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Validity of Deed Given under Compulsion of "Foreign" Court

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man; John C. Hauck of Helena, Secretary; and E. A. Blenkner of Columbus, W. E. Keely of Deer Lodge, Joseph J. McCaffery Jr. of Butte, Theodore F. McFadden of Dillon, and Honorable R. S. McHugh of Anaconda, administrative personnel.

The Honorable Cody Fowler, President of the American Bar Association, will appear as a guest speaker at the 1951 meeting to be held in Butte on June 28, 29, and 30, 1951.

VALIDITY OF DEED GIVEN UNDER COMPULSION OF "FOREIGN" COURT

A court of equity of one jurisdiction cannot directly affect by its decree title to land situated in another state. A court foreign to the situs of land is said to have ". . . no inherent power, by the mere force of its decree, to annul a deed or to establish a title."[1] However, it is well settled that jurisdiction exists in a court of equity to give a decree directing a defendant over whom it has personal jurisdiction to execute a conveyance of land situated elsewhere, and that such a decree may be enforced, as against the person of the defendant, by contempt proceedings.[2]

Courts of the situs have consistently recognized such defendant-executed deeds as valid.[3] Inevitably, however, astute counsel will someday persuade a situs court to refuse recognition to one of these conveyances,[4] and the situs' decision will be appealed to the Supreme Court of the United States. There are

[1]Hart v. Sansom (1894) 110 U.S. 151, 155. This particular quotation has been repeated in many cases.

[2]Penn v. Baltimore (1750) 1 Ves. Sr. 444, 2 White and T. Lead. Cas. in Eq. 923; Montgomery v. U.S. (1888) 36 F. 4; Cleveland v. Burrill (1857) 25 Barb. 532; Hart v. Sansom (1894) 110 U.S. 151, 155; Watkins v. Holman 16 Pet. 25 (U.S. 1842); Corbett v. Nutt 10 Wall. 464 (U.S. 1868); Carpenter v. Strange (1891) 141 U.S. 87; Tardy v. Morgan (1844) 3 McLean 358, Fed. Cas. No. 13 752; Burnley v. Stevenson (1873) 24 Ohio St. 474, 15 Am. Rep. 621; Davis v. Headley (1871) 22 N. J. Eq. 115.

[3]Bullock v. Bullock (1894) 52 N. J. Eq. 561, 30 A. 676, 46 Am. St. Rep. 528, 27 L.R.A. 213; Mitchell v. Bunch (1831) 2 Paige 606, 22 Am. Dec. 669; Baschal v. Acklin (1863) 27 Tex. 174; Burnley v. Stevenson (1873) 24 Ohio St. 474, 15 Am. Rep. 621; Steele v. Bryant (1909) 132 Ky. 569, 116 S. W. 765; Deschenes v. Tallman (1928) 248 N.Y. 33, 161 N.E. 321; Bailey v. Tully (1943) 242 Wis. 226, 7 N.W. (2d) 837, 145 A.L.R. 578.

[4]An Iowa case very nearly raises this issue: Gilliland v. Inabnit (1894), 92 Iowa 46, 60 N.W. 211. However, there the original grantor never did contest the conveyance. After his death some of his heirs sought unsuccessfully to have the grant set aside. Cf. Goodrich's interpretation of this case: GOODRICH, CONFLICT OF LAWS (3d. Ed. 1949) 219, n. 205.

a variety of reasons which the situs might assign for its refusal.[5] Whether the jurisdiction of the foreign court will give the deed efficacy at the situs in the face of the situs' displeasure, and whether the Supreme Court will require the situs to give effect to the coerced deed under the Full Faith and Credit Clause is the precise question to which this comment is addressed. The decision of the Supreme Court on the subject will be a landmark in the law because it will precisely define, at last, the power or jurisdiction which a court of equity may exercise over land outside its own territory.

