Limitations on the Exercise of Jurisdiction in Personam

Edward S. Stimson
LIMITATIONS ON THE EXERCISE OF JURISDICTION IN PERSONAM*

By Edward S. Stimson†

The purpose of this article is to consider and explore the various limitations which have been placed on the power of a court to act in personam. Before considering these limitations the general transitory character of actions or the right of foreigners to sue is considered. The limitations are then treated, beginning with local actions which are an exception to the general rule that actions are transitory.

Transitory and Local Actions

Generally speaking, actions are transitory in their nature. Foreigners have traditionally had access to the courts. The earliest authority on the right of foreigners to sue, which the writer has found, is an English statute enacted in 1353.1 It permitted merchant strangers, not enemies of the King, to enter the kingdom under the safe conduct of the King and provided that they should have speedy and ready process against persons taking anything from them contrary to agreement. In an anonymous case,2 decided in 1517 in the Court of Common Pleas, it was plead in answer to a writ of debt that the plaintiff was an alien living in France. The justices held that this was no plea on the ground that aliens should be permitted to sue in all personal actions if there was no war between the kingdom and the alien’s country, but not in real actions, because an alien could not own land in the realm unless he was a denizen.

It should be noted that this case goes beyond the earlier statute not only in its language but also because it is not clear that the alien was a merchant who had entered the kingdom under safe conduct, or that the contract out of which the cause arose was made in England. The case extends the right of foreigners to sue at least to all contract actions and possibly to all actions of any kind.

This principle was recognized in the United States by Roberts v.

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2 1 Dyer 2b (1517).
Knights, a Massachusetts case decided in 1863, in which a British seaman was permitted to sue the British master of his ship in Boston for wages. The contract of employment was made in England.

Local Actions

The plaintiff's right may nevertheless be limited by the nature of the action. Most actions are transitory, meaning that they can be sued upon in any court where jurisdiction can be obtained over the defendant. A few actions are local and can be brought only in one jurisdiction. Thus the action of ejectment is local because in form the action is to recover a term for years and its object is to put the plaintiff in possession of the premises. This can only be done by a court having jurisdiction over the land because the sheriff of another state would have no authority to oust the occupants from possession of the land and put the plaintiff in possession.

In Livingston v. Jefferson, Chief Justice Marshall held that trespass was a local action. He admitted that this was an unsound principle since all the plaintiff sought was money damages and a court anywhere could give such a judgment, but he felt bound by the English authorities.

In Ellenwood v. Marietta Chair Co. the Supreme Court of the United States held the same way. The declaration contained two counts—one for trespass on the land and the other for conversion of the timber. The plaintiff was required to amend his petition so as to show a continuous trespass. He amended the petition so that it contained a single count which showed that both trespass and conversion were relied upon. The Supreme Court interpreted this to be a count for trespass only and affirmed an abatement of the action on the ground that the trespass was local and the suit could not be brought in a district court in Ohio for trespass to lands in West Virginia. The result seems wrong since an action for trespass is merely a suit for money damages, which it should be possible to bring anywhere. Furthermore, under the modern codes if the facts pleaded showed a right to recover for conversion, the fact that the plaintiff's theory was trespass would be immaterial. In the later case of Stone v. United States the Supreme Court of the United States held that an action for conversion was transitory. A Minnesota court held that trespass is a transitory action. It pointed out that the effect of holding that trespass actions were local might be to deny recovery to the plaintiff altogether if he could not get service on the defend-

3 89 Mass. (7 Allen) 449 (1863).
5 158 U.S. 105 (1895).
6 Bruheim v. Stratton, 145 Wis. 27, 129 N.W. 1092 (1911).
7 167 U.S. 178 (1897).
in the jurisdiction where the land was located. The rule in England that trespass was a local action was abolished by the Judicature Act of 1873.

**Fraud and Privilege**

Assuming that the court has jurisdiction over the defendant, its right to exercise that jurisdiction may be limited by the doctrines of fraud and privilege.

