own law. After the *Erie* decision there was no longer any "transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute."[24] Thereafter, federal courts in exercising diversity jurisdiction were required, "except in matters governed by the Federal Constitution or by Acts of Congress"[25] to apply the law of the state.[26]

Two difficulties at once arose. First, *which state* was to provide the law? And second, if the proper state is determined, *what law* of that state is to be applied in the federal court?

Mr. Justice Brandeis' opinion in the *Erie* case sheds no discernible light on either question. It may be pointed out that as the actual result of the Supreme Court decision the case was remanded to the federal court sitting in New York but Pennsylvania law was to be applied. It is not clear whether this was because the conflict of laws rule of New York required the application of the locus delicti, i.e., that the federal court was to apply the conflict of laws rule of the state in which it sat, or, rather, the federal court was to apply the law of the place of the tort without regard to the state in which it was sitting.

The federal statute[27] provided:

> "the laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Surely the federal statute would lend itself to either construction. In fact, from a purely literal and, it is thought, intelligent interpretation, the statute could well be construed to mean that the federal court under the facts of *Erie* would be bound by the "general" conflict of laws rule on the ground that litigation of a Pennsylvania tort is not included in the phrase "in cases where they (the laws of the several States) apply." If the New York courts, under their conflict of laws

[24] Holmes dissent in Black & White Taxicab v. Brown & Yellow Taxicab, 276 U. S. 518, 532-536, 48 Sup. Ct. 404, 408-410, 72 L. Ed. 681, 686-687, 57 A. L. R. 426 (1928).

[25] 304 U. S. 64 at 78. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

[26] The court remanded the case to the federal court sitting in New York where the Pennsylvania law was applied. If this was an application by the federal court of the conflict of laws rule of New York, it was not recognized as such. In fact, the problem of *Erie* as applied to conflict of laws was not conclusively answered until 1941 by Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941) and Griffin v. McCoach, 313 U. S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941).

[27] Rule of Decision Act, 28 U. S. C. §725, derived from §34, Federal Judiciary Act, September 24, 1789, c. 20.

rule, would apply Pennsylvania law, the situation is no different; such would be a coincidence having no bearing on the primary choice of law of the federal court. However, strong as this argument may have been if presented soon after *Erie,* there can be little doubt now that a federal court must apply the law of the state in which it is sitting even though that law should be contrary to that which is commonly accepted as being proper.[28]

The second question left open by *Erie* was the problem of what law of the state must the federal court apply. Since "Congress has no power to declare substantive rules of common law applicable in a state"[29] it should follow that the *"substantive" law of the states* must be applied in the federal courts.

Characterization of a particular rule as one of substance or procedure is under any circumstances difficult and somewhat inexact. It is well nigh impossible to make a characterization which will be valid for all purposes.[30]

The "substantive" law of the state which the *Erie* case, by inference at least, required federal courts to follow was not defined or clarified by the case itself. One must trace the term as it developed in later decisions. In subsequent cases the court has expanded the *Erie* rule so that by the process of scrutinizing each case it is possible to determine the present limit of the Court's characterization of "substantive" *for the purpose of diversity jurisdiction in a federal court.*[31]

In the same year as *Erie* the rule was extended to suits in equity, though the court reserved and left unanswered a question of whether in diversity cases the federal courts are required to follow the conflict of laws rules prevailing in the states in which they sat where that state did not apply the generally accepted conflict of laws rule.[32]

In 1939, one year later, it was held that the rule extended to burden of proof.[33] Thus it was held that the federal court sitting in Texas wrongfully declined to follow the State rule of placing the burden of proof upon him who attacks the legal title and asserts a superior equity in a contest concerning ownership of land.

[28] Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941); Griffin v. McCoach, 313 U. S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941); Sampson v. Channell, 110 F. 2d 754 (C. C. A. 1st 1940), 128 A. L. R. 394 (1940).

[29] 304 U. S. 64 at 78, ". . . whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."

[30] Tunks, *Categoriaztion and Federalism: "Substance" and "Procedure" After Erie R. R. v. Tompkins,* 34 ILL. L. REV. 271 (1939); COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, 154-193 (1940); ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS, 245-248 (1940).

[31] Emphasis added.

[32] Ruhlin v. New York Life Ins., 304 U. S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290 (1938); *cf. supra* note 26.

[33] Cities Service v. Dunlap, 308 U. S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196 (1939).

The next important advancement occurred in 1941 with two cases, *Klaxon Co. v. Stentor Electric Mfg. Co.*,[34] and *Griffin v. McCoach.*[35] In the *Klaxon* case the court was confronted with that problem which it left open and unanswered in the *Ruhlin* case,[36] viz., must a federal court, sitting in State X, apply the conflict of laws rule of that state when it does not conform to the "accepted" or "general" conflict of laws rule? Speaking for a unanimous court, Mr. Justice Reed affirmatively answered the question by saying:

> "We are of the opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[37]

After this decision there is little chance for the success of the argument mentioned earlier, *viz.*, that the federal court sitting in State X need not apply the conflict of laws rule of that state since under a plausible interpretation of Section 34 of the Federal Judiciary Act[38] that state's law would not apply.

