

February, 1941

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

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VOLUME 89

FEBRUARY, 1941

No. 4

TWO STATES AND REAL ESTATE

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Law suits in which legally important events have taken place in more than one state have not infrequently been decided by courts with reference only to the internal law of the forum. The problems of the legal effect of foreign facts have passed unnoticed. This is less frequent than it used to be; judges and counsel are now for the most part conscious of the two state problem, though finding the answer may baffle the most ingenious. If one may venture a sweeping obiter dictum, it would be to the effect that the present consciousness of Conflict of Laws problems is due in large part to the influence of Joseph Henry Beale. Not only to the thousands of his own students, but through many of them as teachers, he made Conflict of Laws one of the exciting intellectual adventures of a stimulating law school curriculum. His magnificent casebooks, concerning the retail price of which law students have composed ribald songs, have been the great mine of authoritative material for judges and brief writers. His essays in legal magazines have both conveyed ideas of his own and stirred up thinking in others. And finally through a dozen years of work upon the *Restatement*, followed by *Beale on the Conflict of Laws*, we have both a permanent record of his contribution to group thought plus the summation of a long lifetime of scholarly thought and research in a highly important field of the law. The importance of the two state element in legal questions

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has become recognized¹ and Professor Beale has done much to bring it about.

Upon one general proposition in the Conflict of Laws there has been little if any difference of opinion among the authorities. The reference to the law of the state where land lies with regard to legal questions involving rights in the land is one of practically universal acceptance. The principle has been stated by courts and text writers in very broad terms. Thus, our pioneer American authority in the field, Mr. Justice Story generalizes: "All the authorities recognize the principle in its fullest import, that real estate is exclusively subject to the laws of the government, within whose territory it is situate."² And speaking for a unanimous court, Mr. Justice Miller in *McGoon v. Scales*³ generalized to the effect that: "It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which the land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

Applications of the broad principle are easy to find. The law of the situs governs the requisites of a deed to land,⁴ the quantum of the estate conveyed,⁵ the validity of a will devising land,⁶ the determination of the question whether the will has been revoked,⁷ whether a trust can be created in real estate,⁸ whether a grantor has legal capacity to convey.⁹ It would be affectation to multiply instances, for the general principle is well known and thoroughly established.

Like some other general rules of law,¹⁰ the reasons which lie underneath are seldom stated. Two adequate explanations of this one, however, seem to be clear. There is the necessity of practical convenience in the selling of real estate, which in this country is as simple

1. The present writer has endeavored to state why the two-state element should make a difference in a paper called *Public Policy in the Law of Conflicts* (1930) 36 W. VA. L. Q. 156. Compare, for a different point of view: Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173.

2. STORY, CONFLICT OF LAWS (1834) § 428.

3. 9 Wall. 23, 27 (U. S. 1869).

4. See 2 BEALE, THE CONFLICT OF LAWS (2d ed. 1935) § 215.1; GOODRICH, CONFLICT OF LAWS (1938) § 144, and cases there cited.

5. 2 BEALE, *op. cit. supra* note 4 at § 221.1; GOODRICH, *op. cit. supra* note 4 at § 144, n. 7.

6. 2 BEALE, *op. cit. supra* note 4 at § 249.1; GOODRICH, *op. cit. supra* note 4 at § 162, and cases there cited.

7. 2 BEALE, *op. cit. supra* note 4 at § 250.1; GOODRICH, *op. cit. supra* note 4 at § 162.

8. 2 BEALE, *op. cit. supra* note 4 at § 241.1; GOODRICH, *op. cit. supra* note 4 at § 147.

9. 2 BEALE, *op. cit. supra* note 4 at § 216.1; GOODRICH, *op. cit. supra* note 4 at § 144.