In *Townsend v. Smith,* the defendant published an item in his newspaper in Chicago which the plaintiff, who lived in Wisconsin, regarded as libel. The plaintiff induced the defendant to come to Wisconsin on the pretext that he wanted to advertise his hotel in the defendant's paper. When the defendant arrived, the plaintiff caused him to be arrested on a charge of criminal libel. While the defendant was in custody, the plaintiff had him served with process in a civil action for damages for libel. Although the plaintiff filed an affidavit to the effect that he had not thought of the civil action until the defendant was in custody, the Supreme Court of Wisconsin held that although the court acquired jurisdiction by such service, the court should not exercise this jurisdiction in favor of the plaintiff who had fraudulently induced the defendant to come within the jurisdiction. In *Blandin v. Ostrander,* the court reached the same result holding, however, that it had not acquired jurisdiction over the defendant at all because of the fraud. The court declared that the defendant could not be said to have been found in the jurisdiction. The result in this case is correct, but the reasoning is unsound. However, the fraud is so closely related to the jurisdiction that the full faith and credit clause does not require a court in another state to enforce a civil judgment based on jurisdiction obtained by the fraudulent use of criminal process.

The limitation of privilege is similar in effect. A witness at a trial or hearing is privileged from the service of summons. This is because the courts desire to encourage the attendance of witnesses at trials. Witnesses from out of the state cannot be compelled to appear and testify, and they should not be discouraged by the possibility of being subjected to suit or by having the corporation which they represent subjected to suit within the jurisdiction. The privilege does not extend to attendance at a judicial sale.

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9 See also Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952).
10 47 Wis. 623, 2 N.W. 439 (1879).
11 239 Fed. 700 (2d Cir. 1917).
since such attendance would not be in the capacity of a witness. Nor does it extend to attorneys from out of state. At common law, attorneys were exempt from arrest during a trial because this would interfere with their conduct of the client’s case. But this rule does not extend to a privilege exempting them from the service of process which would not interfere with the conduct of the trial. The presence of an out-of-state attorney is not regarded as essential to justice since there are plenty of local attorneys who can properly handle a client’s case.

There is a question whether the privilege from service of process for witnesses extends to a party who is a witness in his own case. It can be argued that the privilege is not necessary for such a party because his own interest will induce him to attend and testify in his own behalf. On the other hand, if the action in which he wishes to testify involves only a small amount of money and the suit to which he might be subjected while attending the court proceeding in the minor matter would be a suit involving many times that amount of money, the possibility of such a suit might discourage the party from attending and testifying in his own behalf for the small amount. The authorities are conflicting. In Morrow v. U. H. Dudley & Co., the court held that a party was entitled to the privilege against service. In Bishop v. Vose the court held he was not entitled to this privilege.

**Forum Non Conveniens**

The court, although having jurisdiction in the sense of power may be further inhibited by the doctrine of forum non conveniens. The practice of taking law suits to large metropolitan centers where juries are accustomed to give much larger awards than juries in small towns and rural areas, or in trying a case in some forum where the law is favorable to the plaintiff has caused this doctrine to come about. The court, although it has jurisdiction over the defendant, will refuse to exercise jurisdiction and will dismiss the case without prejudice. It will do so on the ground that its court is not the convenient forum. The forum will be inconvenient if the witnesses and records are elsewhere or if the plaintiff is trying to secure the application of favorable legislation of the forum otherwise not applicable.

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14 Greenleaf v. People’s Bank, 133 N.C. 292, 45 S.E. 638 (1903).
15 Ibid.
17 27 Conn. 1 (1858).
The cases in which the courts will refuse to hear the cause on the ground of forum non conveniens are chiefly cases in which the defendant is a corporation. If the defendant is an individual, the courts are reluctant to refuse to hear the case because they cannot be sure that the plaintiff will be able to obtain jurisdiction over the defendant in the jurisdiction which is the convenient forum; and if jurisdiction could not be obtained there, the refusal to hear the case might mean that the plaintiff would be denied any opportunity to recover.

The Minnesota courts do not recognize the doctrine of forum non conveniens. Their conclusion was apparently based on the erroneous notion that application of the doctrine of forum non conveniens would constitute a discrimination between citizens of Minnesota and citizens of other states. This need not be so if the distinction is between causes of action and between convenient and inconvenient forums. Thus even a citizen might be denied access to the court on the ground that the convenient forum was a court in another jurisdiction. However, courts are reluctant to apply the doctrine of forum non conveniens to a citizen of their own jurisdiction and this tendency lends some support to the Minnesota view.

It is generally held that courts of jurisdictions other than that in which a corporation is incorporated will not inquire into the internal affairs of the corporation. This is merely an application of the doctrine of forum non conveniens. Thus in a dispute between stockholders involving control of the corporation, the convenient forum would be the forum of the jurisdiction in which the corporation is incorporated because the records of the corporation would be there. If the dispute involves outsiders, it is held that the internal affairs of the corporation are not involved.