Decided on the same day as the *Klaxon* case was another step in the spreading process of the *Erie* doctrine, *Griffin v. McCoach.*[39] Here an insurance policy on the life of one Colonel Gordon had been taken out in New York by a syndicate organized by him. Certain members of the syndicate assigned their interests to others not connected thereto. In an interpleader suit brought in the federal court in Texas the right of the assignees to the proceeds was attacked on the ground that under Texas law the beneficiaries must have an insurable interest and here the assignees had none. The Supreme Court held that the federal court sitting in Texas must apply the Texas law of conflict of laws and that since the insured was a domiciliary of Texas, constitutionally Texas could refuse to recognize rights of assignees without insurable interests even though New York, where the transactions took place, would have permitted the assignees to recover.

> ". . . we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the state in which they sit. . . . it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary."[40]

[34] 313 U. S. 487 (1941).
[35] 313 U. S. 498 (1941).
[36] 304 U. S. 202 (1938).
[37] 313 U. S. 487, 496 (1941).
[38] See note 27 *supra.*
[39] 313 U. S. 498 (1941).
[40] *Id.* at 503.

In 1943 the Court in *Palmer v. Hoffman*[41] rendered a decision similar in import to *Cities Service Oil Co. v. Dunlap*[42] holding that the question of the burden of proving contributory negligence is one of local law which a federal court in diversity of citizenship cases must apply.

The final step in the growth of the *Erie* doctrine before *Angel v. Bullington*[43] took place in 1945, *Guaranty Trust Co. v. York*,[44] already briefly referred to. That case dealt with the duty of a federal court sitting in New York to apply New York limitations barring equitable relief on a cause of action arising in New York. The majority of the court speaking through Mr. Justice Frankfurter held that the federal court sitting in New York must apply New York limitations. The opinion reads:

> ". . . since a federal court adjudicating a State created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[45]

and further that where:

> "a plea of the statute of limitations would bar recovery in a State, a federal court ought not to afford recovery."[46]

It should be noted that in the *Guaranty* case the cause of action was created by the same state whose statute of limitations was sought to be applied barring recovery on the right. Thus, in the *Guaranty* case the real holding is that where a State creates and limits a right, the Court requires federal courts sitting in that State to limit the right as well. That the State law "ought to govern in litigation *founded on that law*"[47] is not the question before the Court in *Angel v. Bullington*. Lifting from its context a phrase which was applicable to the *Guaranty* situation and placing it in surroundings only slightly similar may conceivably lead to far reaching results. One is tempted to ask at what point will Mr. Justice Frankfurter cease to refuse to distinguish between the State court and its alter ego.

C. *Res Judicata.*

Having satisfied itself that the doctrine of res judicata will bar relitigation of the constitutional question in the North Carolina courts and that action in the federal courts of North Carolina is likewise pre-

[41] 318 U. S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719 (1923).
[42] 308 U. S. 208 (1939).
[43] Angel v. Bullington, 67 Sup. Ct. 657 (1947).
[44] 326 U. S. 99 (1945).
[45] *Id.* at 108-109.
[46] *Id.* at 110.
[47] *Id.* at 112; emphasis added.

cluded, the Court, evidently troubled by the language of the North Carolina Supreme Court[48] makes a rather startling statement:

> "For purposes of res judicata, the significance of what a court says it decides is controlled by the issues that were open for decision."[49]

Taken narrowly, this statement is undoubtedly correct. Thus, if issue "A" is *not* before the court and yet the court affirmatively states that it is deciding issue "A," this would not, on the theory of res judicata bar a later litigation of issue "A."[50]

However, in the North Carolina Supreme Court case,[51] the litigation thought to be the basis of the alleged bar of res judicata, the situation is not that of the example above. In the opinion, the North Carolina court there said:

> "It will be noted that the limitation created by the statute is upon the jurisdiction of the court. . . . The statute operates upon the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this state. . . . Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. No denial of the full force and credit of the Virginia contract is made, and no interpretation of the construction of the contract is attempted. The court being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged."[52]

Here, though issue "A" is before it, the court states, in effect, that it is not deciding issue "A." Should not this situation be treated differently? Should, under these circumstances, a prior dismissal bar a collateral litigation of issue "A" on the theory of res judicata? That is to say: is the quoted portion of the majority opinion true only when a judicial body attempts to adjudicate beyond those issues open for decision; and not where it seeks specifically to limit its decision to something less than all the issues before it? To contend that the North Carolina court by expressly disclaiming decision of an issue does in fact decide the issue may seem an unwarranted interpretation. However, the North Carolina court was of the opinion that it had no power to grant recovery on a deficiency. It based its disability upon the North

[48] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).
[49] Angel v. Bullington, 67 Sup. Ct. 657, at 660.
[50] 2 FREEMAN, JUDGMENTS 1474 (5th ed. 1925). "But even if 'a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto.'"
[51] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).
[52] *Id.* at 20.