10. Like that, for instance, that one state will not open its courts to the enforcement of the penal or fiscal laws of another. *Huntingdon v. Attrill*, 146 U. S. 657, 671 (1892); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888); *Moore v. Mitchell*, 28 F. (2d) 997 (S. D. N. Y. 1928), 30 F. (2d) 600 (C. C. A. 2d, 1929), 281 U. S. 18 (1930); RESTATEMENT, CONFLICT OF LAWS (1934) § 610, comment c, § 611; *cf. Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935). See Sack, (*Non-Enforcement of Foreign Revenue Laws in International Law and Practice* (1933) 81 U. OF PA. L. REV. 559.

and almost as common as selling a motor car. Instruments affecting land must, under universal recording statutes, be recorded if a subsequent purchaser is to take subject to them. Whether the strength of the chain of title is to be passed upon by the individual lawyer for a prospective purchaser, or by counsel for a title insurance company, the convenience of a single state's law to check against is clear. Another reason is less practical, but equally controlling. Reference to the law of the situs for questions concerning land is the natural one for the American lawyer to make. He thinks in terms of a law which is territorial,¹¹ and this reference fits that method of thinking. The combination of practical advantage and theoretical "at homeness" results in a rule the authority of which is unquestioned.¹²

One of the characteristics of a mature mind is its ability to make distinctions and gradations; people and issues are not black or white, but varying shades of gray. Likewise, a mature system of law, which the common law now is, develops distinctions, limitations and qualifications as called for, instead of fitting all problems of litigants into a limited series of grooves. A few of those limitations upon and qualifications of the universal reference to the law of the situs show that the Conflict of Laws, though comparatively new in the divisions of our common law, has gained the benefit of the maturity of legal thinking which we can now claim.

The first limitation upon the broad principle of reference to the law of the situs appears in the distinction between transactions which purport to change the ownership of interests in land and transactions which have land as their subject-matter. In other words, there is a distinction made between conveyances of land and contracts which concern land. Suppose *A* and *B*, for instance, in state *X* make an agreement by which *A* promises, for a consideration, to convey land in state *Y* to *B*.

11. For a critical examination of the territorial concept, see Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

12. A third reason which ought not to be too greatly stressed in our day is undoubtedly significant if only historically. Since land is immovable, the state of its situs is the only sovereignty which can exercise physical power over it and the exercise of such power is not an infrequent occurrence. It is perhaps quite natural that the sovereign exercise that power in accordance with its own rules. See Holmes, J., in *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897); 2 BEALE, *op. cit. supra* note 4 at § 214.1. But there is no logical reason why the exercise of that power should not follow a prior determination of the rights of the parties, that determination being reached by reference to the laws of some other place. Moreover, well advanced civilized society should not have to rely upon the primitive concept of power to enforce as the justification for a rule. For example, we have come a long way from the original idea of physical power as the basis for the existence of personal jurisdiction. E. g. *Washington v. Superior Court*, 289 U. S. 361 (1933); *Hess v. Pawloski*, 274 U. S. 352 (1927); *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *Dodd, Jurisdiction in Personal Actions* (1929) 23 ILL. L. REV. 427. Compare, DICEY, *CONFLICT OF LAWS* (5th ed. by Keith, 1932) 30.

Suppose that by the law of the state where the land is, *A*, who is a married woman, has no power to convey land, but that by the law of the state where the parties make their agreement *A* has all the legal powers of an adult, unmarried woman. One might refuse to make any deviation from the general rule in such a case and refer the validity of this whole transaction to the law of the situs. The English rule, as stated in Dicey, is broad enough to sustain this position generally.¹³ And it is certainly a possible position for a court to take. On the other hand, the general rule as to the determination of the validity of a contract, as set out in the *Restatement*, refers this question to the place of contracting.¹⁴ While this may be an over-simplification, and there is confusion in the authorities upon the subject,¹⁵ it seems almost as natural a view to take with regard to the contract rule as the reference to the place where the land is as the rule with regard to the land's transfer. But if the law of the place of contracting is looked to with reference to the validity of the contract and the law of the situs is looked to with reference to the validity of the conveyance one may come out with an enforceable contract to convey but be under a legal disability to carry out the agreement. Obviously, a decree for specific performance would hardly lie, at least until such time as the disability is removed.

