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Problems in the Enforcement of Federal Judgments

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PROBLEMS IN THE ENFORCEMENT OF FEDERAL JUDGMENTS

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The year 1938 was a momentous one in the field of Federal Procedure. After more than a century of federal conformity to state practice at law and independence in equity and nearly a century of independence in the interpretation of what was conceived to be the truly "common" (i.e., general and unwritten) law, in the past year it has been decided that actions at law and equity should be merged in a single procedure, uniform throughout the country and independent of the practice of the courts of the states,[1] but applying the common law of the states in which the respective federal district court sits.[2] The "about face" has been so sudden that those who march in the rear will have great difficulty in maintaining orderly ranks, and a few collisions have already occurred near the head of the column. While the occasion calls for reappraisement of the entire field, it seems thoroughly appropriate to consider individually any of the important and multitudinous subjects it embraces.

The old recipe for jugged hare sagely counseled, "First catch your rabbit," but did not specify how that difficult requirement was to be satisfied. There are more serious obstacles to obtaining a judgment than catching a rabbit, but following the precedent of the ancient cook just quoted, I would leave them to the reader and other writers, and devote this article to a discussion of certain aspects of a judgment already obtained.

I

The objective of every litigant is to obtain judgment in his favor, but most often the attainment of that end is, for the plaintiff, advantageous only in that it furnishes a foundation upon which he may proceed for more

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1. Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, c. 651, and effective September 1, 1938.
2. Erie R. R. v. Tompkins, 304 U. S. 64, 114 A. L. R. 1487 (1938).

material benefits. He does not instantly acquire money, for example, by the mere acquisition of a money judgment. However, under some circumstances it is possible for the court which has heard the controversy to assure, by the mere force of its decree, the ultimate relief sought. Because title is a "bundle of legally cognizable rights" and because such intangible rights are significant only as judicially recognized, a decree that the title to specific land or goods is in the successful party is quite as potentially practicable as a decree that it should be, if the court is in a position to protect the rights it has declared to exist.

Decrees "vesting title" must by the nature of things be limited to suits in which the claim is of rights in specific land or chattels. (And if the claimant is out of possession of the chattel, even though specifically identified, the subsequent transfer of possession may be necessary for completion of title.) Where the demand is for money generally, or for the performance of certain acts, satisfaction cannot be obtained from the judgment itself. It would appear, *a priori*, that the simplest remedy in those situations would be a judicial decree that the obligated party should pay the money or do the act. Various methods of inducement or coercion suggest themselves. Imprisonment or fines could be threatened or imposed, either as a penalty for disobedience or, with sequestration of property, as a continuing coercion. Money could be forcibly taken from the obligor, either in kind or raised by the sale of his property. If the services to which he had obligated himself were not unique, they could be rendered by another party, for whose efforts recompense could be squeezed from the recalcitrant defendant by the methods suggested. The court could act through its own officers or could authorize the judgment creditor to act for his own benefit. And of course any combination of these measures could be employed. If the claim were one for money, the theory of the action—that the claimed sum had itself been promised or that it represented the monetary damage to the complainant caused by the defendant's conduct—would not seem important in determining whether the judgment should affirmatively command payment or merely judicially recognize the obligation, or in selecting the methods by which obedience or satisfaction should be assured (except as a distinction might be imposed by constitutional prohibition against imprisonment for debt).

Ingenuous as the rationalization of the preceding paragraph must seem to a lawyer steeped in the matured principles of the Anglo-American law, it is essentially the approach of the civil law. If the absence of a

separate system of equity jurisprudence has there lessened the emphasis on personal decrees, it has on the other hand permitted the adaptation of remedies to fit the relief demanded. It is especially interesting to observe the manner in which the one court not only awards money judgments, enforceable by methods comparable to the writs of the common law, but vests title by its decrees and, in general, assures relief despite the default of the judgment debtor. The theoretical attitude is, indeed, that the obligee should primarily receive exactly what he bargained for and damages in substitution therefor only as the exceptional remedy, though in fact the doctrine of substituted performance at the expense of the debtor usually translates itself, in commercial transactions at least, into a claim for the difference between the contract and the "market" price.[3]

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3. It is usually said there was no doctrine of specific performance in Roman Law [FRY, SPECIFIC PERFORMANCE (6th ed. 1921) § 6], but even at an early date coercive measures to enforce performance in kind were available in the *clausula arbitraria* [see JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (1932) 217] and *actiones famosae* [see HUSTON, ENFORCEMENT OF DECREES IN EQUITY (1915) 42]. At later dates the *cognitio extraordinaria* recognized the power of a magistrate to act directly to carry out his orders [JOLOWICZ, *op. cit. supra* note 3, at 402, 3], and there were available enforcement measures not incomparable to sequestration proceedings [DIGEST VI, 1, 68; see BUCKLAND, EQUITY IN ROMAN LAW (1911) 45].

Under the French law, contracts are divided into those "of giving" and those "of doing." It is the theory of French law that rights in specific goods pass with the contract "à donner" and the court merely acts to give possession when those rights have been established. FRENCH CIVIL CODE, arts. 1136, 1138, 1583, 938, 1703. For limitations in the application of this principle, see Amos, *Specific Performance in French Law* (1901) 17 L. Q. REV. 372.

Where this doctrine is inapplicable, either because the goods are of such character that rights pass only by delivery or because the contract is one *"à faire ou à ne pas faire,"* the French law is less effective than English Chancery, for contempt procedure is unauthorized and Art. 1142 of the Civil Code reads: "Every obligation to do or not to do resolves itself in damages, in case of nonperformance by the debtor." However, substituted performance is possible (CIVIL CODE, arts. 1143, 1144), and by developing Art. 1147, which authorizes moratory damages, a penalty virtually amounting to a fine is levied for delay in performance. For further discussion of the doctrine of *astriente*, see AMOS AND WALTON, INTRODUCTION TO FRENCH LAW (1935) 187; David, *Measure of Damages in the French Law of Contract* (1935) 17 J. COMP. LEG. & INT. L. 64.

In Germany the creditor is entitled to specific relief unless it is inadequate, impractical, or inappropriate. Nietzel, *Specific Performance, Injunctions, and Damages in the German Law* (1909) 22 HARV. L. REV. 161; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW (1907) 184; B. G. B. §§ 241 *et seq.* The tendency to accept damages in actual practice is described by Kahn-Freund, *Remoteness of Damage in German Law* (1934) 50 L. Q. REV. 512. Decrees of specific performance may be enforced by fine or imprisonment. CODE OF CIVIL PROCEDURE §§ 883, 884, 885, 899-915. Substituted performance is authorized by the Code of Civil Procedure § 887.

The decree of the court may represent the defaultor's consent to registration of his land in the complainant's name in the land register (the method of conveyancing there practiced.) CODE OF CIVIL PROCEDURE § 894; *Neitzel, Non-Contentious Jurisdiction in Germany* (1908) 21 HARV. L. REV. 476, 485 *et seq.*; *Specific Performance, Injunctions, and Damages in the German Law* (1909) 22 HARV. L. REV. 161. The sheriff, upon court order, will deliver movables or put the creditor in possession of immovables. CODE OF CIVIL PROCEDURE §§ 883, 884, 885.

That peculiar capacity for growth which has characterized the common law from its inception might eventually have produced a similar condition in England and America had it not encountered the curious paralysis in matters of procedure which forced the development of equity jurisprudence. Reference to the legal historians discloses an amazing flexibility of enforcement technique at an early period. What is most significant in this connection was the willingness to give specific relief.

> "By far the greater number of the judgments that are given in favour of plaintiffs are judgments which award them seisin of land, and these judgments are executed by writs that order the sheriff to deliver seisin. But even when the source of the action is in our eyes a contractual obligation, the law tries its best to give specific relief. Thus if a lord is bound to acquit a tenant from a claim for suit of court, the judgment may enjoin him to perform this duty and may bid the sheriff distrain him into performing it from time to time. In Glanvill's day the defendant in an action on a fine could be compelled to give security that for the future he would observe his pact. The history of Covenant seems to show that the judgment for specific performance . . . is at least as old as an award of damages for breach of contract. We may find a local court decreeing that a rudder is to be made in accordance with an agreement, and even that one man is to serve another. Nor can we say that what is in substance an 'injunction' was as yet unknown. The 'prohibition' which forbids a man to continue his suit in an ecclesiastical court on pain of going to prison, is not unlike that weapon which the courts of common law will some day see turned against them by the hand of the chancellor. But further, a defendant in an action of Waste could be bidden to commit no more waste upon pain of losing the land, and a forester or curator might be appointed to check his doings. The more we read of the thirteenth century, the fewer will seem to us the new ideas that were introduced by the chancellors of the later middle ages."[4]

The achievement of technical perfection, in all arts and studies, is frequently accompanied by diminution of vital creative force. Obsession with procedural niceties seems not only to have induced conservatism in extending the remedial powers of the common law courts, but an actual atrophy of measures previously exercised. The demand for special relief was not to be denied and the development of equity jurisprudence followed. It was no more preconceived than the growth of the common law. An existing institution was utilized because its general powers of an administrative and disciplinary character promised to meet the need. When the courts of chancery were set up, they followed in the tradition established by the

4. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1909) 595.

keeper of the King's conscience. It was natural that their decrees should have been *in personam* and that enforcement machinery should primarily be directed to disciplinary or coercive measures. There were some few examples of what might be called "direct relief"—such as the authorization of substituted performance at the expense of the defendant[5]—and there was the adaptation of certain common law writs to the use of personal decrees. The comparable character of *assistance* and *sequestration* to *fieri facias* and *levari facias* has been elaborated elsewhere,[6] but it should not be overlooked that they represented the unusual rather than the ordinary procedure.

