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Place of Trial in Civil Actions

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PLACE OF TRIAL IN CIVIL ACTIONS

I

TELEVISION and the "talkies" may some day become practical and permissible means of dramatizing the testimony of distant witnesses and thus minimize many of the difficulties dealt with in this article. Thus far "Progress" has served only to make more important the proper determination of the place of trial. The rather arbitrary rules of venue and jurisdiction taken over from the common law of England were never well adapted to our federal system. Our increasingly mobile civilization and the growing discrepancy between political and economic frontiers have rapidly multiplied the instances where dogma, developed to meet such different problems, prove utterly inapplicable.

The traditional analysis distinguishes between jurisdiction and venue. Jurisdiction is said to depend on physical power over person or property. Venue, meaning originally the place from which the jurors were summoned to Westminster, and later the county where trial would take place, has come to signify the doctrines which determine whether a court having the requisite power happens to be at an appropriate place for trial. This is solved by deciding whether the action is local or transitory. An accepted criterion is whether the action is one that might have happened anywhere. If so it is transitory. If it could have happened only in one place it is local. Local actions can be tried only where they arise; transitory actions, in whatever court has jurisdiction over the defendant or his property. This roughly outlines the law at the time we broke away from England.

1 In Duncan, Receiver v. Kiger, 27 Ohio C. A. 422, 6 Ohio App. 57 (1916), a motion picture film of plaintiff walking was offered as an exhibit bearing on the extent of his injury. On review the appellate court ordered an expert to display the film. See also N. Y. Times, Nov. 3, 1929, at 1; id., March 29, 1930, at 1, referring to police practice of making sound pictures of confessions to forestall third degree charges, and the admission of such evidence by Judge James Gordan, Jr. at the quarter sessions court in Philadelphia.

2 For a more detailed study, see Scott, Fundamentals of Procedure (1922) c. I; Kuhn, Local and Transitory Actions in Private International Law (1918) 66 U. of Pa. L. Rev. 301; Storke, The Venue of Actions of Trespass to Land (1921)
The doctrine is simple to expound. It has a flavor of antiquity. It lends itself so beautifully to syllogistic reasoning that it may well be a relief to judges a little exhausted by their daily grind of making doubtful guesses and exercising close judgment in other branches of the law. It may even afford a feeling of rejuvenation as it leads to speculation about this little cause of action that stayed at home and this that went to market. There is little else that can be said for it. When we look to its results, we find decisions reaching the paradox that in the case of local actions the only court having jurisdiction may have to dismiss the action on grounds of venue, and the only court satisfying the requirement of venue may lack jurisdiction; while in the case of transitory actions the physical power criterion may sometimes create undue obstacles to the prosecution of meritorious claims, and sometimes, by affording plaintiffs a wide choice of forums, present an opportunity to vex and inconvenience the defendant out of all proportion to what is necessary for a fair presentation of the plaintiff’s own case—or to use the threat of such vexation to coerce settlement of doubtful claims otherwise than on the basis of their merits.

Protest and reaction were inevitable. Courts have criticized the doctrine even when they felt compelled by precedent to adhere to it. As the instances where theory was obviously out of line with common sense became more and more frequent, these ceased to be regarded as the occasional “hard cases” against which judges should steel themselves lest they make bad law. Recurrent pressure of facts compelled the drawing of distinctions on other grounds than logic, and the rendering of decisions that can not be explained in terms of the old dogma. Legislation has played an important part in the process.

The problem of adjustment cuts across a number of the traditional subdivisions of law: procedure, the law of associations, private international law, and constitutional law. In the field of constitutional law it concerns itself with the full faith and credit clause, the due process clause, the commerce clause, the equal pro-

tection clause, and the privileges and immunities clause. Preoccu-
pan has been with concrete abuses and with the applica-
tion to them of relatively restricted groups of decisions involving
one or more phases only of the problem. The right hand of the
law has not seen what its left hand was doing. This has some-
times made change easier. It has made less obstructive the prece-
dents laid down when the system was more rarely out of line with
the facts and the pressure for change less strong than now. On
the other hand, pressure to correct specific abuses sometimes has
suggested warping of traditional theory in the opposite direction
from that required to meet others. Progress in removing arbitrary
limitations on plaintiffs' choice of forums without corresponding
progress in protecting defendants from improper exercise of such
choice may create more abuses than it corrects.