The general question of the extraterritorial power of a court of equity with respect to land has been a subject of extensive inquiry by many legal writers.[6] The theories advanced have included all possibilities, ranging from the view that the situs may utterly ignore whatever the foreign court tries to do,[7] to the view that the action of the foreign court should be accorded Full Faith and Credit at the situs.[8] For the most part, these writers have considered the problem as one of defining the scope of

[5]For example, suppose that the foreign court orders a minor to convey land at the situs, and by the law of the situs the minor cannot convey land; or suppose that the foreign suit is for specific performance of a contract entered into in the foreign jurisdiction to convey land at the situs, and the contract would be void at the situs, while good by the law of the foreign jurisdiction; or suppose the situs court declared the deed invalid simply because executed under the coercion of the foreign court.

[6]See Langdell, SUMMARY OF EQUITY PLEADING, 35, n. 4 (1883); Note, 25 HARV. L. REV. 653 (1912); Note 21 HARV. L. REV. 210 (1908); Walsh, EQUITY § 17 (1930), (cf. review of Chaffee, 44 HARV. L. REV. 313; 316 (1930); Schofield, *Equity Jurisdiction Under the Full Faith and Credit Clause; Fall v. Eastin*, 5 ILL. L. REV. 1 (1910) (uncompleted); Pound, *Progress of the Law-Equity*, 33 HARV. L. REV. 420, 423, 425 (1920); Beale, *Equitable Interests in Foreign Property*, 20 HARV. L. REV. 382 (1907); Schofield, *Full Faith and Credit v. Comity and Local Rules of Jurisdiction*, 10 ILL. L. REV. 11, 28-30 (1915); Cook, *Powers of Courts of Equity*, 15 COL. L. REV. 106, 159 n. 56, 228, 243-246; 2 BLACK, JUDGMENTS, 2nd Edition, § 872 (1902); Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for Conveyance of Foreign Land*, 34 YALE L. J. 591 (1925); Barbour, *The Extraterritorial Effect of Equitable Decrees*, 17 MICH. L. REV. 527 (1919); Durfee, Note 18, MICH. L. REV. 142 (1919); Goodrich, *Enforcement of a Foreign Equitable Decree*, 5 IA. L. BULL, 230 (1920); Goodrich, CONFLICTS OF LAWS, § 207 (1927); Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930); note, 70 CENT. L. J. 1 (1910); Note, 11 CAN. BAR REV. 211; Gordon, *The Converse of Penn v. Baltimore*, 49 L. Q. REV. 547 (1933); *Developments in the Law*, Equity, 47 HARV. L. REV. 1174, n 2 (1934); Briggs, *The Jurisdictional—Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165, 1179 (1948). This list is far from exhaustive.

[7]Briggs, *op. cit.* 6; Schofield, *Full Faith and Credit v. Comity and Local Rules of Jurisdiction*, 10 ILL. L. REV. 11, 28-30 (1915).

[8]Barbour, *op. cit.* 6; Durfee, *op. cit.* 6; Messner, *opt. cit.* 6.

equity jurisdiction, i.e., merely as a problem of laying down a rule pronouncing what a court of equity, as such, may do with respect to foreign land. It is believed that such an analysis is inadequate for finding a satisfactory solution.

More deeply considered, the problem is one of conflict of laws. Any refusal on the situs' part to give effect to the foreign decree, or to a conveyance executed in compliance with it, will necessarily arise out of some law or policy which the situs has with respect to its own land; or, put another way, out of a failure of the law of the foreign state to conform to the law of the situs. Thus, the pertinent inquiry is this: When a court of equity of one state attempts to affect title to land in another state, and its power to do so is denied by courts of the situs (necessarily on the basis of the situs' law) which court has *power* to apply its own law to the exclusion of the law of the other?

The rule laid down for resolving this conflict will be a rule which recognizes a paramount power in one court or the other to apply its own law in determining the party in whom title will finally reside. That will be its net effect, by whatever name it is called and in whatever words it is expressed. Such rule will hereinafter be called a rule of controlling jurisdiction or power-recognizing rule.