But the existence of a disability has no bearing on the question of the validity of the contract. Thus in the leading case of *Polson v. Stewart*¹⁶ the disability had been terminated by death and the court gave a remedy equivalent to specific performance. The essence of the distinction was characteristically stated by Justice Holmes: "It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. . . . But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. . . . If valid by the law of North Carolina there is no reason why the contract should not be enforced here."¹⁷

13. DICEY, *op. cit. supra* note 12 at 583, 597, 683, 953.

14. RESTATEMENT, CONFLICT OF LAWS (1934) § 332.

15. See, for example, *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111 (1893); *Meylink v. Rhea*, 123 Iowa 310, 98 N. W. 779 (1904); *Farm Loan Co. v. Beale*, 113 Neb. 293, 202 N. W. 877 (1925); *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235 (1909); *Abell v. Douglass*, 4 Denio 305 (N. Y. 1847); *Anderson v. May*, 10 Heisk. 84 (Tenn. 1872); *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240 (1919); *Beale, What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 1, 79, 194, 260; *Cook, "Contracts" and the Conflict of Laws* (1936) 31 ILL. L. REV. 143; *Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties* (1938) 32 ILL. L. REV. 899; (1939) 34 ILL. L. REV. 423; *Greene, The New York Rule as to the Law Governing the Validity of Contracts* (1927) 12 CORN. L. Q. 286.

16. 167 Mass. 211, 45 N. E. 737 (1897).

17. *Id.* at 214, 45 N. E. at 738.

Could an action for damages for breach of contract successfully have been brought prior to the removal of the disability? The logic of the distinction indicates an affirmative answer.

Again, suppose the facts be varied a little. Suppose that state *X*, where a contract was made, has a thirty-day notice provision governing a vendor who wishes to cancel a contract for the sale of land with a vendee who has defaulted. Suppose that the land which the vendor agrees to sell and the buyer agrees to pay for is in state *Y* and that in state *Y* there is no such thirty-day provision. Must the vendor, if the vendee defaults his payment, give the thirty-day notice according to the terms of the contract? Or is it sufficient if he complies with the rules of state *Y*? That situation arose in a Minnesota case, that State being state *X* in our example, and the Supreme Court of the United States said it was not lack of due process for the Minnesota court to apply its local rule about cancellation of contracts. "As to the contract simply, we have no doubt of the State's power over it, and the law of the State, therefore, constitutes a part of it."¹⁸ The Minnesota law, therefore, was properly chosen to determine the rights of the parties upon the contract side of the transaction. The logical inference is, and it has so been held,¹⁹ that the law of the place where the land is will determine whether the purchaser got an interest in the land and upon his default how that interest could be foreclosed.

One more instance will suffice on this phase of the discussion. Let us state again the case of a married woman grantor. She executes an instrument in *X* where she has full powers both to convey and to contract. Her deed contains the usual warranties. The subject-matter of the deed is land in *Y* where a married woman may neither contract nor convey. On the application of the general rule, it is quite clear that ownership of the land is not passed by the conveyance to the grantee. Would not the grantor, however, be liable in an action at law upon the covenants? She would unless there is some countervailing reason for assimilating to the same governing law rules both as to the deed as a conveyance and that part of the deed which deals with covenants. This question will be noted a little further on. In the case where approximately this set of facts came up the question before the court was changed just a little. The grantor, having made this ineffective deed found herself in a dispute in the state of the situs for possession of the land with the grantee's successor. The court held that no matter what liability there might be in damages in an action on the general covenant of warranty considered as a contract, the covenant could not have the

18. *Selover, Bates & Co. v. Walsh*, 226 U. S. 112 (1912).