Equity was as chary as law of tampering with title to real property. Until the practice was authorized by statute, land was not sold to satisfy judgments at law,[7] and though it was subject to sequestration proceedings,[8] it could not be sold to meet a money claim.[9] Consideration for the feudal incidents of and family interests in the ownership of land probably induced this restraint;[10] there was never any hesitation in disposing of items that "passed by delivery"[11] and *a priori* it would seem the court could better protect the title of an immovable within its jurisdiction than the title to a chattel.

Nor is there any evidence that the English courts of chancery on their own authority have ever attempted to transfer title directly, either by officer of court or by a decree vesting title. Indeed, the very fact that it seemed necessary to enact legislation authorizing such decrees in situations where their appropriateness could hardly be questioned is evidence the judges felt they did not possess and should not assume this power as late as the 18th century.

The first statutory provision only made it possible for infant trustees or mortgagees of land to give a valid deed under court decree.[12] Subsequent legislation of a similar character increased the effectiveness of equitable control over trustees of other kinds.[13] Finally, in 1826, following the report

5. For an early case see Vane v. Lord Bernard, 2 Vern. 738 (Ch. 1716).
6. Cook, *Powers of Courts of Equity* (1915) 15 COL. L. REV. 37, 106, 228.
7. Stat. West. II, c. 18, in 1285 gave the judgment creditor right to possession of one-half his debtor's lands until the judgment was satisfied; *levari facias* gave only right to the profits of the land.
8. Coulston v. Gardiner, 3 Swans. 279n (Ch. 1680).
9. Shaw v. Wright, 3 Ves. 22 (Ch. 1795).
10. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1909) 596.
11. Shaw v. Wright, 3 Ves. 22 (Ch. 1795).
12. 7 ANN. c. 19 (1708).
13. 4 GEO. II, c. 10 (1731) (conveyances by lunatics or guardians); 36 GEO. III, c. 90 (1795) (securities transferable at the Bank of England by one not

of the Royal Commission to inquire into the practice of Chancery, headed by Lord Eldon, it was enacted that where a party refused to execute an instrument as decreed and remained in prison for two months for contempt, the court could appoint a master to execute it in the defaultor's name.[14] The present practice finds origin in what is known as the Trustee Act,[15] which empowers the court to declare any person seised of land which is the subject of court order trustee of the land and subject to the power of the court to "vest title" without his participation.

II

In the United States it should be noticed that until the code mergers of the late 19th century, even the statutes which broadened, limited, or purported to codify judicial enforcement machinery recognized the line of demarcation which the courts of law and chancery had drawn for themselves. Maryland was the first state to authorize self-executing decrees in equity. The statute, enacted in 1785, provided that a decree for "a conveyance, release or acquitance" which was not obeyed should stand in place and have the effect of such instrument.[16] At the present time, statutes in the majority of states give the decree the effect of the conveyance ordered, sometimes immediately,[17] other times after proof that the decree has not been respected.[18] Many states have provided that a court official[19]

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answerable to court pressure could be transferred under court direction by other bank officers); 52 GEO. III, c. 158 (1812) (extending the rule to other personalty held in trust); 6 GEO. IV, c. 74 (1825) (re-enacting, consolidating, and extending the control over trust estates, real and personal).

14. 11 GEO. IV, and 1 Wm. IV, c. 36 (1830).

15. 56 & 57 VICT., c. 53, 31 (1893).

16. MD. LAWS 1785, c. 72, § 13, set forth in 1 DORSEY, MARYLAND LAWS 1692-1839 (1840) 215.

17. ARIZ. REV. STAT. (1913) §§ 552, 553; ARK. DIG. STAT. (Crawford & Moses, 1921) § 6297; CONN. GEN. STAT. (1930) § 5455; GA. CODE ANN. (Michie, 1933) tit. 37, § 1202; MICH. COMP. LAWS (1929) § 14522; MINN. STAT. (1929) § 9523; MO. REV. STAT. (1929) § 1089; NEV. COMP. LAWS (Hillyer, 1929) § 8797; N. C. CODE (1935) §§ 607-608; N. D. COMP. LAWS ANN. (1913) § 7684; TENN. CODE ANN. (Michie, 1932) § 10594; TEX. STAT. (Vernon, 1936) § 2214.

18. ALA. CIVIL CODE (1923) § 6644; ALASKA COMP. LAWS (1913) § 1213; ARK. DIG. STAT. (Crawford & Moses, 1921) § 6298; D. C. CODE (1929) tit. 24, § 330; FLA. COMP. LAWS (1914) § 4952; KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-3108; MASS. GEN. LAWS (1932) c. 183, §§ 43-44, as amended by act of 1937, c. 101; MISS. CODE ANN. (1930) § 456; MO. REV. STAT. (1929) § 1091; NEB. COMP. STAT. (1929) § 20-1304; N. J. REV. STAT. (1937) tit. 2, c. 29, § 61; OHIO GEN. CODE ANN. (Page, 1931) § 11590; OKLA. STAT. (1931) § 425; ORE. LAWS 1920, § 414; S. D. REV. CODE (1919) § 2871; UTAH REV. STAT. ANN. (1933) § 104-38-8; VT. PUB. LAWS (1933) § 1320; WIS. STAT. (1935) § 269.07; WYO. REV. STAT. ANN. (Courtright, 1931) § 89-2211.

19. ALA. CIVIL CODE (1923) § 6644; KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-3108; KY. CODES ANN. (Carroll, 1919) §§ 394-399; MONT. REV. CODES ANN.

or a master specially appointed[20] may act in behalf of and with the same effect as the party enjoined. A few states have by statute authorized decrees of either type.[21] In seven states statutory provisions are nonexistent[22] or of fragmentary character.[23]

(Anderson & McFarland, 1935) § 9310; N. Y. CIVIL PRACTICE ACT § 979; OKLA. STAT. (1931) § 425; PENN. STAT. ANN. (Purdon, 1936) tit. 21, § 53; WIS. STAT. (1937) § 269.07.

20. ALA. CIVIL CODE (1923) § 6644; Del. Sess. Laws 1923, c. 229; ILL. REV. STAT. (1923) c. 22, § 46; IND. STAT. ANN. (Baldwin, 1934) §§ 888-895; IOWA CODE (1931) §§ 11613-11620; MD. ANN. CODE (Bagby, 1924) art. 16, §§ 94, 98; MISS. CODE ANN. (1930) § 456; R. I. GEN. LAWS (1923) § 4956; S. D. REV. CODE (1919) § 2871; VA. CODE ANN. (Michie & Sublett, 1936) § 6296; W. VA. CODE ANN. (Michie & Sublett, 1937) § 5515; WASH. CODE (Pierce, 1933) § 8094.

21. Compare notes 17, 18, 19, and 20, *supra.*

22. Louisiana, South Carolina, and New Hampshire. However, in Louisiana, following the civil law (see note 3, *supra*), it is held that a judgment for specific performance is satisfactory evidence of and may announce the rights which passed by the contract. Barfield v. Saunders, 116 La. 136, 40 So. 593 (1906); Dey v. Nelken, 131 La. 154, 59 So. 104 (1912); Kinberger v. Drouet, 149 La. 986, 90 So. 367 (1922). Professors Flory and McMahan have expressed the view that Rule 70 does go beyond the authorized Louisiana practice, in *The New Federal Rules and Louisiana Practice* (1938) 1 LA. L. REV. 45, 76.

In South Carolina, the case of Bush v. Aldrich, 110 S. C. 491, 96 S. E. 922 (1918), discussed *infra,* seems to authorize a conveyance by the court whenever it is deemed appropriate, though the actual holding is confined to a case of a non-resident defendant in a specific performance suit who was served by publication.

No case law has been found on the subject in New Hampshire.

23. California, Colorado, Idaho, and Maine.

In California an attempted code revision in 1901 provided specifically for court conveyance (CIVIL CODE, § 3396), but it was held the revision was improperly enacted and it never became effective. Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901). At present there is only statutory authorization for the conveyance by the sheriff of things capable of delivery [CODE OF CIVIL PROCEDURE (1931) §§ 572, 573, 574]. For some inexplicable reason the provision for conveyance of title to real estate which appears in these sections of the Field Code in other states was omitted in this version. *Cf.* N. Y. CIVIL PRACTICE ACT §§ 978, 979; MONT. CODE OF CIVIL PROCEDURE § 9310. See also CAL. CIVIL CODE §§ 3379, 3380, for writs of execution and sale of property (CODE OF CIVIL PROCEDURE § 684), for actions to quiet title, in which the judgment is conclusive of the rights of the parties (CODE OF CIVIL PROCEDURE §§ 738, 749, 751, 766), and "for all suitable methods of effecting the jurisdiction of the courts consonant with the spirit of the code" (CODE OF CIVIL PROCEDURE § 187). See also CIVIL CODE § 3368. Reference should also be made to § 3375 of the Civil Code.