The First National Bank Case

In First National Bank v. United Air Lines a wrongful death action was brought in federal district court in Illinois by an executor appointed there to recover under the wrongful death act of Utah for the death of a resident and citizen of Illinois which occurred in Utah. An Illinois statute provided that no action should be brought in Illinois to recover damages for a death occurring outside the state where a right of action existed under the laws of the place where the death occurred and service of process could be had upon the defendant in such place. The federal district court, applying this statute, dismissed the action. The Supreme Court of the United

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10 Borlight v. Chicago, R.I. & P. R.R., 180 Minn. 52, 230 N.W. 457 (1930).
22 342 U.S. 396 (1952).
States reversed, holding that this statute was unconstitutional because it was contrary to the full faith and credit clause. They relied in part on *Hughes v. Fetter*\(^{23}\) where the statute prohibited suit on foreign wrongful death causes without providing the exception contained in the Illinois statute for suit in cases where service could not be had on defendant in the state where the cause arose. Although in the opinion Justice Black noted the difference between the two statutes, he said:\(^{24}\) That Illinois is willing for its courts to try some out-of-state death actions is no reason for its refusal to grant full faith and credit as to others. The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois. This is true although Illinois agrees to try cases where service cannot be obtained in another state. While we said in *Hughes v. Fetter* that it was relevant that Wisconsin might be the only state in which service could be had on one of the defendants, we were careful to point out that this fact was not crucial. Nor is it crucial here that Illinois only excludes cases that can be tried in other states.

The difficulty with this reasoning of the Supreme Court is that the statute seems to be merely a legislative requirement that the doctrine of forum non conveniens be applied. If so, it is difficult to see why a doctrine which courts themselves employ without a statute should become unconstitutional when required by statute. Generally the place where the cause of action arose will be the convenient forum where witnesses are available and the court is familiar with the applicable law. Of course it can be said that the place where the cause arose is not necessarily the most convenient forum. It can happen that more witnesses will be available in some other jurisdiction. Thus, if two automobiles collided and the only witnesses are occupants of these two cars, all of whom are residents of other states, it may be expected that they will return to those states after the accident and there will be no witnesses where the cause of action arose. If *First National Bank v. United Air Lines* is sound, it rests on the rather narrow distinction between the place where the cause of action arose and the place which is the most convenient forum. Since in most cases the place where the cause of action arose will be the most convenient forum, the distinction is one which will be without a difference in many cases. There was no showing either that Utah was the convenient forum or that Illinois was an inconvenient forum. It is possible that, when the case was returned to the federal district court in Illinois for trial, the federal district court could still dismiss the case on the ground that Illinois was an inconvenient forum and the plaintiff should bring his action in Utah. Certainly the full faith and credit clause of the United States Constitution should not make the doctrine of forum non conveniens unconstitutional.

\(^{23}\) 341 U.S. 609 (1951).
\(^{24}\) 342 U.S. at 398.
Limitations by Injunction or Statute

As a possible extension of the doctrine of forum non conveniens, states have attempted by statute to require suit within the state on certain causes of action arising locally. In *New York, C. & St. L. R.R. v. Matzinger*, Mrs. Matzinger had a tort claim against the railroad arising out of an accident in Cuyahoga County (Cleveland) Ohio. She sued on it in a state court in Chicago, Illinois. The company brought an action in Huron County, Ohio, to enjoin her from prosecuting the action in Chicago on the ground that sixteen or seventeen of its witnesses resided in Ohio, that no process could compel them to attend the trial in Chicago, and that if they did attend the trial the expense to the railroad would be great. The company said that many of these witnesses were employees and that their absence would interfere with the operation of the railroad. The injunction was denied but a reversal of the decree by the court of appeals was affirmed by the Supreme Court of Ohio. The Supreme Court relied on an Ohio statute which required tort actions against railroads to be brought in the county in which the cause of action arose or in the county in which the claimant resided. It said that the purpose of this statute was to prevent the filing of actions in a place far removed from where the cause arose, an exception being the provision authorizing the maintenance of the action in the county where the plaintiff resided.