19. *Kryger v. Wilson*, 242 U. S. 171 (1916).

effect of estopping the grantor from claiming the land, since that would result in an indirect means of transferring title, something which she could not do.²⁰ The result does not have any special appeal to one's sense of fairness as to the outcome of the dispute between these two parties, but it is compatible with the dogma that interests in land are controlled exclusively by the law of the place where the land is.

Is there any value in the distinction thus drawn between contracts about land and transfers of interests in land? It is not at all clear that any social utility for such a distinction can be proved. The differentiation is logical. That neither proves nor disproves that it is valuable. It is one which finds its counterpart in the law having to do with the transfer of interests in chattels and contracts concerning chattels.²¹ In real estate matters also one need not quarrel with it, although he may admit that civilization would not crumble if the distinction disappeared and both the contractual and the conveyancing sides of the transfer of land were referred to the law of the place where the land is.

More controversial points may arise with regard to the action of equity courts upon persons before them if the result of the action is to produce a change in ownership of land located elsewhere. It is said broadly that equitable interests in land are determined by the law of the situs.²² Professor Beale has commented on the rule with the epigram: "Whether they work out their right through the sheriff or the chancellor is, after all, merely a question of procedure".²³ A trust of land creates an equitable interest therein if the interest of the beneficiary is in a thing and not merely a right to have the trustee carry out the terms of the trust.²⁴ Whatever one calls a constructive trust a small but important group of cases shows that equity's power to give appropriate relief is not limited to a reference to the rules which govern interests in foreign land. The old case of *Lord Cranstown v. Johnston*,²⁵ somewhat modified, provides a striking illustration. The defendant by fraudulent representations in England deceives the plaintiff into inaction with regard to the state of accounts between them. In the meantime, the defendant brings an action through foreign attachment proceedings in the Island of St. Christopher and, obtaining judgment in the absence of the other party, proceeds to subject the other's plantation to sale and buys it in himself. By the law of St. Christopher the defendant has

20. *Smith v. Ingram*, 132 N. C. 959, 44 S. E. 643 (1903).

21. GOODRICH, *op. cit. supra* note 4 at §§ 149, 150.

22. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 239, 240.

23. Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382.

24. Obviously a discussion of this question, which has been the subject of historical controversy, is beyond the scope of this paper. The interested reader will find the point completely discussed by Scott and Stone in their classic articles, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 269, 467.

25. 3 Ves. Jr. 170, 30 Eng. Rep. R. 952 (1796); see Beale, note 23 *supra*.

now become complete owner of the land, not subject to any trust or other duty. The plaintiff sues the defendant in England in an equity court. By reference to the foreign law it is undisputed that the land is the defendant's, free and clear. Yet the court orders the defendant to reconvey subject only to being paid what the plaintiff owes him. As specific reparation for an English tort the defendant is ordered to convey foreign land which, under the law of the situs, unconditionally belongs to him. A similar result was reached in a contract case a little later on.²⁶ Judge Learned Hand, in an interesting case in the Second Circuit, made a modern application of the same principle in *Irving Trust Co. v. Md. Casualty Co.*²⁷

These cases make no logical invasion upon the rule that the law of the situs governs interests in land. As Judge Hand pointed out, the decision does not turn upon equitable ownership by the plaintiff. The court gives a decree which has its effect upon foreign land as reparation for a tort or specific performance of a contract, and orders against a defendant to convey foreign land in an appropriate case have long been standard practice.²⁸ But that the result of such litigation affects foreign land cannot be doubted.