Under these statutes California courts have in several instances conveyed real property and it would appear that they feel their power complete in that regard. See Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33, 53 Pac. 440 (1898); Love v. Watkins, 40 Cal. 547 (1871); Seculovitch v. Morton, 101 Cal. 673, 36 Pac. 387 (1894); Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536 (1897).

In Colorado it is provided only that in specific actions where the defendant is not within the jurisdiction of the court and service is had only by publication, the court may appoint a trustee to do, with the same effect, any act which might be required of the defendant. REV. STAT. (1933) § 1517.

Idaho has only the California provisions but relying on Scadden Flat Gold Mining Co. v. Scadden, *supra,* it was there held that in a specific performance suit the court might direct the clerk to give a deed. Glancy v. Williams, 50 Idaho 109, 293 Pac. 665 (1930); CODE OF CIVIL PROCEDURE §§ 6-702, 6-703, 1-1622.

The most appropriate Maine statute [REV. STAT. (1930) c. 123, § 15] appears to refer only to conveyances to or by the executors or administrators of deceased parties subject to land contracts. Chapter 91, § 65 of the Rev. Stat.

Legislation dealing with the transfer of chattels or with substituted performance is less common, perhaps because of the willingness of chancery to issue decrees of that character of its own volition from an early date.

Because the dynamic potentialities of equity have not been exhausted, there are a number of cases presenting decrees of unprecedented form and recognizing in some instances their self enforcing character. It is interesting to observe, however, that though the language may be broad, in every case involving title to land there has been at least some shadow of statute to bolster the court.[24] Typical are *Scadden Flat Gold Mining Co. v. Scadden*[25] and *Glancy v. Williams*.[26] Even in the leading case of *Bush v. Aldrich*,[27] it was thought expedient to argue that a statute which authorized service by publication in certain actions relating to real estate impliedly justified a decree vesting title in the complainant, as a personal decree against the defendant would obviously be futile under those circumstances.

In this brief survey of the status of the law in the several states, it is not meant to convey the impression that by virtue of statute and an expansive spirit there now exists a substantial accord throughout the United States, in which the remedy is tailored to the demand as the chancellor deems most fair and most expedient. There is no authority that a court will issue a decree vesting title at all in New Hampshire or in other than under limited conditions in Colorado or Maine. In *Lipe v. Lipe*,[28] the Illinois court held that it was improper to attempt to vest title by decree where the statute only provided for the appointment of a master. In *Morris v. White*,[29] it was held that a decree would not pass title unless by its terms it purported to do so, though vesting decrees were authorized by statute. Conversely, in *Cooper v. Johnson*,[30] where statute provided that a decree might operate as a deed, a decree which directed the defendant to convey, and if he did not, that the clerk of court should do so, was considered not improper, being, it was said, in accordance with the old equity practice of the state.

The law in the courts of the United States has been more complex.

(1930), would not seem to add anything to the general powers of the courts of chancery.

24. Except in Louisiana.
25. See note 23, *supra*.
26. *Ibid.*
27. See note 22, *supra*.
28. 327 Ill. 39, 45, 158 N. E. 411 (1927).
29. 96 N. C. 91, 2 S. E. 254 (1887).
30. 151 Ga. 608, 107 S. E. 849 (1921).

The federal government being an independent sovereignty, its courts might be expected to possess independent power over the persons and property of its citizens, determining the rights of litigants by its own rules, administering justice by its own procedure, and assuring relief by its own measures. If the jurisdiction of the federal courts had been limited to matters exclusively their own this might have been the fact, as it is true of an original proceeding in the United States Supreme Court. However, the inferior federal courts are creatures of Congress, under express authorization of the Constitution, and they have been given jurisdiction which is, in large degree, concurrent with that of the state courts. Very early in their life Congress directed that in trials at law the laws of the several states should be regarded as rules of decision for the courts of the United States, except where the Constitution, treaties, or statutes of the United States otherwise required,[31] and that the modes of proceeding therein should conform, as near as might be, to that of the courts of the state in which the given federal district court is held.[32] These statutes have not affected federal equity practice, which, as frequently was said, continued in the path of the English High Court of Chancery. This did not mean that state law could never determine the substantive rights of litigants in federal courts sitting in equity, however, and obviously nice questions were raised by the struggle to preserve the traditional boundaries of equity jurisdiction and forms of equity procedure while recognizing the substantive rights created by state law within its proper sphere. Though it has sometimes been said that the state procedure must supplant independent federal practice where necessary to the enforcement of a new state-created right, the observation is literally true only upon acceptance of what may seem an artifical classification of the authorities on the basis of what is substance and what procedure. So in the well known case of *Pusey & Jones Co. v. Hanssen*,[33] the United States Supreme Court denied that a simple contract creditor could put an insolvent corporation into receivership in federal district court because a statute of that state purported to give him that power. So it was held that one not in possession of real estate might not try the title thereto in federal district court sitting in chancery,

31. REV. STAT. § 721 (1875), 28 U. S. C. § 725 (1928).
32. REV. STAT. § 914 (1875), 28 U. S. C. § 724 (1928).
33. 261 U. S. 491 (1923).

though the statute of the state (which was also the situs of the land) gave that remedy in addition to ejectment.[34]

Although there has been a good deal of congressional legislation affecting the jurisdiction and the procedure of federal courts, sitting both in law and in equity, there has been little which specifically dealt with the effect of judgments or the enforcement of decrees. Provision has been made for the judicial sale of land, when that should be ordered,[35] but other matters have been left to decisions and rules of courts. Until 1912 the Supreme Court not only purported to follow the earlier English practice,[36] but affirmatively disclaimed any power to issue self-executing decrees.[37] From a very early date the lower federal courts availed themselves of the statutes of the state in which they sat, however, and the practice, never discouraged by the United States Supreme Court which had frequent occasion to observe it,[38] was ultimately squarely approved by it. In *Clark v. Smith*,[39] it was held that the United States Circuit Court for Kentucky had jurisdiction to entertain a suit to remove clouds from title to Kentucky land and might appoint a commissioner to give a deed in accordance with the local statute. And in *Langdon v. Sherwood*,[40] a decree of the United States Circuit Court for Nebraska, rendered in a suit for specific performance of a contract to convey Nebraska land, under which no deed was ever executed, was held to have conveyed the title (as by its terms it purported to do) under the Nebraska statute, so as to support the title of the plaintiff in the ejectment action before the court.

The Supreme Court of Ohio ineffectively challenged this borrowing practice on the ground that the state legislature had no intention to confer additional power in the federal courts.[41] Professor Huston complained of the above decisions because "the remedies by which these (substantive)

34. Whitehead v. Shattuck, 138 U. S. 146 (1891). *Cf.* Miles v. Caldwell, 2 Wall. 35 (U. S. 1864), holding that a state law by which a judgment in ejectment is a bar to a subsequent action between the same parties on the same subject matter is binding upon the federal courts.

35. 27 STAT. 751 (1893), 28 U. S. C. §§ 847-849 (1928). The federal courts may conduct the sale and conserve the purchase money in their own way [Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51 (1882)], but it may not cut off rights of redemption guaranteed by state law. Brine v. Insurance Co., 96 U. S. 627 (1877).

36. See Equity Rules of 1842, Rule 90.

37. See Miller v. Sherry, 2 Wall. 237 (U. S. 1864); Gay v. Parpart, 106 U. S. 679 (1882); Hart v. Sansom, 110 U. S. 151 (1884).

38. See Watts v. Waddle, 6 Pet. 389 (U. S. 1832).

39. 13 Pet. 195 (U. S. 1839).

40. 124 U. S. 74 (1888).

41. Shepherd's Lessee v. Comm'rs, 7 Ohio 271 (1835).

rights are protected (in the federal courts) are wholly the creatures of the Constitution and laws of the United States. They are uncontrolled by the practice of the state courts."[42]

The justification advanced was that the issue was primarily one of substantive law—and of the substantive law of real property, concerning which the states have been left in relatively undisputed supremacy—to which federal procedure should adjust itself:

> ". . . this is a mode of conveyance and of passing title, which the States have the exclusive right to regulate; still, the same statute that conferred the power thus to decree a conveyance, prescribed the mode of proceeding, and had the form of the remedy been rejected by the courts of the United States, the right to have such record conveyance would have fallen with it, as they could not be separated."[43]

And in holding that a state might provide by statute for equitable decrees quieting title to land within its borders when service on the defendant was had only by publication, the court observed:

> "It (the state) has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing title thereto. . . . The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts."[44]

In 1912 the Federal Equity Rules promulgated by the Supreme Court provided for the appointment of a substitute to perform any act, including the conveyance of land, which might be decreed, with the same force and effect as if done by the defendant.[45] There is no discussion of the application of old Equity Rule 8 in the reported cases, and it is a matter of

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42. HUSTON, ENFORCEMENT OF DECREES IN EQUITY (1915) 28. See also POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1318 (but the cases there cited do not sustain the text).
43. Clark v. Smith, 13 Pet. 195 (U. S. 1839).
44. Arndt v. Griggs, 134 U. S. 316 (1890).
45. Equity Rule 8.

conjecture whether courts sitting in New Hampshire, for example, have exercised the power it declared to be in them (and, *lèse majesté,* of the effect of such a decree if ordered). *Quaere* also, if it thereafter was proper for a federal court to vest title by decree in accordance with state statute, rather than by appointing a master to give a deed?