The statute is only a venue statute. It is difficult to understand how it could be interpreted as prohibiting the bringing of suits in other states on causes of action arising in Ohio. However, the decision is sound. The case holds that the state in which the cause of action arose may compel the claimant to bring his action there when it is the convenient forum. There is no reason why the state where the cause arose cannot require trial there if it is the convenient forum. Note that the case differs from *First National Bank v. United Air Lines* in that the railroad made a showing that the Illinois forum was inconvenient and the Ohio forum convenient. In the *Air Lines* case the statute alone without such a showing was held to be unconstitutional.

In *Atchison, T. & S.F. Ry. v. Sowers* a brakeman for the Santa Fe brought suit in Texas to recover for personal injuries received in New Mexico. The New Mexico statute required suit to be brought in New Mexico if the cause arose there and jurisdiction could be obtained over defendant there. The statute declared that this was a condition of the right. The Texas court allowed the plaintiff to recover in spite of the contention that the full faith and credit clause of the United States Constitution required it to give

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25 136 Ohio St. 271, 25 N.E.2d 349 (1940).


effect to the New Mexico statute. The Supreme Court of the United States affirmed, holding that the full faith and credit clause did not require Texas to give effect to this statute because New Mexico could not by such a statute defeat the jurisdiction of the Texas court. Justice Holmes, dissenting, said that he did not see why New Mexico could not abolish the common-law right and substitute in its stead a statutory right, subject to the condition that suit be brought in New Mexico if the defendant could be served there.

Here again, if the statute is thought of as a requirement that the suit be brought in New Mexico when that is the convenient forum, the decision seems to be wrong. Of course the place where the cause arose is not necessarily the convenient forum. There was no showing that Texas was an inconvenient forum or that New Mexico was the convenient forum. Therefore the decision may be right on the ground that the statute does not clearly require trial at the convenient forum. Possibly a showing could have been made that Texas was the inconvenient forum and New Mexico the convenient forum. The witnesses for the railroad probably were employees of the railroad living in and available in New Mexico. However, a judgment against the railroad having been affirmed, there was no new trial and therefore no later opportunity for the railroad to make a showing of the inconvenience of Texas or the convenience of New Mexico as a forum. For lack of such a showing the case is not necessarily contra to the Matzinger case.

Sweeney v. Hunter involved a Pennsylvania statute which prohibited the assignment of claims against residents for the purpose of having them collected by attachment proceedings in other states, or with the intent to deprive persons of the exemption laws where the debtor and garnishees were within the state. Violators of the statute were liable in an action for the amount lost. An undertaker, who had a claim against a Pennsylvania employee of the B. & O. Railroad for services, assigned the claim to Smith. Smith brought a garnishment proceeding against the B. & O. in West Virginia and collected. The employee sued the undertaker in Pennsylvania to recover this amount. A judgment for the plaintiff was affirmed by the Supreme Court of Pennsylvania. The court said that the statute accomplished the same purpose as injunction against prosecution of the action in West Virginia and therefore was not contrary to the privileges and immunities clause of article 4 section 2 of the United States Constitution.

In this case there is no evidence as to which is the convenient forum. However, it seems clear that the purpose of bringing the garnishment proceeding in West Virginia was the hope that the West Virginia court would make the wrong choice of law and thus deprive the employee of his exemption under the Pennsylvania law. This is exactly what the court did and

this is what the statute was designed to prevent. If this case had gone to
the Supreme Court of the United States, would the Supreme Court apply
Atchison, T. & S.F. Ry. v. Sowers and say that Pennsylvania could not
thus defeat the jurisdiction of the West Virginia court? Of course it could
be argued that the West Virginia court should apply the Pennsylvania law
and if it did there would be no need for the Pennsylvania statute. However,
the fact that the West Virginia court made the wrong choice of law shows
that the fears of Pennsylvania were justified and the statute was needed.
It is not perceived why Pennsylvania may not protect Pennsylvania em-
ployees by such a statute.

Foreign Causes of Action

The states have also attempted the converse of the above. That is, they
have attempted to prohibit suits in the state on causes of action arising in
another jurisdiction. An example of this is found in Chambers v. Baltimore
& O. R.R.28 which involved the following Ohio statute:

Whenever the death of a citizen of this state has been or may be caused
by a wrongful act, neglect or default in another state, territory or foreign
country, for which a right to maintain an action . . . is given by a statute
. . . such right of action may be enforced in this state within the time pre-
scribed for the commencement of such action by the statute of such other
state . . . . (Emphasis added.)