A search of the cases for such a power-recognizing rule is soon rewarded. The repository of exclusive jurisdiction is unquestionably the situs. The decisions of the Supreme Court around the point are replete with statements like the following from *DeVaughn* v. *Hutchison*:[9]

> "It is a principle firmly established that to the law of the state where land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."[10]

This language indicates that the power of the situs in this regard goes beyond the determination of the mere formal sufficiency of the act of conveyance. Its law is determinative of *all* questions relative to passage of title to land within its borders.[11] A clearer statement of a power-recognizing rule would be difficult to imagine.

[9](1896) 165 U.S. 566.
[10]*Id.*, p. 568.
[11]See Clarke v. Clarke (1900) 178 U.S. 186, holding that a court of the situs not only has the power to decide the validity of a conveyance of land within its territorial jurisdiction, but also has power to determine whether power existed in the conveying party to make the conveyance in the first place.

If the Supreme Court can be taken to mean what it says about the exclusive application of the situs' rule, then without doubt no dispute relating to passage of title can be finally settled without either the application of the situs' law, as such, or the consent of the situs to the contravention of its law. A power in the foreign court to give a decree of conveyance, and enforce it against the person of a defendant within its personal jurisdiction, is not inconsistent with the exclusive power of the situs, so long as we keep in mind that the foreign court in giving its decree must depend upon the situs to make it finally effective. If the foreign court in framing its decree adheres carefully to the formal and substantive requirements of the situs' law, it will, of course, have the greatest assurance that the situs will give effect to the decree or a conveyance executed thereunder. If the foreign court applies its own or some other law not coinciding with the internal or conflicts law of the situs, then it will have to depend on whatever policy of comity the situs may have at the choice-of-law level. In any event, the situs, applying its own exclusively applicable law or policy, will decide what operation the foreign action will have on the land. This sufficiently explains the cases where foreign decrees and conveyances executed thereunder have been recognized as valid by the situs.[12]

It appears, then, that the rule which will give or deny actual, final effectiveness to the foreign decree, or a conveyance pursuant thereto, is a *choice-of-law rule belonging to the situs* and exclusively applicable because of the recognized exclusive power or jurisdiction of the situs over its own land.

Actually, there are two rules here in operation: 1. An exclusively applicable choice-of-law rule belonging to the situs, and 2. A rule belonging to the foreign jurisdiction which recognized the exclusive character of the situs' choice of law rule. To repeat, this latter is a power-recognizing rule, itself a conflicts rule. It obliges any foreign court to look to the whole law of the situs when determining rights in land.[13]

[12]See note 3, *Supra*. In 1 CHAFEE AND SIMPSON, CASES ON EQUITY (1934) 143, the authors declare that at least seven different theories have been advanced as to the "effect of foreign decrees for the conveyance of land," briefly describing each. It is believed that the thesis of this paper will be helpful in harmonizing a large part of the apparently diverse views set forth there.

[13]The recent English decision, Re Duke of Wellington (1947) Ch. 506; (1948) Ch. 118 has stirred up a discussion among certain English scholars of the question whose law governs when an English court adjudicates title to foreign land, and of the renvoi problem. See J. H. C. Morris, *Renvoi*, 64 L. Q. REV. 264 (1948); Jennings, note, 64 L. Q. REV. 321 (1948); Mann, note, 11 MOD. L. REV. 232 (1948); see also Falconbridge, note, 26 CAN. BAR REV. 467 (1948). It is submitted that those

The existence and actual use of such a separate category of jurisdictional rules in the conflicts field is a rather new thesis, formally advanced only recently by Professor Briggs of Montana State University School of Law.[14] This thesis should soon receive wide acceptance, at least as concerns interests in lands and succession to movables,[15] for only in the light of it do the cases assume any consistency whatever. Any other analysis is inadequate in that the power of a foreign court of equity over the person of a defendant before it is simply left at loggerheads with the exclusive power of the situs over its land. Professor Briggs' jurisdictional-choice-of-law dichotomy of conflicts rules breaks the apparent deadlock between these two powers without doing violence to either. It is believed that his thesis articulates the law as it actually exists with regard to tangible movables and land.