Carolina statute precluding recovery on deficiencies. By its recognition of the validity of the statute it inferentially and of necessity accorded it constitutionality. This, according to Mr. Justice Frankfurter was the issue before the state court and an issue which, notwithstanding what the court said, was litigated and finally decided.[53]

When confronted with an argument that the North Carolina court did not adjudicate the "merits" of the controversy, the Court said:

> "It is a misconception of res judicata to assume that the doctrine does not come into operation if the court has not passed on the 'merits' in the sense of ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another action in the State. . . . The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were litigated."[54]

Mr. Justice Reed, in an attempt to refute this argument, proposes a case where suit is brought in a federal court on an allegation of diversity of citizenship and the federal court dismisses the suit with an opinion saying that the case was dismissed for lack of jurisdiction, *e.g.*, proof of non-diversity of citizenship. It is clear, he feels, that here, "no state court would hold that there had been a decision on the merits."[55] It is believed that there may be others, including the author of the majority opinion, who might agree with him. Mr. Justice Reed's hypothetical case, of course, is far from the case at bar. In his situation the dismissal by the federal court on the ground of lack of jurisdiction is only that and nothing more. The court indeed adjudicated the issue of jurisdiction and, perhaps, as to that issue the doctrine of res judicata is applicable.[56] However, as a prerequisite to its arriving at its conclusion, the federal court was not bound to make any initial determination; whereas in the North Carolina case, before it dismissed

[53] If the Court is correct in its view that the state court in deciding it had no jurisdiction necessarily determines that the statute is constitutional, whom does this determination bind? Are the present litigants the only parties barred from re-litigating this question or does the state court's adjudication as interpreted by the U. S. Supreme Court bar an action between another Virginia mortgagee of Virginia land and a North Carolina mortgagor contesting the validity and constitutionality of the statute in the courts of North Carolina or in the federal courts sitting therein? These are problems more easily posed than solved.

[54] Angel v. Bullington, 67 Sup. Ct. 657 at 661.

[55] *Id.* at 664.

[56] Jurisdictional facts once litigated are res judicata; (a) jurisdiction over the person, see Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 51 Sup. Ct. 517, 75 L. Ed. 1244 (1931); (b) jurisdiction over the subject matter, see Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938); Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 Sup. Ct. 44, 84 L. Ed. 85 (1939). It is suggested that the scope of res judicata in the jurisdictional field extends not only to those jurisdictional facts which have been actually litigated but also to those which might have been. Note, 53 HARV. L. REV. 652 (1940).

the case, the court was forced to inquire, by inference at least, into the constitutionality of the statute requiring dismissal.[57]

D. *Constitutionality of State Court's Determination.*

It is quite possible that the determination of the State court was erroneous. Under the facts, the land concerned was Virginia land, the mortgagee a domiciliary of Virginia, the contract was made and was to be performed in Virginia. In fact, the only contacts or interests of North Carolina in the transaction were the fact that North Carolina was the present domicile of the mortgagor and the state of the forum. It would seem that according to great weight of authority, both case[58] and text writers,[59] the general conflict of laws rule as to choice of law in a situation similar to that presented normally requires the application either of the law governing the contract or that of the situs of the land. Since, in the present case, the loci are identical there seems to be no question but that the accepted rule would require the application of Virginia law to the enforcement of the deficiency. The cases have arrived most frequently at this result by regarding the local statute as applicable only to local land[60] or, similarly, by considering the forum without power because of lack of real interest in the case.[61]

Thus the decision of the North Carolina case in the eyes of most authorities would be the result of an improper choice of law. But, even though erroneous, is the impropriety of such a character as to make the operation of the local statute, under these facts, unconstitutional? To put it differently; had Bullington sought review by the Supreme Court of the State court's holding, might there have been a reversal?

The question of the extent of constitutional limitations upon the choice of law is one which is not without difficulty. A discussion of

[57] "It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must be taken as conclusively settled." 2 FREEMAN, JUDGMENTS 1462 (5th ed. 1925).

[58] McGirl v. Brewer, 132 Ore. 422, 280 Pac. 508, 285 Pac. 208 (1930); Fellows v. West, 102 Cal. 266, 32 Pac. 676 (1894); New York Life Ins. Co. v. Aitken, 22 Jones & S. (N. Y. 1891); and cases collected in 136 A. L. R. 1059.

[59] STUMBERG, CONFLICTS OF LAWS 351 (1937): In the event of a deficiency remaining after foreclosure and sale, where the bond and mortgage are governed by the same law and suit is brought in another state for the deficiency, the existence and extent of the right to recover are determined by the law of the situs and contract. Recovery will thus not be limited by provisions of the internal law of the forum prohibiting deficiency judgments, or restricting recovery to the difference between the debt and the true value of the land, rather than the amount realized on sale." GOODRICH, CONFLICT OF LAWS 402 (2d ed. 1938).

[60] Fidelity Bankers Trust v. Little, 178 S. C. 133, 181 S. E. 913 (1935); McGirl v. Brewer, 132 Ore. 422, 280 Pac. 508, 285 Pac. 208 (1930).