Typical of the development has been the struggle with the doc-
Livingston sued in the district of Virginia where Jefferson lived, for an injury to land in Louisi-
ana. The action was held to be local and therefore triable only
in Louisiana, although Jefferson was assumed by everyone not to
be subject to suit there. In criticism of the rule he felt obliged
to apply, Chief Justice Marshall pointed out that trial elsewhere
of actions for injury to land involves no greater difficulties of proof
than in the case of other actions conceded to be transitory, such as
actions for conversion of chattels, or on contracts, where title
to land is incidentally involved. He urged that the category of
transitory actions should include every action seeking a personal
judgment.\footnote{Following the views of Lord Mansfield in Mostyn v. Fabrigas, 1 Cowp. 161
(1774).} The possibility of unfairness to plaintiffs in the rule
applied in Livingston v. Jefferson caused the Supreme Court of
Minnesota to reject it, in Little v. Chicago Ry.,\footnote{65 Minn. 48, 67 N. W. 846 (1896).} and to adopt the
theory which Marshall advanced but did not follow. Unfortu-
nately, the Minnesota court has been less sensitive to possible un-
fairness to defendants incident to an unrestricted application of
the dogma that transitory actions may be brought wherever de-
fendants can be found. Indeed the Little case itself presented a
situation where due regard for convenience would have precluded
trial of the action in Minnesota; for the plaintiff lived and the
defendant was subject to suit in the very county in Wisconsin where the damaged land was. It was apparently assumed, and at any rate has been frequently reiterated by subsequent Minnesota decisions, that once an action is held to be transitory it can not be dismissed on grounds of convenience. Thus it was open to the dissenting judge to question whether the new rule might not involve more frequent injustice to defendants than the old to plaintiffs.

By contrast to the development in Minnesota, the Massachusetts court has expanded the category of local actions to relieve itself from the burden of a litigation peculiarly difficult to try away from its source. An action was brought for conversion of ore, traditionally a transitory action, but here involving determination of difficult questions of fact concerning the subterraneous courses of veins and lodes in an Arizona mine and the application of unfamiliar rules of law. It was held that in substance the action was for injury to land and therefore local. The dismissal of the action accorded with sound policy, since the Arizona courts were open to the plaintiff. It would be most unfortunate, however, if the case should become a precedent for enlarging the category of local actions where the result, as in the Livingston v. Jefferson situation, is to impose arbitrary limitations regardless of convenience.

Far more significant and far more complicated has been the development with regard to transitory actions, first in making it easier for the plaintiff to find a convenient forum with jurisdiction, and later in limiting his choice on grounds of convenience. Joint debtor acts were passed to permit suit on joint claims after service on less than all of the joint debtors, with the possibility of execution against joint property and property of the debtors served. Similar statutes have been enacted to facilitate suit on claims against firms. Foreign corporation acts have made corporations subject to suit wherever they do business. Attempts have been

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6 Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4 (1920). An alternative ground for the decision is the Massachusetts doctrine that a disseisee can not sue for conversion until restored to possession.

7 The statutes are discussed in Magruder and Foster, Jurisdiction Over Partnerships (1924) 37 Harv. L. Rev. 793.

8 See Conflict of Laws Restatement (Am. L. Inst. 1930) § 98; Henderson, Position of Foreign Corporations in American Constitutional Law (1918)
made somewhat less extensively and less successfully to predicate jurisdiction over non-resident individuals and unincorporated associations upon their engaging in business through local agents.\textsuperscript{9} Blue sky laws, non-resident motorist laws, and others, have endeavored to secure jurisdiction over claims arising out of particular kinds of activity.\textsuperscript{10} Other statutes have permitted various forms of non-personal service at defendants’ domicils.\textsuperscript{11} Such statutes, and decisions arising under them, have stretched to the breaking point the conception of jurisdiction as dependent on physical power, and have tended to substitute for it the conception that merely because it is an obviously fair place for trial a state has jurisdiction, although the processes of its own courts can reach neither the defendant nor his property.\textsuperscript{12} Attachment laws have made it possible for a state to apply property within its limits in satisfaction of claims against non-resident owners, and to coerce submission to jurisdiction generally, as a condition to being allowed to protect such property by contesting plaintiffs’ claims.\textsuperscript{13}

\textsuperscript{9} Cabanne v. Graf, 87 Minn. 510, 92 N. W. 461 (1902); Flexner v. Farson, 248 U. S. 289 (1919); see discussion of these cases in Scott, Fundamentals of Procedure 42.