The great jurist, Judge Learned Hand, is in accord with the views above expressed, as he indicates in the case of *Irving Trust Co.* v. *Maryland Casualty Co.*[16] There the trustee of a

criticizing this decision have missed the whole point. The central question in the Wellington case was whether English law or Spanish law governed devolution of title to Spanish land owned by a British national and domiciliary. The court began its ratio decidendi by applying the well-settled rule that the law of the situs governs succession to land. The court and the scholars accepted this rule without objection and without examination. Their mistake was made at this point. They assume that the rule is a choice-of-law rule of the forum, which, seemingly, is based upon no stronger necessity then the convenience of the formum. Then, finding that the Spanish conflicts (choice-of-law) rule would refer a Spanish court, under the facts, to the law of England, they are caught in the sticky renvoi web. The way out is to re-examine the basis of the lex rei sitae rule. That rule is no mere matter of convenience, nor is it a choice-of-law rule. If convenience were the only consideration, it would be much more desirable simply to apply the internal law of England, but, in fact, the English court has no freedom to pick and choose in this matter, for only Spain can finally determine what may be done with Spanish land. The lex rei sitae rule has its basis in the exclusive power of the Spanish Government, which is to say the exclusive jurisdiction of Spanish courts, over Spanish land. True, the English court itself seems not to realize why it looks to the law of Spain, but the answer to that must be that the court has applied the rule while losing sight of the reason for it. In the light of this analysis, renvoi is exposed as a false problem, at least in the land field.

[14]See Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L. J. 77 (1943); Briggs, *op. cit.* 6.

[15]See Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L. J. 77 (1943).

[16](1936) 83 F. (2d) 168, 111 A.L.R. 1165. Cf. GOODRICH, CONFLICT OF LAWS (3d. Ed. 1949) 466-67, nn. 50 and 51. He cites this case for the proposition that, ". . . The acceptance of title being a tort, 'any court,' said Judge Learned Hand, 'may compel the tortfeasor specifically to restore the property, whatever the law of this situs'." Out of context, it is submitted that this is an extremely misleading quotation. Hand

bankrupt corporation filed a bill in equity to have set aside conveyances made by the bankrupt to the defendant prior to bankruptcy. The conveyances were executed pursuant to a contract made in New York, and the land was situated in Missouri, Florida and New Jersey. The plaintiff alleged that the conveyances were illegal under Section 114 of the New York Stock Corporation Law, which provided that property transfers made by a corporation doing business in New York were unlawful if, at the time of transfer, the corporation was insolvent or threatened with insolvency. Judge Hand held that since the law of the situs "determines absolutely the validity of conveyances, wherever made,"[17] the New York court could not adjudge void conveyances executed in New York, "except as the lex rei sitae is the same as Section 114 [of the New York statute]."[18] However, he stated that acceptance of the deeds by the defendant was a wrong to the creditors of the bankrupt for which the defendant would be liable in a suit for *damages* because of the well-settled doctrine that the law of the place of contracting is controlling in litigation respecting contracts for the sale of land.[19] He then said:

> "True, the same doctrine might not apply to the remedy of specific restitution, or specific performance; English-speaking courts have always been sensitive about land, and in recent years the doctrine of lex rei sitae has been extended to chattels. Yet in principle there ought to be no distinction between the remedies, for, as we have said, one would invade as little as the other the sovereignty of the situs, *which would be free to refuse any effect to the enforced conveyance, if it chose.* The result of such a refusal upon a suit elsewhere might indeed be crucial, but only because, seeing that its remedy would be futile if granted, the court might decline to act at all. When, as here, there is no reason to suspect that the lex rei sitae would not recognize such conveyances as valid though made under the duress of a decree, there is no reason to hesitate." (Italics supplied)[20]