The Supreme Court of Ohio interpreted this statute as prohibiting suit
in Ohio to recover for the wrongful death of a citizen of Pennsylvania under
a Pennsylvania wrongful death statute because he was not a citizen of Ohio.
In other words, the Supreme Court of Ohio interpreted this permissive
statute as prohibiting suit on all foreign wrongful death causes other than
those authorized by the statute. Of course this interpretation is hardly
sound. However, on appeal to the Supreme Court of the United States the
question was whether the statute as so interpreted was contrary to the privi-
leges and immunities clause of the United States Constitution. The Su-
preme Court held that it was not contrary to the privileges and immunities
clause. There was no discrimination between persons bringing such suits
on the basis of their citizenship, but the discrimination was based on the
citizenship of the deceased. Justice Harlan, with whom White and Mc-
Kenna concurred, said in dissenting that the decision of the majority might
result in denying recovery to the plaintiff altogether in cases where juris-
diction over the defendant could be acquired only in Ohio.

In Hughes v. Fetter the Supreme Court of the United States considered
the validity of a Wisconsin statute as interpreted by the Supreme Court of

28 207 U.S. 142 (1907).
Wisconsin. The Wisconsin statute provided for suits on causes of action for wrongful death arising in Wisconsin. It was interpreted by the Wisconsin Supreme Court as prohibiting suits on wrongful death actions arising in other states. The Supreme Court of the United States held that as so interpreted the Wisconsin statute denied full faith and credit to the Illinois wrongful death statute in a case where the deceased was killed in an automobile accident in Illinois and suit was brought under the Illinois wrongful death statute in Wisconsin where the defendant resided and where his insurance company was incorporated. The court said that the Wisconsin policy is forbidden by the full faith and credit clause and that application of the statute as so interpreted was not an application of the doctrine of forum non conveniens.

*McKnett v. St. Louis & S.F. Ry.*

involved the validity of an Alabama statute as interpreted by the Supreme Court of Alabama. The Alabama statute provided:

> Whenever, either by common law or the statutes of another state, a cause of action ... has arisen in such other state against any person or corporation, such cause of action shall be enforceable in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state.

Plaintiff, a resident of Tennessee, brought suit in Alabama to recover under the Federal Employers' Liability Act for an injury received in Tennessee. The Supreme Court of Alabama abated the action on the ground that the suit was not a suit on a cause of action at common law or under the statutes of another state and that therefore it could not be brought in Alabama. The interpretation is, of course, hardly permissible since without the statute such a cause of action is undoubtedly transitory, and it does not follow that the statute authorizing suits on foreign causes of action in Alabama is to be interpreted as prohibiting those not mentioned. The Supreme Court of the United States held that the statute as so interpreted was unconstitutional because a state could not refuse to entertain the action merely because it was brought under a federal law. The result in this case is inconsistent with *Chambers v. Baltimore & O. R.R.* although the reason would not be applicable.

*The Commerce Clause*

The state's power to require or prohibit the use of its courts may be limited by the commerce clause of the federal Constitution. In Minnesota, where the doctrine of forum non conveniens is not recognized, a statute provided that:

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Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent.

Pursuant to this statute service was made in *Davis, Director General of Railroads v. Farmers' Cooperative Equity Co.*\(^{30}\) in a suit brought by a Kansas corporation against the Director General of Railroads, representing a railroad corporation incorporated in Kansas, on a cause of action arising in Kansas. The Supreme Court of the United States held that the statute was unconstitutional because it burdened interstate commerce insofar as it applied to foreign causes of action when the plaintiff was not a resident of the state at the time the cause arose. It said that it burdened interstate commerce because it kept railroad employees away from their duties, thus interfering with interstate transportation and increasing the carrier’s expense.

Note that the doctrine of forum non conveniens would produce the same result. The only reason it was necessary to bring in the commerce clause was because the doctrine of the forum non conveniens is not recognized in Minnesota. In *Denver & R.G. W. R.R. v. Terte, Judge,*\(^{21}\) the doctrine that interstate commerce is burdened by interfering with interstate transportation by taking railroad employees away from their jobs to serve as witnesses was given a curious limitation. Commerce was held not to be burdened by taking them away from their jobs to testify in other states where the railroad operated lines. In the *Terte case* and *Michigan Cent. R.R. v. Mix*\(^{32}\) the Supreme Court of the United States held that the fact that plaintiff acquired residence in the state where suit was brought after the cause of action arose would not prevent the principle from applying.