The subject is now dealt with in Rule 70 of the new Rules of Civil Procedure for the District Courts of the United States, which reads:

> "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the 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. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If 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 such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk."

As in the Equity Rules of 1912, decrees for the payment of money are ordinarily enforceable by writ of execution.[46] On the other hand, in this merger of law and equity, setting up a procedural code independent of the state practice and superseding the requirements of the Conformity Acts, it was thought fit to limit the methods of enforcing money judgments to those employed by the courts of the several states (unless otherwise provided by specific federal statute).[47] The brief analysis of the nature of an enforcement problem and the summary of historical and comparative treatment earlier in this article fairly demonstrates there is no necessary and inherent distinction between the relief assured by the decree of a chancellor and the judgment of a court of law, and it is a little surprising to find the distinction between the courts preserved in this aspect where it has been deliberately destroyed in many other respects.

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46. Equity Rules (1912) Rule 8; Rules of Civil Procedure (1938) Rule 69.
47. Rule 69.

III

The adoption of Equity Rule 8 in 1912 would seem a repudiation of the doctrine of *Clark v. Smith*[48] and *Langdon v. Sherwood.*[49] The line between substantive and procedural law is a wavering one and may well vary according to the purpose for which it must be drawn. Nevertheless, the conveyance of land by federal court decree is a matter to be regulated by the state or the federal government, and a declaration in favor of the latter is inconsistent with the adoption of state statutory authorization. Whether it is primarily substantive is significant for two purposes. In the first place, it determines whether state or federal authority should be observed. In the second, the United States Supreme Court purported to act under congressional grant of authority to promulgate rules of procedure.[50] Only Professor Walter Wheeler Cook remarked the questionable character of old Equity Rule 8: "The question might well be asked, even with a rule of court, what power has a court, authorized by statute to frame rules of procedure, to introduce a change of this kind, which involves conferring additional power on the court of equity and not merely regulating the manner of exercising powers already possessed?"[51]

The only decisions squarely in point are those whose contradictory nature has just been considered. A number of writers have demonstrated that a given principle may reasonably be considered substantive for one purpose and procedural for another,[52] and I have no desire to confuse the various lines of authorities. From analogy, however, it may be possible to discern more clearly the true nature of this rule.

In the field of conflict of laws matters of procedure are said to be regulated by the law of the forum, matters of substantive law by the law of a sovereignty variously determined. There can be little doubt that the form of judgments, their effect, and the measures used in effectuating them are in general subject to the rules of the forum.[53] In this connection it is

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48. 13 Pet. 195 (U. S. 1839).
49. 124 U. S. 74 (1888). Also Deck v. Whitman, 96 Fed. 873 (C. C. E. D. Tenn. 1899); Single v. Scott Paper Mfg. Co., 55 Fed. 553 (C. C. N. D. Ohio 1893).
50. Act of June 19, 1934, c. 651; 48 STAT. 1064 (1934), 28 U. S. C. §§ 723b, 723c (1928).
51. Cook, *loc. cit. supra* note 6.
52. Sunderland, *Character and Extent of the Rule-Making Power Granted U. S. Supreme Court and Methods of Effective Exercise* (1935) 21 A. B. A. J. 404; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933; Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333.
53. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 590, 600.

proper to note a peculiar problem inherent in the conveyance of land by court decree. It was long ago settled that a suit for specific performance was transitory because it was *in personam* and that any forum with jurisdiction over the person might order a conveyance of foreign land by the party before it.[54] A conveyance executed pursuant to such a decree, be the compulsion never so heavy, will be recognized at the situs if it is in the form there prescribed.[55] Occasionally judges have attempted to convey title to the foreign land without the personal assistance of the owner, acting upon the theory that it was but a procedural variation of the well recognized practice and hence within the discretion of the forum.[56] But these conveyances have never been recognized by the courts at the situs of the land, the only ones which have physical power to determine title authoritatively.[57] It is not a mode of conveyancing recognized by that sovereignty; statutes of that state authorizing such conveyances refer only to conveyances of its

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54. The leading English case is Penn v. Lord Baltimore, 1 Ves. Sr. 444 (1750). The best known American case is Massie v. Watts, 6 Cranch. 148 (U. S. 1810). The subsequent history of that cause and the effect of the decree ultimately issued was before the court in Watts v. Waddle, 6 Pet. 389 (U. S. 1832), cited *supra* note 38. Other authorities are collected in POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1437; Notes (1906) 69 L. R. A. 673; (1910) 23 L. R. A. (N. S.) 924; (1910) 27 L. R. A. (N. S.) 420.

55. Gilliland v. Inabit, 92 Iowa 46, 60 N. W. 211 (1894). And see note 54, *supra*. See Note (1928) 27 MICH. L. REV. 202.

56. E. g., Poole v. Koons, 252 Ill. 49, 96 N. E. 556 (1911); Wolf v. Lawrence, 276 Ill. 11, 114 N. E. 567 (1916).

57. Of the numerous cases so holding (see note 54, *supra*), the decision in Watts v. Waddle, 6 Pet. 389 (U. S. 1832), cited *supra* note 38, is peculiarly pertinent to this study.

An earlier action had been brought in the United States Circuit Court for Kentucky to compel the holder of legal title to Ohio land to convey it to the owner of prior equities. All the parties named in the complaint were before the court (though it appears that the plaintiff failed to join all persons interested in the property.) A Kentucky statute authorized the court to appoint a commissioner to execute its decrees. An Ohio statute gave the decrees of its courts the effect of conveyances. The federal court adopted the Kentucky practice and the commissioner gave the deed. The recipient of this deed, complainant in the instant case, was under contract to convey the premises by good warranty deed to defendant's assignor. For his failure to do so the defendant had obtained a judgment for damages. This suit was brought to stay the enforcement of that judgment and to compel defendant to perform the contract, a deed being tendered. It was held that the plaintiff could not fulfill his own obligation, that he had only an equitable title which must be perfected in the Ohio courts, that the commissioner's deed conveyed nothing, and that in consequence the defendant need not perform.

It should be noticed that new Rule 70 would avoid this situation, for court conveyances are authorized only when the property involved is located within the district in which the court sits. (Note, the limitation is to *district*, not merely to *state*.) In this respect, the new rule is better drawn than old Rule 8 which contained no territorial limitation at all.

own courts. It is an extra-territorial exercise of a prerogative exclusively sovereign in character.[58]

Since an instrument executed under coercion can ordinarily be avoided by the maker, the fact that a conveyance executed under the compulsion of a foreign judge cannot, certainly suggests that the foreign decree, though in form *in personam*, has an effect *in rem*. If the time honored distinction between foreign decrees *in personam* and those in form *in rem* is unsound, it would seem they are both improper rather than that either might be employed.

Is an action for specific performance, to put the most favorable case, really transitory? There is no dispute among the authorities when the question is so presented. But is it local? Does a statute which authorizes service by publication in suits of a local nature or—as Section 57 of the United States Judicial Code puts it—in suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property"—include an action for specific performance? *Bush v. Aldrich* is the leading case in the affirmative, but there is almost an even split of authority.[59] It seems to have been the

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58. The extent to which any foreign equitable decree ordering acts other than the payment of money is entitled to recognition on principles of comity or constitutional law is the subject of acute dispute. That it is neither customary nor necessary for the state of the situs of the land to recognize a conveyance attempted by the court of a sister state may be seen from the decisions of Watkins v. Holman's Lessee, 16 Pet. 25 (U. S. 1842); Hart v. Sansom, 110 U. S. 151 (1884); Carpenter v. Strange, 141 U. S. 87 (1891); Dull v. Blackman, 169 U. S. 243 (1898); Fall v. Eastin, 215 U. S. 1 (1909).

If the decree does not purport in terms to transfer title itself, it is obvious that only the statute of the situs can give it the effect of a conveyance. Such statutes are uniformly construed not to refer to the decrees of foreign courts. If the decree purports to convey title to foreign land and is ineffectual for that purpose for the reasons just discussed, is it invalid for all purposes? It would seem not; that whatever recognition would have been given an *in personam* decree (as *res judicata* of the issue between the parties, etc.) should be given the broader judgment. Because the forum tried to do more than it might is no reason for denying effect to what it properly did. See Andler v. Duke, 45 Brit. Col. Rep. 96 (1931); *rev'd*, Duke v. Andler, Can. S. C. Rep. (1932).