[61] Connecticut Mutual Life Ins. Co. v. Conley, 194 Minn. 41, 259 N. W. 390 (1935) (holding that a conditional statute of Minnesota did not apply to an Iowa note on Iowa land. "It is obvious that the legislature of this state has no power to enact laws with respect to Iowa contracts and Iowa real estate mortgages.").

the problem has been a favorite of those who profess facility in writing on the law.[62] Since it is not the purpose of this paper to rewarm past delicacies, only a very perfunctory outline of the problem will be presented.

Among the most important constitutional sanctions which may cause a state to make a particular choice of law, or which may effect a reversal by the Supreme Court if a mistaken choice is made, are full faith and credit,[63] due process,[64] interstate commerce,[65] impairment of the obligation of a contract,[66] and privileges and immunities.[67] Of these, the first two have been more frequently before the Supreme Court. Generally, the Court has not seen fit to voice its disapproval of the state court's determination of governing law save in cases falling within three general classifications, *viz.*, insurance, including fraternal beneficial associations, shareholder's liability suits and workmen's compensation.[68]

In fact, in *Kryger v. Wilson*[69] one of the earlier decisions, not of the above listed types but a case dealing with title to land in another state, Mr. Justice Brandeis said, regarding an alleged misapplication of the law:

> "The most that the plaintiff in error can say is that the State court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of the land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."[70]

Subsequent to the *Kryger* decision the Supreme Court faced a series of cases of alleged misapplication of "accepted" conflict of laws rules. It is extremely difficult to attain any order out of the chaos of these Supreme Court opinions. Ranging from a requirement that the state must recognize the statute of a sister state,[71] to an almost total absence

[62] Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Hilbert and Cooley, *The Federal Constitution and Choice of Law*, 25 WASH. U. L. Q. 27 (1939); Ross, *Has Conflict of Laws Become a Branch of Constitutional Laws?*, 15 MINN. L. REV. 161 (1931); Ross, *Full Faith and Credit in a Federal System*, 20 MINN. L. REV. 140 (1931); Smith, *The Constitution and Conflict of Laws*, 27 GEO. L. J. 536 (1939); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due Process Clause*, 22 ORE. L. REV. 109 (1943).

[63] U. S. CONST. Art. IV, §1.

[64] U. S. CONST. AMEND. 14, §1.

[65] U. S. CONST. Art. 1, §8.

[66] U. S. CONST. Art. 1, §10.

[67] U. S. CONST. AMEND. 14, §1.

[68] *Cf.* Alaska Packers Assoc. v. Industrial Accident Comm. of California, 294 U. S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939); Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 Sup. Ct. 208, 88 L. Ed. 149, 150 A. L. R. 413 (1943).

[69] 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229 (1916).

[70] *Id.* at 176, 37 Sup. Ct. at 35, 61 L. Ed. at 232.

[71] John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 Sup. Ct. 129, 81 L. Ed. 106 (1936).

of restriction upon the state,[72] the Supreme Court decisions apparently "bracketed" the difficulty. Today, if test there be, it is most analogous to that delineating the power of a state to tax.[73] That is to say, if there is control, if there is protection, if there are sufficient governmental interests to give foundation to the application of the law of a particular jurisdiction, the Supreme Court will not disturb a decision of the state court on the ground that there has been a violation of the full faith and credit clause or a denial of due process because of misapplication of law.[74]

Since absolutes in a realm of relatives are elusive if not non-existent, it is hazardous to guess what the result of Bullington's appeal to the Supreme Court might have been.

It is possible, though, it is suspected, unlikely that the application of its statute by the North Carolina court in this situation would be found to be unconstitutional upon review by the Supreme Court as a violation of the 14th Amendment or of Art. IV, section 1. If so, then Bullington would be free to bring his action in any court, federal or state, including those of North Carolina.

However, upon review the statute may be found to be constitutional. Such a decision may rest upon one of two grounds: that it is constitutional even though it precludes substantive as well as procedural rights, or, that the statute operated only upon the adjective or procedural law of the state and was therefore constitutional.

If the position of the Court were the former, the plaintiff would have no standing in the federal court in North Carolina by reason of the acknowledged *Erie* doctrine requiring the application of the substantive law of the state in the federal court sitting therein.

If the view of the Court were the latter, that the statute merely was procedural, the dismissal in the state court was then not an adjudication on "the merits" and Bullington would not be barred from bringing action in another court. However, his chances of success in the federal court sitting in North Carolina are meager. "That chance was hardly worth the gamble," writes Mr. Justice Rutledge in his dissent,[75] for the rule of *Guaranty Trust v. York*[76] would seem to bar an action in a federal court where no recovery is possible in the state court. Though the

[72] Pink v. A. A. A. Highway Express, 314 U. S. 201, 62 Sup. Ct. 241, 86 L. Ed. 152 (1941).

[73] *Cf.* Curry v. McCanless, 307 U. S. 357, 59 Sup. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162 (1939); Graves v. Elliott, 307 U. S. 383, 59 Sup. Ct. 913, 83 L. Ed. 1356 (1939).