\textsuperscript{10} As to non-resident motorists, see Hess v. Pawloski, 274 U. S. 352 (1927); Scott, Jurisdiction Over Non-resident Motorists (1926) 39 Harv. L. Rev. 563.

Missellaneous statutes are: Mass. Gen. Laws (1921) c. 227, § 5 (requires building and bridge contractors to appoint process agents); Ohio Gen. Code (Page, 1926) § 1218(1) (requires appointment of process agent by persons contracting with the state for highway construction).

A casual examination of the Corporation Manual for 1929 indicates that in over thirty states the Blue Sky Laws require the appointment of a process agent as a prerequisite to obtaining a license to deal in securities. Some expressly apply to individual dealers, others to “investment companies” which are elsewhere defined to include partnerships or private individuals. Some are expressly confined to claims growing out of violations of the act or the sale of securities, others to causes of action arising within the state, and in others the language is broad enough to include causes of action wherever arising.

\textsuperscript{11} See Scott, Fundamentals of Procedure 41.

\textsuperscript{12} See Dodd, \textit{supra} note 8.

\textsuperscript{13} Cheshire Nat. Bank v. Jaynes, 224 Mass. 14, 112 N. E. 500 (1916), and Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (C. C. A. 6th, 1922), hold that a non-resident defendant may appear for the sole purpose of pro-
Garnishment laws have made it possible to enforce claims against a defendant in a particular state, merely because the defendant’s debtor happens to wander into, or do business in, that state.¹⁴

It is no longer, if indeed it ever was, a safe generalization that it is fair to defendants that trial take place wherever they may be “found.” On the contrary, all defendants who travel, or are owed debts, or whose businesses transcend the limits of single states, are potentially subject to suit in many places which may be highly inconvenient. The actual instances of resulting unfairness to defendants have been too frequent to be ignored. They have led to various attempts at correction.

In studying these attempts one is struck by the constant recurrence of two questions. The first is one of policy: assuming that a court must choose between a place of trial inconvenient for the plaintiff and another about equally inconvenient for the defendant, whose interest should prevail? The second is a question of method. It is only another phase of the eternal problem of the law — where to draw the line between predication and flexibility. One possibility is to create a new set of rules of thumb essentially like the traditional system, modernized to accord more frequently with convenience, but based on a consideration of only such easily determined factors as residence of parties and the place where the cause of action arose.¹⁵ The other possibility is

tecting the attached property, conceding jurisdiction as to it, but urging against its sale that plaintiff’s claim is not meritorious. They do not question the power to condition any consideration of the merits on the defendant’s appearing generally.

¹⁴ Harris v. Balk, 198 U. S. 215 (1905) (jurisdiction to garnish based on transient presence of individual garnishee); Louisville & Nashville R. R. v. Deer, 200 U. S. 176 (1906) (jurisdiction based on doing business by foreign corporate garnishee); see (1925) 38 HARV. L. Rev. 114; Beale, The Exercise of Jurisdiction In Rem to Compel Payment of a Debt (1913) 27 HARV. L. Rev. 107; Carpenter, Jurisdiction Over Debts For the Purpose of Administration, Garnishment, and Taxation (1918) 31 HARV. L. Rev. 905. Some states permit a plaintiff to garnish a debt due from himself. See (1922) 35 HARV. L. Rev. 341; (1924) 31 A. L. R. 711. It has been held no bar to garnishment that plaintiff arranged for the purchase of money orders through the garnishee with a view to creating an indebtedness to defendant. Siro v. American Express Co., 99 Conn. 95, 121 Atl. 280 (1923), (1923) 23 Col. L. Rev. 689; → (1928) 15 Va. L. Rev. 191. Such decisions give astute counsel still wider opportunities for satisfying technical requirements as to jurisdiction.

¹⁵ The ambiguity lurking behind this seemingly definite concept is discussed infra pp. 1227–28. The older technique involves consideration only of the complaint, and guesses from it as to the proper issues.
to inquire into the issues actually in dispute and the testimony actually needed to meet them, and to regard the determination of the proper place of trial as a matter to be settled in each individual case after a careful weighing of all factors.