59 In accord with Bush v. Aldrich, 110 S. C. 491, 96 S. E. 922 (1918), see Rourke v. McLaughlin, 38 Cal. 196 (1869); Seculovitch v. Morton, 101 Cal. 673, 36 Pac. 387. *Contra*: Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 78 Pac. 967 (1904); Spurr v. Scoville, 3 Cush. 578 (Mass. 1849). Additional and related authorities may be found in Notes (1906) 3 ANN. CAS. 1004; (1910) 23 L. R. A. (N. S.) 1135; ANN. CAS. 1914A, 769, but the cases must be read with care, as the statutory language in any case is important. The question is analyzed by Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368. It can, of course, arise in other forms of action than specific performance [see Note (1927) 51 A. L. R. 754 in suits to remove cloud from title], and in relation to other property than real. See Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722 (1915); Hildreth v. Thibodeau, 186 Mass. 83, 71 N. E. 1111 (1904); Jelke v .Goldsmith, 52 Ohio St. 499, 40 N. E. 167 (1895).

consistent opinion of the federal courts, both on the general question and in the application of the federal statute just cited, that the suit is strictly personal and transitory rather than local.[60] The doctrine of "equitable conversion" arising under an executory contract for the sale of land does not settle the question, for the "conversion" depends upon the possibility of forcing specific performance. If the interpretation of *Bush v. Aldrich* is accepted, the further argument that such statute impliedly authorizes conveyance by the court is persuasive; statutory authorization for Rule 70 has existed for nearly fifty years. Except for *obiter* in *York County Saving Bank v. Abbot*,[61] the federal courts have never expressed this view. It is interesting to observe that the existence of a statute specifically providing for conveyance by the court has frequently been relied upon in determinations that the suit was of local nature.[62] This approach is consistent with Professor Scott's thesis that "the character of the remedy sought, rather than the character of the plaintiff's right, should determine whether the action is local or transitory."[63] The adoption of Rule 70 may thus have the effect of enlarging the jurisdiction of certain of the federal district courts.

IV

In the last analysis the issue is one of power. As long as unlimited sovereignty reposes in one person, there can hardly be a question of limitation of his powers. Where sovereignty is limited and especially where it is divided among several institutions, power becomes essentially a question of the ability to maintain what is asserted. Because, as Mr. Justice Holmes

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60. Municipal Investment Co. v. Gardiner, 62 Fed. 954 (C. C. D. Ind. 1894); Gotter v. McCulley, 292 Fed. 382 (E. D. Wash. 1923); and see Hart v. Sansom, 110 U. S. 151 (1884); Hollingsworth v. Barbour, 4 Pet. 466 (U. S. 1830). See collections of authorities cited note 59, *supra*.

61. 139 Fed. 988 (C. C. D. Maine 1905). In Deck v. Whitman, 96 Fed. 873 (C. C. E. D. Tenn. 1899), it was argued that Section 57 of the United States Judicial Code authorized the adoption by the federal court of the state statute providing for court conveyance.

62. Single v. Scott Paper Mfg. Co., 55 Fed. 553 (C. C. N. D. Ohio 1893); Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928); and see Arndt v. Griggs, 134 U. S. 316 (1890). See note 59, *supra*.

On several occasions the existence of such statutes was overlooked by courts which held that a specific performance suit was not within the publication statute under discussion. Hart v. Sansom, 110 U. S. 151 (1884); Municipal Investment Co. v. Gardiner, 62 Fed. 954 (C. C. D. Ind. 1894); Spurr v. Scoville, 3 Cush. 578 (Mass. 1849); Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 78 Pac. 967 (1904). With Spurr v. Scoville, compare Felch v. Hooper, 119 Mass. 52 (1875).

63. SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW (1922) 31.

once observed,[64] we "prefer to consider ourselves civilized and act accordingly" there have been few "show-downs" in this country and almost the only limitation on the United States Supreme Court is its own sense of self-restraint. Precedent is at least as important when it is in the form of a custom of self-denial as it is in the form of a rule of decision. Where political or social factors suggest the exercise of new power, it would seem desirable to have either the concurrence of the other repositories of sovereignty or the direction of that institution intrusted with innovation.

It is to be hoped, therefore, that the several federal district courts will continue to follow the state practice in the enforcement of equitable decrees as well as of judgments at law. Rule 70 is not mandatory but permissive. It is especially desirable that titles to real estate should be well secured, and that the record thereof should show the fact.[65] This condition can best be achieved by conformity to recognized state forms of conveyancing.

Granting the obvious virtues of directly assuring the creditor of the fruits of his judgment, it does not necessarily follow that for the United States it is most desirable that the federal government should invariably adopt and enforce rules (of procedure or substance) which objectively appear most efficient regardless of the policy of the states in which they must operate. That this paper has emphasized primarily the problem of court conveyances of real estate, particularly in specific performance suits, the situation where the issue is most clear cut, should not obscure the fact that other actions and other relief is affected by the rule.

It may fairly be said that one object of the decision in *Erie R. R. v. Tompkins*[66] was the removal of any preference for a federal over a state tribunal (or *vice versa*) based upon the different consequences to be expected from litigation there. It is believed that this policy may properly be extended to the determination of the character of the relief to be awarded a successful litigant and of the coercive measures to be employed in effectuating a judgment.

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64. Direction der Disconto-Gesellschaft v. United States Steel Corp., 267 U. S. 22 (1925).

65. The question might well arise of the propriety (or possibility) of a state officer recording a transfer by decree of federal court in a state which did not recognize that mode of conveyancing.

66. 304 U. S. 64, 114 A. L. R. 1487 (1938).

V

The discussion of decrees purporting to convey title to land outside the territorial jurisdiction of the court suggests a further difficulty in assuring substantial relief to a deserving litigant. As just said, all methods of forcing a judgment debtor to satisfy or comply with the judgment are prerogatives of sovereignty, and sovereignty has territorial limits. It is inevitable that as between independent states, therefore, judgments may be ineffectual to the extent that activity in enforcing them must take place outside the state.

Whatever modifications of the principle may be worked by application of rules of comity, it should be recalled at once that the states of the United States are not absolutely independent sovereignties. Article IV, Section 1 of the Constitution of the United States requires that full faith and credit should be given in each state to the judicial proceedings of every other state, and authorizes Congress to prescribe by general law the manner in which they should be proved and the effect thereof. It is conceivable that the Supreme Court of the United States might have construed this provision to require one state to permit and to recognize the effect of execution within its boundaries on a judgment rendered by a court of a "sister" state, or the courts of the several states could so have interpreted their obligation. Virtually without exception[67] they have not done so, nor has the congressional enactment under the constitutional provision just quoted been so construed.[68] In general one who wishes to act upon the person or property of his debtor must invoke the blessing of the state where the person or property is, in the form of an action in the courts of that state upon the judgment elsewhere rendered. The United States Constitution has been interpreted to require the second forum to recognize the judgment, if rendered by a court with jurisdiction over the parties, as conclusive of the relative rights of the parties.[69]

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67. Until 1846 execution would issue directly on a foreign judgment in Louisiana. Succession of Macheca, 147 La. 164, 84 So. 574 (1920).

68. M'Elmoyle v. Cohen, 13 Pet. 312 (U. S. 1839); Cole v. Cunningham, 133 U. S. 107 (1890). And see Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421-449; Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law* (1935) 33 MICH. L. REV. 1128, 1150; Ross, *"Full Faith and Credit" in a Federal System* (1936) 20 MINN. L. REV. 140-190.

69. The leading case is Mills v. Duryee, 7 Cranch. 481 (U. S. 1813). Applying the same principle to federal judgments, Preston v. Durham, 262 Fed. 843 (D. C. Ga. 1920); Barr v. Simpson, Fed. Cas. 1038 (C. C. Pa. 1832); Carey v. Roosevelt, 83 Fed. 242 (C. C. S. D. N. Y. 1897).

In 1927 the American Bar Association sponsored a bill in the House of Representatives to simplify this practice.[70] It provided that the judgments of the courts of any state might merely be registered in the appropriate court of any other state, whereupon execution would issue immediately. The principle was not new. At the present time certain judgments of the courts of affiliated sovereignties can be registered for the purpose in some forty-six British jurisdictions. But unfortunately, the bill never became a law.

Federal control over the state court judgments and their force among the several states is based upon and limited to the full faith and credit clause of the Constitution, but the inferior federal courts owe their existence to congressional legislation[71] and are obviously subject to much greater regulation. Congress could give the lower federal courts jurisdiction throughout the nation and could provide that their judgments should be a lien on the property of the debtor in every state. Writs of execution might be equally extensive, obviating within the system of the federal courts the difficulty with which we are here concerned.