A somewhat related case is *Sioux Remedy Co. v. Cope*\(^{33}\) in which the Supreme Court of the United States invalidated a South Dakota statute because it interfered with interstate commerce. The statute provided that no foreign corporation could sue in the courts of the state until it had (1) filed a copy of its charter with the secretary of state, (2) appointed a resident agent to receive service of process, and (3) paid the fee of $25. An Iowa corporation sued in South Dakota to recover on a claim for $80 for merchandise sold in interstate commerce to a resident of South Dakota. The Supreme Court said that the regulations in the statute had no relation to bringing suit and that the right to sue was directly related to interstate commerce. The $25 fee was in effect a tax on interstate commerce. The

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\(^{30}\) 262 U.S. 312 (1923).
\(^{31}\) 284 U.S. 284 (1932).
\(^{32}\) 278 U.S. 492 (1929).
\(^{33}\) 235 U.S. 197 (1914).
decision would not apply to a reasonable regulation such as a requirement that security be given to pay the costs in case the decision went against the plaintiff.\footnote{Cf. Miller's Adm'r v. Norfolk & W. R.R., 47 Fed. 264 (W.D. Va. 1891).}

**Apparent Limitations**

**Pendency of Suit in Another Jurisdiction**

If it appears after commencement of the suit that the same parties are involved in litigation in another state for the same cause of action the problem is presented of the disposition of the present suit. At what point will the foreign suit become a bar to the local action and deprive the court of jurisdiction?

*Kerr v. Willetts*\footnote{48 N.J.L. 78, 2 Atl. 782 (1886).} was an action in New Jersey in which the defendant pleaded the pendency of another action on the same cause between the same parties in the state of New York. A motion to strike out the plea in abatement was granted. The court said that the pendency of a suit by the same plaintiff against the same defendant on the same cause of action in another state could not be pleaded in abatement to a suit in New Jersey. The principal reason which the court gave was that the plea in abatement would end the suit and it might be that no adequate remedy could be had in the other jurisdiction. It said that the pendency of the suit in the foreign jurisdiction might furnish grounds for staying the action in New Jersey until there was a final judgment in the foreign action.

In *Dodge v. Superior Court*\footnote{139 Cal. App. 178, 33 P.2d 695 (1934).} the suit was in a California court. There was a motion to abate the action on the ground of pendency of a suit on the same cause of action in Washington. The court ordered that the above action abate pending the final determination of the suit in Washington and, if for the defendant in that action, that he have leave in this action to amend so as to plead the judgment in bar. The plaintiff brought a mandamus action to compel the court to hear the cause. This was dismissed, the court holding that it was within the discretion of the court to stay proceedings until a decision was reached in the Washington court. The Restatement of the Conflict of Laws is in accord. It provides, "if the local procedure of the forum so provides, the action may be stayed pending the outcome of the first suit."\footnote{Restatement, Conflict of Laws § 619, comment a (1934).}

It should be noted that the term "abatement" is used differently in *Dodge v. Superior Court* than it is in *Kerr v. Willetts*. In the *Kerr* case abatement is used in the sense of completely ending the case while in the *Dodge* case abatement is used in the sense of staying the suit for a time.
In *Paine v. Schenectady Insurance Co.*, Paine's action in Rhode Island resulted in a judgment for him. The company appealed. Subsequent to the appeal the company's receiver sued Paine in New York. Paine pleaded in set-off the same cause of action on which he had a judgment in Rhode Island and there was a judgment for the company. The company pleaded the New York judgment in the Rhode Island proceeding as a discharge of the claim and as a basis for reversing and dismissing the Rhode Island action. Paine demurred on the ground that the New York suit was not commenced first. The court overruled the demurrer on the ground that the fact that the New York suit was subsequently commenced did not prevent judgment obtained on it from being res judicata and a bar in the Rhode Island action. Paine then replied, alleging that the New York judgment had been appealed from. The company demurred to the reply on the ground that by New York law the appeal did not vacate the judgment which was good until reversed. Its demurrer was sustained. The court said that since the New York judgment was not vacated by the appeal its existence prevented prosecution of the action in Rhode Island, but since the New York judgment might be reversed the Rhode Island action should only be stayed and the New York judgment should not be a complete bar until the outcome of the New York appeal was known.