[74] Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777 (1943); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939). *But cf.*, recent majority opinion of Mr. Justice Burton in Order of United Commercial Travelers of America v. Wolfe, 67 Sup. Ct. 1355 (1947).

[75] Angel v. Bullington, 67 Sup. Ct. 657 at 670.

[76] 326 U. S. 99 (1945).

York case is not precisely in point, yet its theory could readily be expanded to include the circumstances of the present case.[77]

E. *Construction and Effect of State Statute and Policy.*

The Court by a three-pointed argument seeks to negative the suggestion that the North Carolina Supreme Court construed the statute in such a way as to close only the state courts but not the federal court sitting in North Carolina. First, Mr. Justice Frankfurter denies that the state court made any such assertion, saying, "It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts."[78] The opinion of the Supreme Court of North Carolina[79] in dealing with the limitation of the statute reads in part: "This closes the courts *of this State* to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law *of the State*. . . . It is a limitation of the jurisdiction of the courts *of this State*."[80] Mr. Justice Frankfurter manifestly is not swayed by the equivocal Latin maxim, *"Inclusio unius est exclusio alterius."* One is induced to ask what view would have been taken by the learned justice had the North Carolina court specifically construed the statute as closing *all* courts in North Carolina, expressly stating that action in the federal courts was precluded as well.

Secondly, and with little more rationality, the court declares, ". . . it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other states to secure such deficiency judgments against North Carolinians."[81] It may be admitted that there is slight probability that the legislature or judiciary of North Carolina desires to restrict its own citizens but not those of other states. However, it is suggested that, despite that, there would be here no greater discrimination than that which normally results from local statutes which limit or bar a right of action, or from any local decision wherein the court refuses to exercise its jurisdiction.[82] To take the view proposed would result in grant-

[77] In point of fact, the *York* case was thought by Mr. Justice Rutledge to have been an alternate basis for the majority view.

[78] Angel v. Bullington, 67 Sup. Ct. 657 at 662. *Cf.* his earlier statement, "For purposes of res judicata, the significance of what a court *says* it decides is controlled by the issues that were open for decision." On the face of it, these two statements seem in opposition.

[79] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).

[80] *Id.* at 20, 16 S. E. 2d at 412.

[81] Angel v. Bullington, 67 Sup. Ct. 657 at 662.

[82] Chambers v. Baltimore & O. R. R., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143 (1907). But note qualifications upon limiting of jurisdiction. McKnett v. St. Louis & S. F. R. R., 292 U. S. 230, 54 Sup. Ct. 690, 78 L. Ed. 1227 (1934); Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct 57, 59 L Ed 193 (1914). The operation of the doctrine of *forum non conveniens* is a familiar example of the problem presented here.

ing exterritorial effect to local policy. Here, it is believed, North Carolina is simply asserting that the holder of notes securing the purchase price of land shall not be entitled to recovery in the courts of North Carolina. Surely the court would not go to the extreme of holding that an action brought against Angel in the courts of another state should be barred by the policy of his domicile as expressed by its statute. Moreover, there was no perceivable reason for the court to insert this argument since, by the simple expedient of declaring that, "For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State,' "[83] any criticism of the Supreme Court's explication of what the North Carolina court meant is futile. However, as a result of that declaration, the court in essence admits of the power of a state, through its legislature and judiciary, to limit or take away the jurisdiction of the federal court in diversity cases.

Thirdly, the Court argues that the statute, upheld by the North Carolina court, is expressive of North Carolina policy and that it is the duty of the federal court to carry out that policy under the *Erie* doctrine. "The essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."[84]

If this be true for the present case, how far will the doctrine be carried? Assume that Angel brought action against Bullington in North Carolina for specific performance of a contract to convey Virginia land. Assume further that a North Carolina statute contained a limitation upon the court in that it declared that no person shall be entitled to a decree of specific performance of a contract to convey foreign land. Would a determination of the North Carolina Supreme Court that the statute barred Angel's action in the state court likewise preclude it in a federal court of North Carolina? It would seem that no recovery could be had since the same factors were present: the statute limiting the state court's jurisdiction and the determination in the state court upholding the statute as to the same parties.

What would be the result if the plaintiff seeks a remedy in the federal court without first going to the state court, there having been decisions of the state court upholding the constitutionality of the statute in similar cases? Would the absence of the state court determination *as applied to the plaintiff* cause a different conclusion? Or, as a further step, assuming that the constitutionality of the statute has never been questioned and therefore never determined, would the federal court apply the policy of the state as announced by the legislature of North Carolina and refuse recovery?

[83] Guaranty Trust v. York, 326 U. S. 99 (1945).
[84] Angel v. Bullington, 67 Sup. Ct. 657 at 662.

It is, of course, apparent that the principal case is not square authority for an affirmative answer to this question. However, the language of the majority opinion would seem to be broad enough to require the federal court to conform to state policy even though there be nothing more than the bare statute indicative of it. Whether the Court will extend the *Erie* rule to cover this remains yet to be answered.