He concluded that the plaintiff was entitled to a decree of

himself, makes it perfectly clear that a foreign court may compel a tortfeasor specifically to restore property *only* because the situs presumably acquiesces in that procedure. Elsewhere Goodrich expressly recognizes that such foreign executed deed is good only ". . . if, at the situs of the land, a deed executed elsewhere will be recognized as effective. . . ." *Id.* at 217.

[17] *Id.*, 171.

[18] *Id.*, 172.

[19] Selover, Bates and Co. v. Walsh (1912) 226 U.S. 112; *in re* Barrett (1926) 12 F. (2d) 73, 77, 78.

[20] *Op. cit.* 16, p. 172.

recoveyance of all the land illegally transferred, and that the New York court had power to give such a decree, for the very reason that the power of the situs to refuse any effect to any conveyance made pursuant to the decree remained unimpaired. The Supreme Court of the United States refused certiorari.[21]

As stated above, the precise question of the extraterritorial efficacy of a coerced deed in the presence of the situs' refusal to recognize it has never been directly decided by the Supreme Court. However, it is believed that the power of the situs to refuse all effect to such a deed is impliedly affirmed in the case of *Clarke* v. *Clarke*.[22] In that case the plaintiff brought an action in a Connecticut state court on a decree of the Supreme Court of South Carolina which declared that, under the law of South Carolina, land situated in Connecticut became personalty when devised by the will of the South Carolina resident. Such a conversion, if finally effective, would have resulted in certain advantages to the plaintiff. The Supreme Court of Connecticut decided that under the law of Connecticut the land remained realty, that the law of Connecticut governed the matter, and refused to give any effect to the South Carolina decision. The Supreme Court of the United States affirmed the Connecticut decision, saying:

> "It is conceded that, had the will been presented to the courts of Connecticut in the first instance, and the rights been asserted under it, the operative force of its provisions on the real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given it; for in such a case not the will, but the decree of the South Carolina court construing the will, is the measure of the rights of the parties, as to the real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective states controlling the transmission of real property by will, or in the case of intestacy, are operative only so long as there does not exist in a foreign jurisdiction a judgment or decree *which in legal effect has changed the law of the situs of the real estate.* This is but to contend that what cannot be accomplished directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty *exclusive jurisdiction* over land within its borders is in legal effect dependent upon

[21] (1912) 299 U.S. 571. Whether approval of the doctrine here pertinent is implicit in the denial is not clear.
[22] (1900) 178 U.S. 186.

> the non-existence of a decree of a court of another sovereignty determining the status of such land. *Manifestly, however, a power cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time.*'' (Italics supplied).[23]

With regard to the Full Faith and Credit Clause the Court said:

> ''. . . no violation [of full faith and credit] was brought about, as the decree of the South Carolina Court was not entitled to be followed by the courts of Connecticut, by reason of a *lack of jurisdiction* in the South Carolina Court over the particular subject matter. . . .'' (Italics supplied).[24]

In the context of the quotations the Court indulges in no language indicating an intention to restrict the principle of the exclusiveness of the situs' power to the particular facts of the case, or to restrict it in any way. Certainly, a decree of the South Carolina court commanding conveyance by a defendant of the Connecticut land would be no less an attempt to infringe on the exclusive power of the situs as conceived by the Court. Such a decree would be just as much an attempt to accomplish by indirection that which cannot be accomplished directly, and, if accorded full faith and credit, would just as effectively ''frustrate at any time'' the exercise of the situs' exclusive jurisdiction over its land.[25]