With few exceptions, Congress has not done so. The United States has been divided into districts and in some cases, divisions of districts, but in no case does a district include any territory in more than one state.[72] The venue of actions is set forth in detail and is definitely limited.[73] Judgments of the district courts are liens only throughout the state in which they sit.[74] And writs of executions have the same territorial limitation,[75] except those upon judgments for the use of the United States, which may be executed in any state or territory.[76]

Among the more important extensions of the territorial jurisdiction of the district courts are those which vest a receiver with control over all fixed property within the circuit in which the district court appointing him sits,[77] and which provides for the service of process throughout the

70. See 52 A. B. A. Rep. 77, 292, 319 (1927); Hearings before Judiciary Committee of the House of Representatives on H. R. 5615, Jan. 18, 1928.
71. U. S. CONST. ART. III, § 1.
72. 28 U. S. C., c. 5 (1927).
73. 28 U. S. C., c. 4 (1927); *id.* at c. 2, § 43.
74. 25 STAT. 357 (1888), 37 STAT. 311 (1912), 28 U. S. C. § 812 (state statutes providing proper facilities for recording federal judgments may, in conjunction with the federal statutes, have the effect of reducing the territorial extent of the lien.)
75. REV. STAT. § 985 (1875), 28 U. S. C. § 838 (1928).
76. REV. STAT. § 986 (1875), 28 U. S. C. § 839 (1928).
77. 36 STAT. 1102 (1911), 28 U. S. C. § 117 (1927).

nation in suits to enforce the anti-trust laws,[78] or to enforce or set aside the orders of the Interstate Commerce Commission.[79]

That the district courts are limited in their jurisdiction to the territory in which they sit, may not bring parties before them by process served outside the district, and may not by their judgments bind property outside their districts, except in the exceptional instances mentioned above, is well established by decision[80] and is recognized by Rule 4 of the new Rules of Civil Procedure. In the great majority of cases, therefore, one who holds a judgment of a federal district court and wishes to reach assets of his debtor located in another state must sue on that judgment in the courts for that state. He may always sue in the state courts, if he can either obtain personal service on his debtor or if the laws of that state permit, as is usually the case, the institution of an action by attachment (though in that situation no judgment for the deficiency may be rendered[81]). He may sue in the federal court if the jurisdictional and venue requirements can be satisfied.

The defenses which may be interposed to an action in one federal court upon a judgment rendered by another federal court fall into three types.

The first runs to the validity of the judgment as a debt of record. (a) It may question the jurisdiction of the court which rendered it, or (b) the form and nature of the judgment.

(a) Judgments are either *in rem* or *in personam,* using the terms as did the United States Supreme Court in *Pennoyer v. Neff*.[82] The former may only be rendered when the subject matter is within the territorial jurisdiction of the court. The courts have generally limited themselves in accordance with this restriction, and, because the subject was within their power, there has been little occasion to attempt enforcement elsewhere. On occasion, judges have tried to vest title to foreign land by their decrees. It is clear that this is beyond their power, but, if a suit were instituted upon such a decree in the court where the land was situated, it would be but an effort to obtain local recognition of a foreign equitable decree, in form *in rem* but in effect at most only *in personam*, which may or may not be possible. Whether the title could then be vested by decree

78. 26 STAT. 210 (1890), 15 U. S. C. § 5 (1927); 38 STAT. 736 (1914), 15 U. S. C. § 25 (1927).
79. 28 U. S. C. § 44 (1927).
80. The leading case is Toland v. Sprague, 12 Pet. 300 (U. S. 1838).
81. Pennoyer v. Neff, 95 U. S. 714 (1877).
82. *Ibid.*

would depend upon the power of the court of the state which was the situs of the land.

Pursuant to statute, judgments *in rem* are commonly and properly rendered after constructive service on the defendant. A judgment *in personam* must be based on personal service within the territorial jurisdiction of the court.[83] This is true whether the judgment is for the payment of money or for the doing of any other act, or whether it purports to conclude title to any property not before the court and for the enforcement of which recourse must be had to other courts. So in any action on a judgment, it is generally open to the defendant to plead[84] that he was not properly[85] before the court in the controversy in which the judgment was rendered, that he was not served in accordance with the requirements of the statutes, and that he did not waive his defense by his subsequent conduct.[86]

Perhaps the most important limitation on this defense is the doctrine

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83. Toland v. Sprague, 12 Pet. 300 (U. S. 1838); Levy v. Fitzpatrick, 15 Pet. 167 (U. S. 1841).

84. The court whose judgment is sued upon is presumed to have had jurisdiction to render it. Lee v. Terbell, 33 Fed. 850 (C. C. S. D. N. Y. 1887); (holding that under the controlling state statute, the plaintiff need not plead the jurisdictional facts); L'Engle v. Gates, 74 Fed. 513 (C. C. E. D. Wis. 1896); Coolat v. Kahner, 140 Fed. 836 (C. C. A. 9th, 1905). *Cf.*, Denny v. Giles, 250 Fed. 987 (C. C. A. 5th, 1918).

The burden is thus upon the defendant to raise this issue by positive averments. First Nat. Bank v. Hamor, 47 Fed. 36 (C. C. D. Wash. 1891).

These cases recognize the possibility that a different rule as to the burden of pleading might be imposed by the controlling state practice. Under the Rules of Civil Procedure for Federal District Courts, state practice no longer controls. *Cf.* Schopp v. Muller Dairies, Inc., 6 U. S. L. Week 218 (E. D. N. Y. 1938), criticized in (1939) 87 U. OF PA. L. REV. 344. Rule 9 (e) provides that it should be sufficient for the plaintiff to aver the judgment without setting forth matter showing jurisdiction to render it. Though this defense is not among the affirmative defenses listed in Rule 8 (c), it would seem that the burden of pleading must still be on the defendant. Proposed Rule 77 (see *infra*) was probably expected to obviate the necessity for provisions as to this matter.

85. It is not within the scope of this paper to discuss in detail the requisites of good service, nor the conflict of federal and state law. The principles are the same whether raised during the trial of the original action, on appeal, or in collateral attack upon the judgment so rendered, and are properly the subject of separate study.

86. This is the general rule. As to state court judgments in federal courts, see Ellis v. Conn. Mut. Life Ins. Co., 8 Fed. 81 (C. C. D. Conn. 1881); Consolidated Iron & Steel Co. v. Maumee Iron & Steel Co., 284 Fed. 550 (C. C. A. 8th, 1922). There are few cases applying the rule to federal judgments, but see Denny v. Giles, 250 Fed. 987 (C. C. A. 5th, 1918), which held that in an action on the federal judgment, some facts must be affirmatively pleaded or the judgment must contain in its text facts which justify the presumption that the court had jurisdiction to render it. See also Young v. Town of Dexter, 18 Fed. 201 (C. C. E. D. Wis. 1883); Lee v. Terbell, 33 Fed. 850 (C. C. S. D. N. Y. 1887); L'Engle v. Gates, 74 Fed. 513 (C. C. E. D. Wis. 1896); Coolat v. Kahner, 140 Fed. 836 (C. C. A. 9th, 1905).

of *Baldwin v. Iowa State Traveling Men's Ass'n*,[87] an action in the Federal District Court for Southern Iowa upon a judgment rendered in the United States District Court for Western Missouri. In the original action (the action culminating in the Missouri judgment) the defendant had "appeared specially, moved to set aside the service, quash the return, and dismiss the case for want of jurisdiction of its person. After a hearing on affidavits and briefs, the motion was overruled, with leave to plead within thirty days. No plea having been filed within that period, the cause proceeded and judgment was entered for the amount claimed." The defendant "did not move to set aside the judgment nor sue out a writ of error." In the principle action, the defendant again pleaded lack of jurisdiction of the person in the original suit. It was held that under these facts the judgment was *res judicata* on the question of the jurisdiction of the court to render it, for there had been voluntary personal appearance and argument on that issue. The fact that the appearance was designated as special would have been of importance if the defendant had chosen to appeal from the adverse ruling, or from the judgment, but when he had not appealed, it would not prevent the determination of the court on that issue from being final. The *Baldwin* case has been followed on several recent occasions.[88]

If the service on which the judgment at issue was based was obtained by fraud, it is invalid despite its apparent perfection.[89]

The objections to the jurisdiction of the court rendering the judgment in suit must be those founded upon principles of natural justice and due process. These do not include the special limitations on the jurisdiction of federal district courts imposed by Congress. Consideration of those factors are always before the court during the trial and on appeal of the original

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87. 283 U. S. 522 (1931).

88. *Cf.* Davis v. Davis, 59 Sup. Ct. 3 (1938); Stoll v. Gottlieb, 59 Sup. Ct. 134 (1938).

89. This rule has frequently been followed in cases of direct attack upon the judgment, Steiger v. Bonn, 4 Fed. 17 (C. C. D. N. J. 1880) (defendant induced by fraud to enter jurisdiction where he was served); Blair v. Turtle, 5 Fed. 394 (C. C. D. Neb. 1881) (defendant brought into jurisdiction by force of extradition). I have found no cases in which the issue was raised by way of defense to an action on a federal judgment, but in Frawley, Bundy & Wilcox v. Penn. Cas. Co., 124 Fed. 259 (C. C. M. D. Pa. 1903), and in Wyman v. Newhouse, 93 F. (2d) 313 (C. C. A. 2d, 1937), it was held a bar to an action on a state court judgment. And in First Nat. Bank of Danville v. Cunningham, 48 Fed. 510 (C. C. D. Ky. 1891), it was held a good defense to an action on a state court judgment to show that the original action had been on a judgment note, which had been paid before the action was brought to the knowledge of the plaintiff and his attorney, and that they fraudulently conspired for an attorney of record to appear and confess to judgment.

cause, whether raised by counsel or not (and even more for that reason is any judgment to be regarded as an adjudication on the issue), but the decision of the court is final and may not be questioned collaterally.[90] Illustrating the distinction, in an action in a federal district court upon a federal judgment, the judgment debtor may plead that the judgment is void because he was never served with process and had no opportunity to be heard in the controversy on which the judgment sued on was rendered; but he may not plead that the original cause was not one mentioned in Section 24 of the Judicial Code[91] (between citizens of different states, etc.).