That the Supreme Court would require conformity with a state statute of doubtful constitutionality, as the one in question, is improbable. Judge Magruder, speaking for the Circuit Court of Appeals for the First Circuit, dealt with this problem indirectly in *Sampson v. Channell.*[85] Concerning whether or not a federal court must follow an unconstitutional state decision, it was said:

> "Presumably we are permitted under the *Tompkins* case thus to attack the decision of a state court collaterally, so to speak, for the Supreme Court would hardly require the federal courts to follow a local decision which, had it been appealed, would have been reversed by the Supreme Court on constitutional grounds."[86]

It would seem that if this dictum is accurate, a federal court would have even less reason to apply a state statute of probable unconstitutionality.

F. *Object and Purpose of Diversity Jurisdiction.*

The majority then advances the object of diversity jurisdiction, saying:

> "Availability of diversity jurisdiction which was put in the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great local body of local citizens."[87]

Without question, protection against discrimination of non-residents was the major purpose of diversity jurisdiction of federal courts. But in what manner is diversity jurisdiction being used to discriminate against "the great body of local citizens?" True, if a contrary view be taken, a resident of North Carolina may not recover on a deficiency against another resident of North Carolina in a state court. Nor, since there is no diversity of citizenship, may he recover in a federal court.[88] And a non-resident bringing action in a state court against a resident may not recover, yet he may in the federal court. Still it should be emphasized, a resident who could not recover against a non-resident in the state court would have resort to the federal court for relief. Accord-

[85] 110 F. 2d 754 (C. C. A. 1st 1940), *cert. denied,* 310 U. S. 650, 60 Sup. Ct. 1099, 85 L. Ed. 1415 (1940). See also Griffin v. McCoach, 313 U. S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941).

[86] *Id.* at 759.

[87] Angel v. Bullington, 67 Sup. Ct. 657 at 662.

[88] Unless, of course, a federal right is claimed.

ingly, it would appear that the court's complaint of discrimination is less weighty than at first glance.

Furthermore, against the proposition of discrimination must be balanced the possibility of fraud, or, at the least, a likelihood of unfairness. Is it not probable that a resident of North Carolina may enter into a contract in Virginia knowing full well that the policy of his domicile, North Carolina, will not permit recovery thereon? Where service in Virginia is not feasible this is a real danger and one to which the parties may now be exposed.[89]

IV. Grounds of Decision

A. *Erie and/or res judicata.*

Mr. Justice Rutledge in a critical dissent decries the joining of both res judicata and *Erie* as an unnecessary admixture which "distorts and misapplies both doctrines." This invites an investigation into the question of whether or not there was a necessity for their joint use.

Had the Court used as a basis for its decision the *Erie* doctrine alone, two roads would have been open. The Court could have held, against the contention of Bullington, that the state court's construction of state policy was not a violation of the Constitution. The opinion, then, would have been similar to that of *Griffin v. McCoach*[90] and the case would have been remanded to the district court to apply the state policy and statute. On the other hand, the Court could, and here did, refuse to determine the constitutional question in the first instance. Unquestionably, there is some doubt as to the constitutionality of the state act as applied to a non-resident plaintiff suing on a contract dealing with foreign land. Therefore, constitutionality not being predetermined, the district court must resolve for itself the constitutional question inasmuch as a federal court, it is believed, would have no duty to apply an erroneous and unconstitutional state law.[91] This determination would then be subject to review by the Supreme Court. Thus it would appear that, since the Court refused to determine constitutionality

[89] "It is considered more important in the administration of justice in our federal system to prevent a party from taking advantage of the accident of diversity of citizenship to secure the benefits of a more favorable rule of law than to prevent him from taking a like advantage of his own immunity from service of process or his opponent's liability to such service because of the accident of locality." Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 189 (1944).

[90] 313 U. S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941). The Court decided the constitutionality of the state policy in the first instance before remanding the case to the district court. The Court said, "If upon examination of the Texas law it appears that the courts of Texas would refuse enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of its interference with the local law, such refusal would be, in our opinion, within the constitutional power of Texas courts."

[91] Note dictum in Sampson v. Channell, *supra* note 85.

initially, the use of *Erie* alone as a foundation for the decision would open the door for a Supreme Court "encore."

Might the decision have been grounded solely on res judicata? A judgment of a court of competent jurisdiction would bar a collateral action between the same parties on the same issues in the absence of fraud.[92] In order to give effect to the North Carolina action as res judicata it must be assumed that the majority was correct in its interpretation of the North Carolina decision and what it actually adjudicated, *viz.*, the constitutional validity of the statute as applied in these circumstances.[93] Assuming, therefore, a valid judgment on the "merits" of a court of competent jurisdiction, if, rather than bringing suit in the federal court, Bullington had brought the second action in the courts of a sister state, Angel might have pleaded as a bar the prior North Carolina judgment on the grounds of "full faith and credit."[94] But "full faith and credit" only constrains the forum to give to the foreign judgment that effect and meaning which it would have been given in the state rendering the judgment.[95] The effect and meaning of the North Carolina decision, as obviously understood by the North Carolina court, was that the North Carolina statute "is a limitation of the jurisdiction of the courts of this State," that Bullington was not entitled to recovery "in such courts." "The court, being deprived of its jurisdiction, has no power to render judgment for the plaintiff in the cause of action alleged."[96] Therefore the sister state, in conformity with the requirements of "full faith and credit" would merely be required to recognize the inability of the North Carolina court to exercise jurisdiction. Such recognition would satisfy the constitutional requirement but would not bar action at the forum.[97] Nor should the "full faith and credit" clause preclude an action on the sister state's judgment in the federal court sitting in North Carolina[98] since "the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to judgments of the courts of her sister states."[99]

[92] See note 56 *supra.*

[93] See note 57 *supra.*

[94] U. S. CONST. Art. IV, §1. The same rules relative to the requirement of an adjudication "on the merits" apply to "full faith and credit" as to res judicata.