II

One line of development involves exceptions to the newer bases for jurisdiction, particularly over foreign corporations, in order to exclude suits which it seems more reasonable not to try within the state. These exceptions may arise by express language in the statutes, by a judicial rule of construction limiting the scope of seemingly broader language, and conceivably also by constitutional limitations on the power which a state can give to its courts.

A situation which arises often enough to influence the development is one where the local forum is obviously inappropriate because the facts relied on by plaintiff occurred, and the parties and presumably their witnesses reside, in another state whose courts are available. The plaintiff's selection of the local forum appears to be plainly vexatious. Under these circumstances no one questions the propriety of not entertaining the action. One way of preventing such a suit is to deny jurisdiction as to it. But the question arises as to how sweeping the rule of exclusion shall be.

A formula expressed in some recent Supreme Court decisions, perhaps as a constitutional limitation, and in any event as a rule for construction of state legislation, looks only to the origin of the cause of action and does not take into consideration either the character of the issues or the residence of the plaintiff. There have been various expressions of it, confining jurisdiction to "suits in respect to business transacted within the state" 16 or "controversies growing out of transactions within the state," 17 or denying jurisdiction as to "causes of action arising elsewhere which are unconnected with any corporate action . . . within the jurisdiction." 18

18 Louisville & Nashville R. R. v. Chatters, 279 U. S. 320, 325 (1929) per Stone, J.
The formula affords a convenient explanation for dismissing some of the vexatiously imported suits, but it goes farther than is necessary for this purpose. If consistently adhered to, it would preclude, for instance, suing a foreign corporation on a foreign claim even after it had been reduced to judgment,19 and prevent a plaintiff from attaching local assets in a suit on an indisposable and liquidated claim. In these instances the only effect of the rule would be to obstruct the plaintiff without in any way furthering trial convenience. Again the rule would in many cases impose severe hardships on plaintiffs who reside in or near the state but whose causes of action have no other connection with it. A typical case is one where the plaintiff has a tort claim for injuries sustained while temporarily in a distant state. Here choice must be made between competing interests of plaintiff and defendant. There is at least no compelling argument of policy for preferring the place of trial convenient for the defendant. If the language of a statute is broad enough to cover such a case, considerations of policy should be more than evenly balanced to make an exception of it. The burden of the argument would be shifted to the plaintiff only by treating the suggested rule of construction as though it were itself a legislative enactment, and making the question not one of construing the act but of construing the court's construction of it. This is construction squared.

Where the words used afford no clue as to what the legislature would have intended had it thought of the case, the writer's best guess is that it would have favored permitting an injured individual to sue at the place convenient for him, although inconvenient for the foreign corporation. The assumed larger resources of the defendant and the ability to shift its burdens to the ultimate consumer may justify such an attitude. A provincial desire to give the benefit of the doubt to its own citizens may also have some influence on the judicial or legislative attitude.

In Barrow Steamship Co. v. Kane,20 the Supreme Court itself seemed more impressed by the hardship of compelling an American plaintiff to go to Ireland to sue than the alternative of requiring a British corporation to defend, in a federal court in New

19 This was the result of the former New York statute. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373 (1903).

20 170 U. S. 100 (1898).
York, a claim for a tort committed in Irish territorial waters. Kane was a resident of New Jersey, but, so far as appears, defendant was not doing business there, and New York was the only possible place for trial in this country. The claim was for an assault alleged to have been committed while plaintiff was on a tender taking him to one of defendant's ships in the harbor of Londonderry for transportation to New York. In addition to the hardship on plaintiff of getting himself to Ireland to participate in the trial, it was likely that fellow passengers whom he would want as witnesses would be more available in New York than at the port of debarkation. A state statute 21 confined non-residents to suing on causes of action arising within the state, and there was no federal statute as to service. The Court held that state legislation can not limit the jurisdiction of the federal courts, and found the common law warrant enough for proceeding after service on an actual agent of the defendant.

State legislation affects the jurisdiction of the federal courts only when service is on a person who is designated by or pursuant to the statute as agent for process but is not otherwise an agent of the corporation. It is here that occasion arises for construction by the federal court. Assuming that the statutory method of service involves adequate notice to the defendant, there is no reason why the resultant jurisdiction should be less broad than in the case of service on an actual agent. To give the statutory method a narrower scope would serve only as a trap for the unwary. Unless the Barrow Steamship case is to be considered overruled, it justifies the hope that no such nice distinctions will be drawn.