Likewise, if fraud in obtaining the judgment is the defense relied on, the fraud must be such that the issue was not concluded by the judgment, because factors were involved that the court could not conclude. The charge of fraud in the presentation of the case—perjured testimony, concealment of evidence, *et cetera*—merely runs to the merits of the original cause which was before the court at the time. If it resulted in a mistaken judgment, correction must be attempted by direct methods.[92]

(b) Even though the proceedings culminating in the judgment were perfect, it may not be the basis of a subsequent action unless it finally and unqualifiedly imposed a definite and unsatisfied civil obligation upon the defendant.[93] It is sometimes said that the judgment must be for a definite

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90. Preston v. Durham, 262 Fed. 843 (N. D. Ga. 1920). See Cutler v. Huston, 158 U. S. 423 (1895); New Orleans v. Fisher, 180 U. S. 185 (1901); Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co., 198 U. S. 188 (1905); Ferguson v. Babcock Lbr. & Land Co., 252 Fed. 705 (C. C. A. 4th, 1918), *appeal dismissed*, 248 U. S. 540 (1918).

91. 28 U. S. C. § 41 (1927).

92. United States v. Throckmorton, 98 U. S. 61 (1878); Vance v. Burbank, 101 U. S. 514 (1879).

93. So a mere entry in the court's minute book (especially where it appears to contain inconsistent statements) is not a judgment which will support an action. Denny v. Giles, 250 Fed. 987 (C. C. A. 5th, 1918). So a decree permitting the defendant to change his attorney upon payment of a fee determined by a special master did not impose a conclusive obligation to pay the sum which would support an action upon it. Du Bois v. Seymour, 152 Fed. 600 (C. C. A. 3rd, 1907). So a judgment against defendant and X will not support an action against defendant alone. First Nat. Bank v. Hamor, 47 Fed. 36 (C. C. D. Wash. 1891). Nor will an equitable decree setting aside a fraudulent conveyance, establishing plaintiff's claim, and appointing a master to whom defendant should pay a certain sum for benefit of his creditors. Corbin v. Graves, 27 Fed. 644 (C. C. N. D. Iowa, 1886).

The judgment sued on must be final, but the fact that the time for appeal has not elapsed and there is an appeal pending does not prevent an action thereon, so long as no *supersedeas* has issued and by the law of the place where it was rendered execution could still issue on it there. Gen. Finance Corp. v. Pa. Nat. Hdwe. Mutual, 17 F. (2d) 383 (M. D. Pa. 1927).

The decisions cited are those of federal courts. The United States Supreme Court has announced in positive terms that an action upon a federal judgment does not necessarily raise a federal question. Provident Sav. Life Ass'n Soc. v.

sum of money, an assertion which raises the complex problem of whether equitable decrees for the doing of any act other than the payment of money may be enforced in another court.[94] The federal courts have not contributed much authority on this question, but there is *dictum* in *Pennington v. Gibson*[95] that by their nature some decrees can only be enforced by the courts which rendered them. Certainly an equitable decree for the payment of money can be sued upon in precisely the same manner as a judgment of a court of law.[96]

The second type of defense runs to the procedure by which the action on the judgment is brought. As an action at law this was formerly governed by the rules of the state in which the court sits.[97] (If an equitable suit to enforce the decree of another court for the doing of any act but the payment of money would have been entertained, presumably the procedure

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Ford, 114 U. S. 635 (1885). Whether a judgment unqualifiedly imposes a definite and absolute obligation upon the defendant, so that it may be the basis of a subsequent action, would seem to be a question of substantive law. Under the decision of Erie R. R. v. Tompkins, 304 U. S. 64, 114 A. L. R. 1487 (1938), the character of the judgment should for this purpose be determined by the law (including "conflicts" rules) of the state in which the judgment is sued upon, which as a matter of conflict of laws should probably look to the law of the state in which it was rendered. However, in so far as the issue is the application of the "full faith and credit" clause of the Constitution, the United States Supreme Court will determine the character of the judgment for itself. See Huntington v. Attrill, 146 U. S. 657 (1892), in which the civil, as compared with penal, character of the judgment was independently determined.

That a penal judgment need not be accorded "full faith and credit" by a sister state, see State of Wisconsin v. Pelican Ins. Co., 127 U. S. 265 (1888); Arkansas v. Bowen, 3 App. D. C. 537 (1894). *Contra*: Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16 (1904). And *cf.* Fauntleroy v. Lum, 210 U. S. 230 (1908); Milwaukee County v. M. E. White Co., 296 U. S. 279 (1935).

94. This has long been the subject of vigorous dispute. Discussion has been so extended that it would unduly prolong this paper even to summarize the unreconciled views maintained by eminent scholars. In 1 SIMPSON AND CHAFEE, CASES ON EQUITY (1934) pp. 143 ff, there is a brief analysis, with adequate citations of seven district theories. Among the leading contributions to the thought on this problem, and in addition to authorities already cited, see Barbour, *The Extra-Territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527; Lorenzen, *Application of the Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Land* (1925) 34 YALE L. J. 591; Pound, *Progress of the Law, 1918-1919, Equity* (1920) 33 HARV. L. REV. 420; RESTATEMENT, CONFLICT OF LAWS (1934) §§ 447 *et seq.*; 2 BEALE, CONFLICT OF LAWS (1935) § 449.1.

95. 16 How. 65 (U. S. 1853). And see, in accord, McQuillen v. Dillon, 98 F. (2d) 726 (C. C. A. 2d, 1938), citing with approval BEALE, CONFLICT OF LAWS and RESTATEMENT, CONFLICT OF LAWS, both *supra* note 94.

The question might well be asked to what extent the doctrine of Erie R. R. v. Tompkins, 304 U. S. 64 (1938), is applicable to this situation. Attempts to enforce equitable decrees for doing of acts other than the payment of money must be in the form of a new bill in equity. Whether *Erie R. R. v. Tompkins* destroys the independent determination of their own equity jurisdiction by the federal courts has not yet been decided. See Schweppe, *What Has Happened to Federal Jurisprudence* (1938) 24 A. B. A. J. 421.

96. Pennington v. Gibson, 16 How. 65 (1853).

97. Conformity Act, REV. STAT. § 914 (1875), 28 U. S. C. § 724 (1928).

would have been controlled by the rules of federal equity practice, unaffected by state law.) The state law determined the procedure of pleading and proving the foreign judgment, the necessity for a full copy of the record, and what satisfied the requirement.[98] It also determined the necessity of pleading the facts showing the jurisdiction of the court to render the judgment.[99] Incidentally, it also determined the proper plea for the defendant.[100]

Today the procedure would have to conform to the new federal rules, and deviations would be a defense. However, the adoption of the Rules of Civil Procedure should not affect the requirement that the action be brought within the time permitted by the state for actions on the judgments of sister states. It should be observed that the state may not, by its statute, discriminate against actions on federal judgments (in state or federal courts) or in federal courts (on state or federal judgments).[101]

The third type of defense challenges the venue of the action on the judgment and the jurisdiction of the court in which it is brought. The learned members of the advisory committee which drafted the Rules of Civil Procedure apparently regarded an action on a federal judgment as inevitably raising a federal question and being in some way ancillary to the original action. The decisions show very plainly that this is not the case, and they were confirmed by the rejection of proposed Rule 77. The action upon the judgment is totally independent, and the fact that the jurisdictional and venue requirements of the federal district court were satisfied in the action on the original claim does not mean and raises no presumption that they are in the case at bar.

This is clearly brought out in *Provident Savings Bank v. Ford.*[102] An action upon the judgment of the United States Circuit Court for Ohio was brought in the Supreme Court of the state of New York, of which both plaintiff and defendant were citizens. The defendant sought to remove the cause to the federal courts in New York on the ground, among others,

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98. Gen. Finance Corp. v. Pa. Nat. Hdwe. Mut., 17 F. (2d) 383 (M. D. Pa. 1927); Springs v. James, 172 Fed. 626 (C. C. N. D. Ga. 1909).
99. Lee v. Terbell, 33 Fed. 850 (C. C. S. D. N. Y. 1887).
100. First Nat. Bank v. Hamor, 47 Fed. 36 (C. C. D. Wash. 1891). Where there is no special provision of state law, the proper plea was *mul tiel record.* Mills v. Duryee, 7 Cranch 481 (U. S. 1813).
101. The applicability of state Statutes of Limitations to suits on federal judgments in federal courts of the state was fully discussed in Metcalf v. Watertown, 153 U. S. 671 (1894). See also Carey v. Roosevelt, 83 Fed. 242 (C. C. S. D. N. Y. 1897); Wells, Fargo & Co. v. Van Sickle, 112 Fed. 398 (C. C. D. Nev. 1901).
102. 114 U. S. 635 (1885).

that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States. His petition was denied and the ruling was affirmed on appeal, Judge Bradley saying that a judgment is "but a security of record showing a debt due from one person to another. It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, for trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case."[103]

The jurisdiction of the federal district courts as set out in Section 24 of the Judicial Code (U. S. C. tit. 28, § 41) may be classified into two types, that depending upon the nature of the subject matter (as, for example, suits arising under patent laws and suits arising under federal law) and that depending upon the character of the parties (as between citizens of different states). Not only must the suit fall into one of the classes there set forth, but if jurisdiction can be invoked only on the ground that the parties are citizens of different states or that the action raises a federal question, the matter in controversy must exceed the value of three thousand dollars.