[95] 28 U. S. C. A. §687. ". . . and the said records and judicial proceedings, so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they were taken."

[96] Bullington v. Angel, 220 N. C. 18, 20, 16 S. E. 2d 411, 412 (1941).

[97] Warner v. Buffalo Drydock Co., 67 F. 2d 540 (C. C. A. 2d 1933); *cf.* Industrial Commission of Wisconsin v. McCartin, 67 Sup. Ct. 886 (1947).

[98] Judgments of state courts are accorded full faith and credit in the federal courts. American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298 (1932).

[99] Cooper v. Newell, 173 U. S. 555, 567, 19 Sup. Ct. 506, 510, 43 L. Ed. 808, 812 (1899).

As long as the North Carolina federal court was considered a separate entity for all purposes Mr. Justice Frankfurter was faced with the probable ineffectiveness of the res judicata concept as applied to the facts of this case. It is possibly for that reason that phraseology of the *York* development of the *Erie* doctrine was introduced. If in diversity cases a federal court is "in effect only another court of the State," the res judicata doctrine then becomes a fully adequate impediment to further litigation in the federal court.

B. *Rationale.*

Unquestionably, the court has gone to great lengths to preclude a recovery for Bullington in the federal court of North Carolina. Its motives are not readily distinguishable. However, there are several bases upon which the decision may be rationalized.

It may be merely that the Court is applying in another instance the fundamental principle of *Erie,* namely, the procurement of the same result in both federal court and the courts of the state in which it sits.[100] Statewide uniformity is regarded as more of a desideratum than uniformity between the states. This aim is considered so paramount that characterization by the state of a matter as procedural or substantive will not control the federal court sitting therein when conformity of result will be sacrificed.[101]

The desired conformity, however, would have been attained without the intrusion of res judicata. The rationale, therefore, must be *Erie* and more. Perhaps it is a desire to put an end to litigation, for as brought out before, the result of refusal to determine the constitutional question while grounding the decision solely on *Erie* would readily have led to a return of the case to the Supreme Court.[102] The importation of res judicata averts that additional litigation.

A contributing factor may well be the evident inclination of the Court to lessen the quantity of cases coming to the federal courts on diversity grounds alone.

> "That the justices have exhibited tendencies in the past to reduce the number of cases coming into federal courts solely on diversity grounds is common currency. Conformable 'substance,' with 'substance' roughly defined to include all matters likely to bear vitally on the result in a case is one way of reducing the number of these cases. If the 'law' is the same, probably the greatest single impetus behind the march to the federal court rooms solely on diversity grounds has been removed."[103]

[100] Griffin v. McCoach, 313 U. S. 498 (1941); Klaxon v. Stentor Electric Mfg Co., 313 U. S. 487 (1941).
[101] Guaranty Trust Co. v. York. 326 U. S. 99 (1945).
[102] *Supra* pp. 45-46.
[103] TUNKS, *op. cit. supra* note 30, at 302.

V. Possible Effect of Angel v. Bullington

The effect and possible consequences of the present decision solicit examination and exploration. Though it is never ascertainable what complexion a future litigation may put on an earlier decision, a projection of the principal case may be of some value. In order to speculate upon the prospective development of *Angel v. Bullington* several hypothetical situations are presented.

First—Where the plaintiff brought initial action against the defendant in the federal court of North Carolina, prior to any state interpretation of the statute.

It is probable here that the plaintiff would have procured an unassailable judgment. It is likely that, in this case, the federal court would have construed the statute as covering deficiencies concerning North Carolina property only.[104] And it is not probable that the Supreme Court would have disturbed this construction, at least, as here, where there was no prior state interpretation of the statute. One may have some misgiving as to whether or not the federal court would be compelled by "full faith and credit" or an *Erie*-conscious Court to give effect to the statute of North Carolina. As briefly noted *supra,*[105] the constitutional sanction presumably will not be of a character which would force the federal court in North Carolina to accord to the statute any effect other than that given it in North Carolina, *viz.,* to preclude jurisdiction of a North Carolina state court. Conversely, however, it is not difficult to imagine that the court would find that the vigorous *Erie* rule requires a result in conformity with the local formula.[106]

Second—Where, after the North Carolina state action, plaintiff was able to serve the defendant in Virgina and brought action in a Virginia state court.