It might be argued that several suits in different jurisdictions would be a hardship on the defendant, that this would permit the plaintiff to harass the defendant by several actions. However, the advantages to the plaintiff outweigh this possible hardship. The plaintiff may wish to bring an action in the convenient forum but the jurisdiction obtained over the defendant might be doubtful, especially where the defendant is a corporation and there is some question about whether or not the defendant was doing business in the place where suit is brought. To stop the running of the statute of limitations the plaintiff may also wish to file a suit in a state where jurisdiction is certain although it is less convenient as a place to try the action. The court in the latter jurisdiction can stay the action until the issue of jurisdiction has been decided in the other case. If the jurisdiction in the other case is sustained the court can continue the stay until that case is tried and a final judgment in the other jurisdiction is pleaded as a bar. It does not matter which suit is started first but only in which action a final judgment is first obtained.

The court in the *Paine* case is clearly right in ignoring the technicalities that an appeal in Rhode Island vacated a judgment while an appeal in New York did not. Until the appeal has been settled and there is a final judgment, the judgment in the court below should not be a bar in the other suit even though not vacated by the appeal. No advantage should be given

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38 11 R.I. 411 (1876).
to the party who has a judgment in one jurisdiction which has been appealed from merely because of the rule in that jurisdiction that the judgment is not vacated by the appeal.

Problems in Granting Remedy

May there be limitations on the exercise of jurisdiction because of the type of remedy which is sought? That is, may the court have jurisdiction of the defendant but be unable to grant relief because the remedy provided the foreign law is novel or because it is impractical to compel an act to be done outside of the state?

In *Slater v. Mexican National Railroad Co.*[^39^] suit was brought in the United States District Court for the Northern District of Texas to recover damages for the wrongful death of Slater, who was killed in Mexico. The Mexican wrongful death act required the wrongdoer to support the dependents of the person killed until it was no longer necessary or until their marriage or coming of age. The court allowed a lump sum recovery as provided for under the Texas statute. The Supreme Court of the United States reversed. It held that the law applicable to damages was the law of Mexico where the act occurred and that the court had no power to provide the relief authorized by the Mexican statute. It said that it could not give a lump sum recovery because that would be prejudicial to the defendant.

This case has often been cited for the proposition that a state need not provide a court for a foreign cause of action. The difficulty with this is that the United States had a court which could have provided the Mexican remedy. The plaintiff should have brought the action in equity. He was mistaken in bringing his action on the law side of the court which of course could not grant a decree for periodic payments. In equity, however, there would be no difficulty about a decree for periodic payments for the support of the dependents so long as they lived or until they were married or came of age.

In *Floyd v. Vicksburg Cooperage Co.*[^40^] the plaintiff sued in a Mississippi court to recover under the workmen's compensation law of Louisiana. The Louisiana compensation act provided for payment in installments which, however, might be commuted to a lump sum payment. The defendant argued that under the Louisiana statute the right and the remedy were so completely blended that no court other than a Louisiana court could give relief. The trial court accepted this argument and sustained a demurrer to the plaintiff's replication. The Supreme Court of Mississippi reversed. It said that there were not sufficient facts to determine whether the periodic payments could be commuted to a lump sum, but said that the case could

[^40^] 156 Miss. 567, 126 So. 395 (1930).
be transferred to the equity side of the court which could give the same order or decree as the Louisiana Workmen's Compensation Commission or a Louisiana court. It said that even if the remedy was novel it would give a remedy as nearly like that in the state where the cause arose as possible.

The case points up the failure of the Supreme Court of the United States in the Slater case to order the case transferred to the equity side of the United States District Court for the Northern District of Texas.

Compelling Acts Abroad

In Massie v. Watts 41 a suit in equity was brought in a Kentucky court to compel the defendant to convey lands in Ohio, which plaintiff claimed he had purchased from defendant but to which he had lost title by reason of an alleged fraudulent survey by the defendant. There was a decree for the plaintiff. The defendant claimed that the action was local and the court did not have jurisdiction. The decree was affirmed on the ground that a court of equity having jurisdiction over the defendant could compel him to convey land outside the territory.