It is to be observed that the plaintiff must have some claim against the defendant in order that he may ask equity to act. He has, by hypothesis, no ownership in the land. Defendant must have done something to him which entitles him to recover, otherwise he has no basis for relief. This is shown by a decision like *Norris v. Chambers*.²⁹ *A*, in England, agrees to sell land in Germany to *B*. By the law of Germany this agreement creates no interest in the land in the purchaser. *C*, knowing that there was a contract between *A* and *B* receives a conveyance of the land from *A*. Now *B* sues *C* asking that *C* be directed to convey the land to him. But *B* had no interest in the land itself nor did *C*, merely by taking the conveyance with knowledge, commit a tort since, by hypothesis, he did not induce *A* to break the contract with *B*. There was no wrong on which to base a claim for specific reparation.

Another group of cases—those involving security transactions—neatly brings out the distinction between contract and conveyance. *A* in state *X*, for good consideration, gives *B* a promissory note for the payment of money and executes a conveyance of land in state *Y* as security. *A* has full competency by the law of *X* but not by the law of *Y*. What are the creditor's rights? The competency of a grantor to

26. *Ex Parte* Pollard, Montague & Chitty 239 (1840).

27. 83 F. (2d) 168 (C. C. A. 2d, 1936).

28. *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, 27 Eng. Rep. R. 1132 (1750); see *Ex Parte* Pollard, Montague & Chitty 239, 251 (1840).

29. 29 Beav. 246 (1861), *aff'd*, 3 De G. F. & J. 583, 45 Eng. Rep. R. 1004 (1861); see also *Norton v. Florence Land and Public Works Co.*, 7 Ch. D. 332 (1877).

convey is determined by the law of the situs and, therefore, *B* cannot hold the land as security for the note.³⁰ But, of course, the note would be good as an independent contract. Now turn the case around. Assume that by the *X* law *A* has no capacity to contract or convey, but by *Y* law has full capacity. In one decision, which came up in a rather peculiar way on the pleadings, it was held that this transaction could be effective as creating a charge on the land. Such a charge did not require a principal obligation to support it.³¹ In another case *A*'s note was given jointly with her husband. Even though she was not under personal liability on the note, her mortgage could stand as security for the husband's debt.³² But if the mortgage is security only for a principal debt which falls for lack of capacity on the part of the promisor there is nothing for the mortgagee to enforce.³³

A minor question under this heading is what law determines the assumption of a mortgage debt by a subsequent grantee of the mortgaged premises. Land in *X* has been subjected to stand as security for a debt contracted by the owner in state *Y*. Then in state *Z* the owner conveys the land. What law determines whether the subsequent grantee, in the absence of express agreement, assumes the burden of the debt or merely takes the land subject to the mortgagee's lien? It has been held that this involves the contractual as distinguished from the conveyancing part of the transaction and the question was referred to the law of the place of the transaction and not that of the state where the land was located.³⁴

Covenants for title raise some questions which are not easy to allocate between reference to the law of the contract and reference to the law of the situs. Suppose a conveyance made in *X* of land in *Y*. Suppose, further, a statute in *Y* by which, unless it was expressed to the contrary, the conveyance carries with it the usual covenants. The deed made in *X* contains no express words. Does the *Y* law apply to impose the obligations of a covenantor upon the grantor? And shall a distinction be made between such covenants as that of seisin which is said, at least by some authorities, not to run with the land, and a covenant of warranty which does run with the land? The *Restatement*³⁵ says that those duties which are contractual in nature are controlled by the law of the place of contracting, but that the law of the place where the land is determines the duties of the grantor which are not contractual. The

30. *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303 (1887); *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418 (1892).

31. *Frierson v. Williams*, 57 Miss. 451 (1879).

32. *Thompson v. Kyle*, 39 Fla. 582, 23 So. 12 (1897).

33. *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206 (1914).

34. *Liljedahl v. Glassgow*, 190 Iowa 827, 180 N. W. 870 (1921); see also *Brown v. Dalton*, 105 Ky. 669, 49 S. W. 443 (1899).