There remains for consideration probably the most famous of all cases considering this problem. In *Fall* v. *Eastin*[26] the majority opinion unqualifiedly supports our above conclusions. There P, H's divorced wife, sought to recover certain Nebraska land from D. To support her action she asked Nebraska to give full faith and credit to a property settlement found in the divorce decree granted her by the state of Washington, and ordering H to transfer title of the Nebraska land to P. Instead, H rushed to Nebraska and transferred to D, who had full notice. The Washington court then directed its commissioner to give her

[23] *Id.*, pp. 191, 192.
[24] *Id.*, p. 195.
[25] At this point it is appropriate to again state that the fact that deeds of the type here in question have generally been honored by the situs constitutes no valid objection to the position we have taken in this comment. It must always be kept in mind that the question whether the situs *will* give effect to a deed is quite distinct from the question whether the situs *must* give effect to it. The cases where the situs has honored these deeds (note 3, supra) are properly described as illustrations of the operation of the situs' own choice-of-law rule.
[26] (1909) 215 U.S. 1.

a deed, which she also relied on. The majority ruled that Nebraska was under no such compulsion, and it seems reasonably clear that their opinion was not based on the fact that the suit was not formally between H and W.

Although the majority opinion is clear enough, Holmes'[27] special concurring opinion probably has caused the greatest interest and has produced the confusion existing as to just what this case stands for. It is typical of the confused treatment generally accorded this question by judges. Holmes believes that, because the Washington court had jurisdiction of H and W, its decree was "entitled to full faith and credit in Nebraska."[28] Assuming at the outset that the answer is obvious, in view of this admitted jurisdiction, it is apparent that Holmes does not consider the real issue in the case at any point. That basic question is as to the possible limitations upon Washington's power to render an effective decree, and the limitations upon the effectiveness of any decree thus rendered, because of the fact that the real subject matter is foreign land. That he never recognizes this as the element making the case particularly difficult is evidenced by the fact that he cites *Fauntleroy* v. *Lum*,[29] decided by himself just one year earlier, and dealing with the entirely different subject matter of the effect of F-1's judgment in F-2, based exclusively on simple contract rights.

Further, he assumes that the effect of the Washington decree is to be determined just like any judgment based on simple contract rights. He tells us that, "If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska."[30] Failing to check carefully his certainty that such contract would be valid in Nebraska, it does not seem to occur to him to ask whether it is valid only because and to the extent that Nebraska law makes it valid, or because it is valid in Washington. So it becomes clear that Holmes begs the only real question in the case from the very first of his opinion. He adds that "So I conceive that a Washington decree for the

[27]Cf. *Goodrich, Two States and Real Estate*, 89 U. PA. LAW REV. 417, 428 n. 50 (1941). It is submitted that Goodrich concedes too much to Holmes' analysis. Under the thesis of this paper, it is the majority opinion that is perfectly clear in its import. Goodrich also assumes too much in so far as he intends to say that the bald fact of exclusive control over land need no longer be given decisive consideration in determining the locus of *ultimate* legislative jurisdiction with respect to "transactions which have land as their subject matter." *Id.* at 419 n. 12.
[28]*Id.*, p. 15.
[29](1908) 210 U.S. 230.
[30]*Op. cit.* 26, p. 14.

specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska.''[31] Again, he fails to consider carefully the question whether such judgment would be entitled to full faith and credit only on the assumption that it conforms strictly to Nebraska law entitling one to specific pefromance, or because it conforms with Washington law. Can Washington render a decree for specific performance entitled to full faith and credit, altogether contrary to the law of Nebraska determining when a contract is entitled to specific performance?[32] There is no evidence that it can.

Holmes concludes his consideration of the status of the Washington decree in Nebraska with these observations: ''A personal decree is equally within the jurisdiction of a court having a person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree is entitled to full faith and credit in Nebraska.''[33] Having begun his discussion with a question-begging statement, he finishes it with a question-begging conclusion. Presumably, Holmes here states his view that, as between H and P, P should be able to compel the Nebraska court to compel H to convey title to her because Washington has so ordered it, having had jurisdiction to make such order. But that is a non sequitur. Authority for any such proposition is again entirely lacking. Granted even that the Washington decree is ''entitled to full faith and credit,'' exactly *what* faith and credit does this particular kind of judgment demand? Equitable orders are supposed to be strictly personal and purely local in scope. By their own terms they are not supposed to have any extraterritorial effect.