It has just been shown that a suit on a federal judgment does not necessarily arise under federal law. Nor does the fact that the original claim involved a federal question or some subject of which the federal courts have peculiar jurisdiction give that character to the judgment.

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103. That is, if the defendant had in his petition, fairly alleged facts that would inevitably have forced a consideration of the jurisdiction conferred on the Ohio court by REV. STAT. § 739. This case is quoted with approval and followed in Carson v. Dunham, 121 U. S. 421 (1887). Quoted with approval in Pope v. Louisville, N. A. & C. Ry., 173 U. S. 573 (1899). Accord as to action on federal judgment in federal courts: Metcalf v. Watertown, 128 U. S. 586 (1888); United States *ex rel.* Lambert v. Pedarre, 262 Fed. 839 (E. D. La. 1920).

Cook v. Beecher[104] was an action in the United States District Court for Connecticut on a judgment against B corporation rendered by the same court for infringement of a patent. Both the plaintiff and the parties defendant, directors of B corporation who by local statute was personally liable, were citizens of Connecticut. It was held that the court had no jurisdiction to entertain the action on the judgment, which involved no patent question to obviate the necessity for diversity of citizenship. *United States* ex rel. *Lambert v. Pedarre*[105] was an action by the assignee by subrogation of a materialman supplying labor and materials to X, who had contracted with the United States government to build a levee in the state of Mississippi, against defendants who were surety on bond given the federal government for performance of X's contract and for the payment of labor and materials, in the United States District Court of Louisiana upon a judgment for $1457.70 obtained by the plaintiff's assignor in a federal district court of Mississippi. All the parties were citizens of Louisiana. It was held that the court had no jurisdiction, there being no federal question involved and the United States not being an interested party.

United States ex rel. *Lambert v. Pedarre* illustrates two limitations on the jurisdiction of the court in which the action on the judgment is laid. Though the original action was between citizens of different states, if, subsequent to judgment, there is such a change of residence that, at the time an action is brought thereon, the parties to the original claim, let alone parties to the case at bar, are citizens of the same state (so stated because the assignee of a judgment has only the right of his assignor,[106]) the court has no jurisdiction.[107] And though the original action may have involved more than three thousand dollars, a valid judgment could have been rendered for less without loss of jurisdiction.[108] But an action on that judgment involves only the amount contained in it, without any regard to the original claim.[109] As the only ground for federal jurisdiction of an action on a judgment is diversity of citizenship, the court may not receive the action.

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104. 217 U. S. 497 (1910), *aff'g*, 172 Fed. 166 (C. C. D. Conn. 1909).
105. 262 Fed. 839 (E. D. La. 1920).
106. JUDICIAL CODE § 24; 28 U. S. C. § 41 (1927).
107. Metcalf v. Watertown, 128 U. S. 586 (1888).
108. Scott v. Donald, 165 U. S. 58 (1897).
109. United States *ex rel.* Lambert v. Pedarre, 262 Fed. 839 (E. D. La. 1920). See Mississippi Mills v. Cohn, 150 U. S. 202 (1893); Alkire Grocery Co. v. Richesin, 91 Fed. 79, 84 (C. C. W. D. Ark. 1899); Preston v. Durham, 262 Fed. 843 (N. D. Ga. 1920).

A very important consideration in this problem is of the venue of the suit. Suit on a judgment when brought in a district different from that in which the judgment was rendered is usually laid there to reach assets so situated. But as an independent suit it can only be brought in the district where plaintiff or defendant resides, unless defendant waives the defense.[110] Because a judgment does not give a lien outside the state in which it is rendered,[111] an action on a judgment in another state does not involve a local matter or the enforcement of a lien which might be brought wherever the property was situated[112] (the lien not arising until the suit on the judgment, which on this ground is being contested, is itself reduced to judgment).

We have, then, the situation that as long as one keeps his property in the district of which neither he nor his creditors are resident, he is practically immune from federal civil process. This probably accounts for the scarcity of cases dealing with actions in federal courts on other federal court judgments, for if the residence of the parties was such that one court could hear the original cause under valid service, by that fact it would be seldom that any other court could entertain an action on the judgment there rendered. It is more common to sue on the judgment in the state courts, which by their statutes are given jurisdiction over even transitory actions to an extent sufficient to subject the property there situated to the claim of the creditor, whether or not the debtor resides or can be personally served there.

The awkwardness of extra-state enforcement of federal judgments moved the advisory committee to suggest proposed Rule 77.[113] This em-

110. JUDICIAL CODE § 51; 28 U. S. C. § 112 (1927).
111. 25 STAT. 357 (1888), 37 STAT. 311 (1912), 28 U. S. C. § 812 (1928).
112. 28 U. S. C. §§ 112, 118 (1927).
113. "A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment. When so registered the judgment has the same effect and like proceedings for its enforcement may be taken thereon in the court in which it is registered as if the judgment had been originally entered by that court. If in the court in which the judgment was originally entered the judgment has been satisfied in whole or in part, or an order has been made modifying or vacating it or affecting or suspending its operation, the party procuring the registration shall and any other party may file authenticated copies of the satisfaction or order with the court in which the judgment is registered. This rule shall not be construed to limit the effect of the Act of February 20, 1905, c. 592, § 20 (33 Stat. 729), as amended, U. S. C., Title 15, § 100; or the Act of March 4, 1909, c. 320, §§ 36 and 37 (35 Stat. 1084), U. S. C., Title 17, §§ 36 and 37; or § 56 of the Judicial Code, U. S. C., Title 28, § 117; or to authorize the registration elsewhere of an order or a judgment rendered in a divorce action in the District of Columbia."

bodied the principle of the ill-fated American Bar Association bill referred to above[114] though limited in application to registration of federal judgments in federal courts. Indeed, in its first form it merely paraphrased that bill.[115]

It was one of only two proposed rules not accepted by the court. No reasons for the rejection were given, but it does not seem impossible to find a plausible explanation. There were objections of expediency and principle which may be seen by considering the effect of the proposed rule on the three types of defense to an action upon a federal judgment under the established practice.

As to (a) of the first mentioned defense, the only important difference would be to put upon the judgment debtor the burden of freeing his property from the lien of and possibility of execution under a void judgment. Because the foreign judgments are valid in the great majority of cases, this seems a reasonable requirement.

The issue of (b) in the same defense would have been put upon the clerk of court, who would probably be incompetent and undoubtedly be reluctant to determine what judgment was in proper form for registration. It should be noted that it also provided for the enforcement of all federal equitable decrees and penal judgments by other federal courts, a step the Supreme Court may not have been ready to take.

If proposed Rule 77 had been adopted, the second type of defense would be confined to raising the issue of compliance with its provisions. This would probably be a desirable condition, though some question might exist as to the burden of proving compliance with the state Statute of Limitations, a point not dealt with in the rule.

The chief difficulty comes with the third defense. The proposed rule would have permitted any final judgment to be registered in any district. In terms it would have authorized the enforcement of a judgment for less than $3000, and in districts of which neither creditor or debtor were resident, and regardless of the diversity of citizenship of the parties. Rule 82, prohibiting the construction of any of the rules to effect a change in the jurisdiction of any district court or in the venue of any action, would seem a tacit admission that such changes are not within the statute conferring power to regulate procedure. If proposed Rule 77 were con-

114. See note 70, *supra*.
115. See proposed Rule 84 in the preliminary draft of the rules published in May, 1936.

strued under that policy—though it would have stretched the doctrine of "construction" to have limited the broad terms of the rule so drastically —the procedure would inevitably have become much more complicated.

In effect, the rule would have read,—any final judgment or order may be registered in any other district where it might have been successfully sued upon prior to the adoption of this rule. Who would have determined what judgments may be registered? Should the debtor have had an opportunity to argue whether the judgment was within the rule? The rule would have forced the development of a considerable amount of procedure law by the courts who would have had to apply it; and it would be highly doubtful if, once developed, that procedure would be simpler than the unsatisfactory present practice.

At any rate, our procedure has been reformed without proposed Rule 77. Only Congress can simplify the extra-state enforcement of federal judgments now, and Congress should do it. The present situation is absurd. If there is any virtue in a system of federal courts, it should be possible to get complete relief through them, without having to resort to state courts in the majority of attempts to reach assets outside the state in which the original action must have been brought. If Congress will enter this field, perhaps it can be persuaded to exercise its broad powers under the "full faith and credit" clause and reorganize the whole system of extra-state enforcement of state and federal judgments. The ancient practice under which we still labor was better suited to "horse and buggy" days.