It is very likely that recovery would be possible.[107] Since the North Carolina decision was, as construed by the North Carolina court itself, merely a dismissal for want of jurisdiction, "full faith and credit" would not require a dismissal in the Virginia state court. Presumably this result would not be limited only to Virginia but to both state and federal courts of any sister state other than North Carolina.

Third—Where the plaintiff brought the initial suit and obtained judgment in Virginia.

Under these circumstances there can be little doubt but that the plaintiff would recover upon a suit on the Virginia judgment even though the

[104] McGirl v. Brewer, 132 Ore. 422, 280 Pac. 508, 285 Pac. 208 (1930).
[105] *Supra,* pp. 45-46.
[106] Guaranty Trust Co. v. York, 326 U. S. 99 (1945).
[107] Warner v. Buffalo Drydock, 67 F. 2d 540 (C. C. A. 2d 1933).

suit be brought in North Carolina.[108] North Carolina would ordinarily be required by "full faith and credit" to recognize the Virginia judgment as long as North Carolina had a suitable court in which action on the judgment might be brought.[109] Furthermore, recovery could be had in the North Carolina federal court as well, since the federal courts are bound by "full faith and credit" to the same extent as a state court.[110]

Fourth—Where, after the litigation in both the North Carolina state court and the North Carolina federal court and the reversal by the United States Supreme Court, plaintiff brought action in Virginia.

If it be true that the reasons for reversal of the lower federal courts was that the North Carolina federal court was only another court of that state, it might be argued that the result should be the same as that arrived at in the second hypothesis *supra*. That is to say, though the state court necessarily determined the constitutionality of the state statute and this bound the federal court sitting in North Carolina to refuse recovery, the vital question, *i.e.*, the liability of Angel to Bullington, was not concluded. Therefore, action may be brought, assuming proper service be had, and recovery enjoyed in the state courts of any sister state. Furthermore, it would seem that this analysis, buttressed by the *York* rule of state court—federal court identity,[111] should permit recovery by the plaintiff in any federal court other than that sitting in North Carolina.

If the preceding discussion be a true explanation of the meaning and effect of *Angel v. Bullington* it would appear that the two underlying principles of the res judicata concept are not consummated.[112] Neither is the defendant protected from vexatious relitigation nor is the public interest in termination of litigation subserved.

VI. Conclusion

The major consequence of the Supreme Court decision ostensibly

[108] Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908).

[109] Though it has been held that the Constitution does not require a state to provide a court, Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225 (1903), yet a state may not avoid its obligations of full faith and credit by simply denying to otherwise competent courts jurisdiction to entertain suits on judgments, Kenney v. Supreme Lodge, 252 U. S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716 (1920), nor may the state substantially deny jurisdiction by requiring conditions legally impossible of fulfillment, Broderick v. Rosner, 294 U. S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133 (1935). Note language of the North Carolina statute, *op. cit. supra* note 5, ". . . or where a judgment or decree is given . . ." the person ". . . shall not be entitled to a deficiency judgment."

[110] American Surety Co. v. Baldwin, 287 U. S. 156 (1932).

[111] Guaranty Trust Co. v. York, 326 U. S. 99 (1945).

[112] Von Mosckzisher, *Res Judicata*, 38 Yale L. J. 299 (1929); 2 Freeman, Judgments 1318 (5th ed. 1925).

is the somewhat shocking result that a state legislature may, in effect, limit, expand or eliminate the diversity jurisdiction of a federal court within that state.[113] Though the case is not authority for a rule to the effect that a state statute alone may qualify the jurisdiction of a federal court, yet the majority opinion categorically declares obsolete[114] an earlier case[115] which promulgated the doctrine that:

> "The state could not prescribe the qualifications of suitors in the courts of the United States and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for th enforcement of a valid contract."[116]

The *Erie* policy of conformity continues to expand and to gather within its compass a growing assembly. The future inviolability of the jurisdiction of the federal courts is obscure and precarious. The present fascination of the Court for statewide uniformity and the momentum of the engulfing *Erie* doctrine may be of such potency as to lead to even further encroachment of this hitherto sacrosanct field.

[113] It may be argued with not too great hope of success that the jurisdiction of the federal court is not abridged by the North Carolina legislature and judiciary but rather that the inaction of the plaintiff, himself, by failing to bring his action originally in the federal court or by failing to seek review of the State decision in the United States Supreme Court, is an instance of not seasonably taking advantage of the jurisdiction which existed.

[114] "In so far as [the case] is based on a view of diversity jurisdiction which came to an end with *Erie R. R. v. Tomkins.*"

[115] David Lupton's Sons v. Auto Club of America, 225 U. S. 489, 32 Sup Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699 (1912).

[116] *Id.* at 500, 32 Sup. Ct. 711 at 714. State law is given effect through the Rule of Decision Act, 28 U. S. Code §725, derived from §34 of the Judiciary Act of 1789, ch. 20, which provides, "The laws of the several states, *except where the Constitution, treaties, or statutes of the United States otherwise require or provide,* shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Quaere:* Is the rule of *Angel v. Bullington* only applicable where the state law does not conflict specifically with the criteria of federal jurisdiction as set forth in the Judicial Code?