If ''full faith and credit'' compels Nebraska to give effect to the bare finding of the Washington court that P is entitled to the Nebraska land, that is getting dangerously near to an attempt to act *in rem,* and states a proposition expressly denied by *Carpenter* v. *Strange,*[34] and many other cases. Furthermore, even if Nebraska were compelled to enforce the order to convey as between H and P, surely Holmes would not deny to Nebraska the exclusive power to determine the status of such deed, once given. To deny it this power certainly would empower Washington to control the title to Nebraska land—directly for all practical purposes. Having that power, it is absurd to say that Nebraska is compelled to coerce the giving

[31] *Id.*, p. 15.
[32] Briggs, *op. cit.* 6 p. 1183.
[33] *Op. cit.* 26, p. 15.
[34] (1891) 141 U.S. 87.

of a deed which it can immediately strike down if it wants to because it was given under the coercion of a decree.

But Holmes bases his final concurrence with the majority on the proposition that after all, the case raises no constitutional question, because, although Nebraska, according to him, must give full faith and credit to the Washington decree, nevertheless it has an unrestricted power to determine who are privies to the Washington judgment. So it can provide even that a purchaser with notice of the prior equity arising from the Washington judgment will take free from those equities. But if this is only because Nebraska is the situs, it amounts to a recognition of ultimately controlling power in the situs. If, however, Holmes intends to say that *any* F-2 could do the same thing if the question arose there, it is an extremely doubtful proposition. As between F-1, with an admitted jurisdiction over both the persons and the subject matter, and F-2 as just any other state where enforcement is sought, ordinarily F-1[35] (provided F-1 does not try to make persons privies that are not subject to F-1's law) is entitled to have its law as to privies accorded full faith and credit.[36] So it would seem that F-2's power to inquire into the question of who are privies under the F-1 judgment should be limited to an inquiry into whether F-1 has exceeded its jurisdiction in this respect. And even as to this question, the United States Supreme Court must assume the final prerogative of deciding both the question whether F-1's law on judgments has been complied with, and that of whether F-1 has tried to exceed its jurisdiction with respect to privies. Hence, it is by no means clear why Holmes assumes that Nebraska must be conceded unlimited power to determine who are takers without notice, and thus not privies to the F-1 judgment.

Recently, the United States Supreme Court has adopted a significant provision bearing on the problem in Rule 70 of the Federal Rules of Civil Procedure. That rule provides:

> "If a judgment directs a party to execute a conveyance of land . . . and the party fails to comply within the

[35]RESTATEMENT, CONFLICTS, § 450, Comment a.

[36]Bigelow v. Old Dominion Copper Mining and Smelting Co. (1912) 225 U.S. 111, holding that a decree of a Federal circuit court sitting in New York, dismissing a suit in personam brought against one of two joint tort feasors, is not denied full faith and credit by the refusal of the Massachusetts court to treat it as a bar to a suit in Massachusetts against the other tort feasor—on the ground that who is a privy to the New York judgment is a jurisdictional question which Massachusetts is at liberty to inquire into independently, subject to U. S. Supreme Court approval. RESTATEMENT, CONFLICTS, § 450 Comment d.