35. RESTATEMENT, CONFLICT OF LAWS (1934) § 341.

obligation upon a grantor "of making good a defective title" is classified as a duty of the latter type. Perhaps the distinction is valid, but it must be confessed that it is just a little hard to follow. At any rate, there is adequate authority for holding that the obligation upon the grantor in this respect is determined by the law of the situs of the land.³⁶

If one accepts the distinction drawn by the *Restatement*, however, does it dispose of all the questions? What law will be looked to in determining whether the covenant of seisin runs with the land? And if it does not in a technical sense run with the land, does a purported transfer by the first grantee carry with it an assignment of such grantee's claim against the covenantor? What law will determine the existence and extent of the estoppel involved in a covenant of warranty? What law will determine what is sufficient performance of the covenant for further assurances? These questions seem to the writer more closely connected with rights in the land than with rights growing out of a contract,³⁷ and, furthermore, as a practical matter, it seems better to refer them all to the law of the place where the land is.

The final problem for testing the limitations and qualifications upon our general dogma is that of the recognition of the foreign equity decree. This question has been much discussed in legal periodicals over a period of years.³⁸ The threshing over of old straw is not indicated. Here is the fact situation: *A* and *B* have litigation in state *X*. The litigation may involve *A*'s rights against *B* on a contract to convey land in *Y*; *A* may be claiming *Y* land as specific reparation for a tort; or, as in some of the cases, *A* and *B* may be parties to a divorce suit in *X* and the *Y* land becomes involved as part of an alimony claim made by *B* upon *A*. At any rate, the court in *X* makes a decree by which *A* is ordered to convey the land in *Y* to *B*. He fails to do so. Now *B*, armed with the *X* decree, sues *A* in *Y* asking the *Y* court to give her the land. How far do *B*'s rights go? And if *B*'s rights are considered as settled by the first decree how far does that cut into our general rule

36. *Platner v. Vincent*, 187 Cal. 443, 202 Pac. 655 (1921), (1922) 10 CALIF. L. REV. 174, see also (1921) 9 CALIF. L. REV. 234; *Alcorn v. Epler*, 206 Ill. App. 140 (1917); *Crane v. Blackman*, 126 Ill. App. 631 (1906); *Lyndon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N. W. 255 (1908). *But see Jackson v. Green*, 112 Ind. 341, 14 N. E. 89 (1887); *Craig v. Donovan*, 63 Ind. 513 (1878); *Bethell v. Bethell*, 54 Ind. 428 (1876).

37. *GOODRICH, op. cit. supra* note 4 at § 146.

38. *Barbour, The Extraterritorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527; *Cook, The Powers of Courts of Equity* (1915) 15 COL. L. REV. 37, 106, 228; *Goodrich, Enforcement of a Foreign Equitable Decree* (1920) 5 IOWA L. BULL. 230; *Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land* (1925) 34 YALE L. J. 591; *Schofield, Equity Jurisdiction under the Full Faith and Credit Clause: Fahl v. Eastin* (1910) 5 ILL. L. REV. 1. *Notes* (1918) 31 HARV. L. REV. 646; (1912) 25 HARV. L. REV. 653; (1910) 23 HARV. L. REV. 390; (1908) 21 HARV. L. REV. 210, 354; (1924) 22 MICH. L. REV. 469; (1919) 18 MICH. L. REV. 142; (1919) 29 YALE L. J. 119; (1919) 28 YALE L. J. 503; (1924) 22 MICH. L. REV. 370, 730.

that rights concerning land are settled by the law of the place where the land is?

Some of the underlying problems have been pretty well settled by authorities whose venerability leaves them beyond question. Equity courts, as said above, have been ordering defendants before them to convey foreign land ever since the days of *Penn v. Lord Baltimore*.³⁹ The theory is, of course, that the Chancellor acts upon the conscience of the defendant before him and through pressure on the defendant can have him do something that has its effect abroad. Furthermore, if the defendant makes a conveyance in pursuance of such an order he may not deny, even in the state of situs, that the conveyance is his own free act and deed even though he made it to get out of jail.⁴⁰

The difficulty arises when the defendant has failed to convey and has succeeded in evading the clutches of the court which made the order. Suppose the court appointed a master to make the conveyance in place of the now absentee defendant. The courts have said a number of times that this conveyance, made by a court officer, could not change the ownership of the foreign land.⁴¹ This seems to accord with the rules which have been thought to be pretty fundamental about the control of the state over land within its borders.