The authorities are divided on the question whether an equity court can compel positive acts to be done abroad. In Gunter v. Arlington Mills 42 suit was brought in an equity court in Massachusetts to compel the defendant to restore a dam in New Hampshire which it had torn down. The defendant demurred and the demurrer was sustained by the trial court. The Supreme Court of Massachusetts affirmed. The court said that it would decline to take jurisdiction when asked to compel the doing of positive acts in another state. It drew a distinction between enjoining the doing of future acts in another state and compelling the doing of positive acts abroad. This is a doubtful distinction since it seems that the question is only whether the court can compel the defendant to do or cause to be done the things which they order. In other words, as a practical matter, can the court compel obedience to its decree? If the defendant is an individual, it can put him in jail for contempt until he causes the act abroad to be done. If the defendant is a corporation and has property within the jurisdiction, the court can sequester its property until it has caused the act to be done abroad. It can also require the defendant to give a bond for the performance of the act. It has been held that a court of equity can compel the partition of foreign lands. A better explanation of the result in Gunter v. Arlington Mills is the doctrine of forum non conveniens. Probably the witnesses were in New Hampshire. If so, Massachusetts would be an inconvenient forum and New Hampshire the convenient forum.

41 6 U.S. (6 Cranch) 148 (1810).
In *Madden v. Rosseter*, plaintiff, a resident of New York, and defendant, a resident of California, each owned a one-half interest in Friar Rock, a valuable race horse. Plaintiff had sold one-half interest to the defendant for $30,000 and the parties had contracted that the defendant was to have the use of the horse in California during 1919 and 1920, and the plaintiff in Kentucky during 1921 and 1922. Breaching the contract, the defendant refused to send the horse from California to the plaintiff in Kentucky in the beginning of 1921. Plaintiff brought suit in New York, asking for a mandatory injunction requiring the defendant to ship the horse and enjoining other disposition of it and asking for the appointment of a receiver to proceed to California to take appropriate steps to secure the shipment of the horse, including invoking of the aid of the California courts. The relief was granted. The court in this case had no difficulty in ordering defendant to cause positive acts to be done abroad.44 The decision is *contra* to that of the Massachusetts court in *Gunter v. Arlington Mills*.

The same result was reached in *Kempson v. Kempson*45 where the New Jersey court ordered the defendant to use his best efforts to have set aside an ex parte divorce decree which he obtained in North Dakota. The New Jersey court modified the decree of the lower court which had ordered the defendant to get the decree set aside. The appellate court did so because of the possibility that in spite of his best efforts to have the decree set aside the North Dakota court might not do so. The *Kempson* case is peculiar because the New Jersey court had not acquired jurisdiction over Kempson (except upon the unrealistic basis of domicile) at the time that the court issued a temporary injunction enjoining him from prosecuting the divorce action in North Dakota. This decree was void. However, the defendant subsequently came into New Jersey and was attached for violating the injunction. It was then that the court ordered him to have the North Dakota divorce decree set aside. It would seem that the jurisdiction of the New Jersey court to enter this order was acquired by the attachment of the defendant in New Jersey.

**Conclusion**

Foreigners have generally been afforded the right to sue except (1) in time of war when they are enemy aliens and (2) in real actions where the local law does not permit them to own land. Therefore actions are transitory except ejectment, trespass in some jurisdictions (an unsound exception) and those situations where the court will refuse to exercise jurisdiction because of fraud in acquiring jurisdiction, privilege (chiefly for wit-
nesses), forum non conveniens and interference with interstate commerce. While the United States Supreme Court in the Sowers case struck down a statutory limitation imposed by the state where the cause arose, it may be that such a statute requiring the action to be brought in the convenient forum would be sustained. At any rate in the Matsinger case a court in the state where the cause arose, enjoined prosecution of the action in another state which was an inconvenient forum, and in Sweeney v. Hunter a statute which authorized an action to recover back money recovered in an action abroad was sustained.

While in the Chambers case the United States Supreme Court sustained statutory limitations on suit imposed by the state of the forum, in later cases, Hughes, McKnett, and Sioux Remedy Co. they held these limitations unconstitutional because contrary to full faith and credit, federal power or interstate commerce. Slater v. Mexican National Railroad Co. seems to say that a state does not have to provide a court for a cause of action arising abroad, but the real difficulty there was that the plaintiff sued at law instead of in equity. An equity court can afford almost any kind of remedy available abroad as the Floyd case shows, and, if not, it should give the nearest remedy to it available in the forum. Pendency of suit in another jurisdiction does not limit the exercise of jurisdiction, although it may cause the suit to be stayed until final judgment in the other case. A court having jurisdiction over a defendant can compel him to execute a deed to foreign land. While the Massachusetts court in Gunter v. Arlington Mills thought that it could not compel the doing of positive acts abroad, the court in Madden v. Rosseter had no difficulty in doing so. The problem seems to be whether practically the court can compel the defendant to cause these foreign acts to be done. The Madden case represents the sound view.