> time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. . . . If the real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and has the effect of a conveyance executed in due form of law. . . .''[37]

Although the last part of the rule seems to restrict the power of the District Court to give a decree which in and of itself transfers title to those cases where the land is within the territorial jurisdiction of the court, the first part of the rule, empowering the court to give an appointive decree, is not limited in terms to where the land is situated. Hence the rule seems capable of a construction which would extend the operation of an appointive decree, and the deed executed thereunder, to land situated outside the territorial jurisdiction of the court, and make such deed effective without the concurrence of the situs. While no case involving the rule has decided the point, it is extremely unlikely that it will receive such a construction.[38] So to construe it would be to overthrow all of the leading cases on the point, viz. *Clarke* v. *Clarke*,[39] *Fall* v. *Eastin*,[40] *Carpenter* v. *Strange*,[41] etc., which enunciate the exclusive jurisdiction of the situs' courts and the exclusive applicability of the situs' law. Further, if the effect of the last-mentioned cases is conceded to be that attributed to them in this comment, Rule 83 of the same Code seems definitely to restrict the operation of Rule 70 to property located within the state where the District Court sits. Rule 83 provides:

> ''These Rules [including Rule 70] shall not be construed to extend or limit the jurisdiction of the District Courts of the United States. . . .''[42]

It seems equally clear that Rule 70 does not create any distinct Federal power with regard to land. In *American*

[37] 1 F.R.D. CXXXV.

[38] The reasonableness of the suggestion that a deed executed by a person appointed by the court (other than the person in whom title is actually vested) could have any more efficacy in any event than a mere decree purporting in and of itself to convey title is extremely questionable. For a discussion of this point see note, 13 ROCKY MOUNTAIN LAW REV. 140 (1940).

[39] *Op. cit.*, Note 11.

[40] *Op. cit.*, Note 26.

[41] (1891) 141 U.S. 87.

[42] 1 F.R.D. CXLVIII.

Surety Co. v. *Edwards and Bradford Lumber Co.*,[43] a case involving the Rule, the District Court said:

> "Actions to challenge transfers of [property] brought in Federal District Courts are governed as to substantive law wholly by state law."[44]

In fact, the framers of the Rule limited their discussion of it largely to the question whether a Federal District Court could properly adjudicate title to state land at all.[45] They decided that question in the affirmative. The framers did not address themselves to the question of a federal District Court's extraterritorial jurisdiction.[46]

CONCLUSION: On reason and authority, the Supreme Court of the United States most probably would not *compel* a court of the situs of land to give any effect whatever to a deed of such land executed personally by a defendant in compliance with a decree of a foreign court of equity.

GENE A. PICOTTE.

[43](1944) 57 F. Supp. 18; See also Dan Cohen Realty Co. v. National Savings and Trust Co. (1942) 125 F. (2d) 288.

[44]57 F. Supp. 24.

[45]Rules of Civil Procedure, Proceedings of the Institutes in July 1938, pp. 338, 341, 343, American Bar Association (1938).

[46]The attitude of state courts as regards the jurisdiction of foreign Federal district courts over land has been emphatically to the effect that such Federal courts have no power whatever to contravene the situs' state law without the situs' consent. An outspoken example of this attitude is the following from the opinion of Angstman, J. in Wilson v. Thelen (1940) 110 Mont. 305, 311, 100 P. (2d) 923, 926; *cert. denied* 311 U.S. 651. "There would be merit in plaintiff's claim [that the Wyoming Federal District court's decision regarding ownership of Montana land was res judicata] if the Wyoming court had jurisdiction to litigate title to land in Montana. But it is firmly established that an action to determine title to or an interest in real estate is local, and that courts of one state have no jurisdiction to litigate title to land in another state . . . jurisdiction lacking, it cannot be conferred by consent. . . . The Wyoming court was without jurisdiction to determine title to real estate in Montana as against anyone, whether he submitted to the jurisdiction over his person or not. While it is proper for parties to submit to the jurisdiction of the court so far as their persons are concerned, they cannot by consent give the court jurisdiction over real property outside the state. In other words, had the Wyoming case been one to compel the execution of a deed to property in Montana, a judgment so directing would have been binding upon those who were served and were before the court." Obviously such judgment would not be binding on the Montana court.