But let us carry our first case a little further. Remember that our plaintiff, having gotten his foreign decree, comes to the state of the situs and there sues the defendant, obtaining personal jurisdiction over him. One point should be eliminated at once. If the suit is in equity there is the preliminary question whether the forum extends the extraordinary aid of equity in that type of case. We will assume a situation properly cognizable by the chancellor. Is our plaintiff helped by the foreign decree or must he begin de novo?

The position has been taken, and it harks back to Lord Coke, that the only effect of an equity decree is to create a duty on the part of the defendant to the court making the decree. Thus in *Bullock v. Bullock*⁴² it was said:

"The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on the respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. . . .

39. 1 Ves. Sr. 444, 27 Eng. Rep. R. 1132 (Ch. 1750). See the cases collected in Notes (1927) 51 A. L. R. 1081, (1910) 27 L. R. A. (N. S.) 420, (1910) 23 L. R. A. (N. S.) 924, (1906) 69 L. R. A. 673.

40. *Ibid.* Goodrich, note 38 *supra*.

41. *Ibid.*

42. 52 N. J. Eq. 561, 569, 30 Atl. 676, 679 (1894).

"The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another state, proceeding in personam to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree in personam may and must be conclusive in our courts and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts."

When it is realized that an equity decree for the payment of money can not only be sued upon in another state, but can be sued upon in an action at law,⁴³ it is obvious that there is nothing to the contention that an equity decree creates a duty only to the court. As to the fear that the foreign court may misinterpret or misapply local law, it is sufficient to say that the same danger exists in every conflict of laws case, whether it involves rights in land or any other subject matter. The prophylaxis would be to have all cases tried locally and abolish the whole field of conflict of laws, and certainly no one would seriously suggest such a result.

Nor is there much of an argument to make in favor of the defendant on this question. He has had his day in court for the litigation of the issues. The rule which limits a litigant to one law suit to settle a given issue between himself and another is broad and well founded. It has recently been authoritatively enlarged to preclude the relitigation of jurisdictional facts.⁴⁴ The *Restatement* position on the subject⁴⁵ is that the decree is conclusive as *res judicata* upon facts found in the previous suit between the parties, but that the plaintiff must sue upon the original claim. The explanation is that except in the case of a judgment for the payment of money an action does not lie in one state upon

43. *Sistare v. Sistare*, 218 U. S. 1 (1910); *Lynde v. Lynde*, 181 U. S. 183 (1901); *Goodrich, op. cit. supra* note 4 at § 135; 2 *FREEMAN, JUDGMENTS* (5th ed. 1925) § 1065.

44. *Davis v. Davis*, 305 U. S. 32 (1938); *Stoll v. Gottlieb*, 305 U. S. 165 (1938); (1939) 87 U. OF PA. L. REV. 346; (1939) 39 COL. L. REV. 274; (1939) 27 GEO. L. J. 1137; (1939) 52 HARV. L. REV. 683; (1939) 25 VA. L. REV. 487, 725; Notes (1939) 48 YALE L. J. 879; (1939) 6 U. OF CHI. L. REV. 290, 293; (1939) 23 MINN. L. REV. 673.

45. § 449.

the judgment of another,⁴⁶ for the form of relief must be discretionary according to the law of the forum. And with this view our plaintiff should sue on the original claim but he would have the benefit of the rules of *res judicata* as to his rights and the defendant's obligations. This view, which has been taken by some very good courts,⁴⁷ is one which is in accordance with the modern trend of the law and has the support of most of the current legal writers upon the subject.⁴⁸

The problem as to *res judicata* is a puzzling one. The American Law Institute is now engaged in writing a *Restatement of the Law of Judgments* and those of us engaged in it have found it bristling with difficulties and a field where comparatively little analytical work has been done. The broad doctrine known as *res judicata* breaks down, when analyzed, into three parts. One has to do with its effect in merging the claim of a successful plaintiff. His original claim disappears and his rights are now upon the judgment. Secondly, if the defendant wins the law suit upon the merits, that constitutes a bar to further action by the plaintiff upon the claim. The third effect is what may be called collateral estoppel by which propositions of fact and, in some instances, of law which have been litigated are settled for any litigation arising thereafter between the parties and those in privity with them. A valid final judgment for money ordinarily carries all three of these effects. The question arises whether there is a distinction between judgments for money and other kinds of judgments. Or possibly the distinction may be between domestic effects, both of judgments and decrees, and their recognition in other States. Furthermore, can this latter distinction be maintained in view of the full faith and credit clause? A not dissimilar problem arises in connection with custody orders for children in divorce suits.⁴⁹ An authoritative guide upon the constitutional question is lacking.⁵⁰

46. § 447.

47. *Burnley v. Stevenson*, 24 Ohio St. 474 (1873); *Matson v. Matson*, 186 Iowa 607, 173 N. W. 127 (1919); *Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973 (1923); *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182 (1916); *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067 (1896); *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997 (1907); *Williams v. Williams*, 83 Or. 59, 162 Pac. 834 (1917).

48. *Lorenzen and Heilman, The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555, 581, 582 (1935); *Goodrich, Institute Bards and Yale Reviewers* (1936) 84 U. OF PA. L. REV. 449, 462 (1935); see 2 BEALE, *THE CONFLICT OF LAWS* (1935) § 449.1.

49. *Goodrich, Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1.

50. In *Fall v. Eastin*, 215 U. S. 1 (1909) a Washington court had awarded land in Nebraska to the wife in divorce proceedings. The husband did not obey the decree but conveyed the land to third parties, whereupon the wife brought a bill in Nebraska to quiet title to the land, serving the husband's grantees. The Nebraska court refused to grant the relief prayed for, and the Supreme Court held that there was no violation of the full faith and credit clause. Although the majority opinion is difficult to follow, Justice Holmes' concurring opinion points out a solid ground for the result. The case did not involve the parties to the Washington proceeding, and there was no constitutional question raised by the Nebraska court's refusal to extend the effect of the judgment to the husband's grantees, whether they were innocent purchasers or not.

If one may make a guess it is that the development of the law will be in the direction of extending the scope of the full faith and credit clause rather than toward a narrowing in the other direction.⁵¹ The American Law Institute will, in course of time, doubtless wend its way through the mazes involved in a restatement of the law of judgments.

Whether or not the foreign equity decree receives the full benefit of all which is involved in the broad doctrine of *res judicata*, the position of the *Restatement*⁵² is obviously sufficient, if followed, to entitle the plaintiff to rely upon the decree for relief in the state where the land is located. Again the effect is indirectly, at least, to give a measure of foreign control to the ownership of local land and to that extent narrow the application of the broad dogma.

All of these instances, taken together, do not sweep away the validity of the general rule that rights in land are governed by the law of the place where the land is located. They do show that courts, concerned with the alternative of applying the very broad principle blindly and limiting or qualifying it in a particular case, do the latter when, in their judgment, limitation or qualification is desirable. One may or may not like a particular instance of such limitation. But that courts should be prepared to reexamine broad theories and shape them to fit the complications of changing life seems a point too clear to be labored. That is what courts are for and that is what courts do.

51. See, for example, *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935); *Roche v. McDonald*, 275 U. S. 449 (1928).

52. *RESTATEMENT, CONFLICT OF LAWS* (1934) § 449.