Although the rule of construction is laid down in cases more recent than the Barrow Steamship case, none of these presented any good reasons of policy for sustaining the jurisdiction. Old Wayne Life Ass'n v. McDonough 22 and Simon v. Southern Ry., 23 sometimes cited in this connection, concerned the validity of default judgments against corporations which had done local business without complying with the foreign corporation acts. In each case process had been served on a public official designated by statute who had no duty to notify the defendant. In neither case did the defendant receive notice prior to judgment. Thus the

22 204 U. S. 8 (1907).
23 236 U. S. 115 (1915).
invalidity of the judgments might have been rested on the lack of such notice as amounts to due process. In two cases plaintiffs were domestic corporations suing on contracts made and to be performed elsewhere. A corporation, desiring to sue on a foreign contract in the state of its incorporation, does not present a case at all comparable to that of an individual plaintiff, seeking relief at his home on account of a foreign tort. The agents who must act and testify for the corporation are as likely to be available at the place of contract or performance as in the state of incorporation. An additional ground for distinguishing these two cases is that in each the defendant had ceased doing business in the state prior to the action, although there had been no formal effort to revoke the process agent's authority. In the most recent case, plaintiff was a corporation of an adjoining state, suing a Danish corporation on an Argentine contract of insurance, covering a shipment from Uruguay to Cuba. The Court found that "the importation of such controversies can not serve any interest of Mississippi." In Louisville & Nashville R. R. v. Chatters, the Court cited both federal and state authority for restrictive interpretation, but found a way to uphold suit in a federal court in Louisiana for an injury received in Virginia. The plaintiff, who lived in Louisiana,}

24 See infra p. 1229 et seq., for a discussion of these cases on the hypothesis that they involve constitutional limitations and not statutory construction. The Court did not stress the defect of notice. Indeed it appears to have assumed that the service was adequate as to suits arising out of the local business, perhaps because compliance with the acts would have involved designating process agents of the corporation's own choice. See 204 U. S. at 18 and 226 U. S. at 117 for provisions of the acts. Assuming the cases do involve construction, it is easy to understand a restrictive interpretation of the drastic penalty for non-compliance.

25 Chipman Ltd. v. Jeffery Co., 257 U. S. 373 (1920); Mitchell Furniture Co. v. Selden Breck Co., 257 U. S. 213 (1921). The Chipman case rests in part on state decisions. The defendant was doing local business at the time plaintiff's claim accrued, but had ceased prior to the action.

26 In the Mitchell Furniture Case the Court qualified its holding that the statute was inapplicable "at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." 257 U. S. at 216.

27 Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405 (1929). The Court also relied on language making the process agent's authority irrevocable "so long as any liability of the company remains outstanding" in the state. Ibid. at 407.

28 279 U. S. 320 (1929).
was traveling by through ticket and car, over the lines of the Louisville & Nashville, the Atlanta and West Point, and the Southern roads, from New Orleans to Washington. He was injured while on the Southern’s road in Virginia. The Louisville & Nashville, a Kentucky corporation, and the Southern, a Virginia corporation, were joined as defendants. The Southern objected to the jurisdiction. The objection was overruled, although the only connection between the injury and its Louisiana business was that the ticket was sold to the plaintiff by an agent of the Louisville & Nashville pursuant to a joint traffic agreement with the Southern. The Southern was otherwise engaged in business and had designated a process agent whom the plaintiff had served. It was conceded that participation in benefits of joint tickets sold by other carriers does not in itself constitute engaging in local business of the kind which subjects a foreign corporation to suit. Yet it was held that the sale of the ticket to Chatters was part of the Southern’s Louisiana business and that the injury arose out of it.

One wonders whether, in case a Virginia resident had been injured there, while on a local train, the statute would have been construed as applicable merely because he bought his ticket in Louisiana — whether the decision was influenced by the need for testimony as to the condition of the car when it left Louisiana, or the convenience to the plaintiff of being able to join the Kentucky and Virginia corporations in one action. One wonders also whether Chatters would have been denied the privilege of suing in his home state for an injury sustained in Virginia, if he had broken his journey en route and had bought his ticket piece-meal, or in case he was returning to New Orleans on a ticket sold in Washington.

The chief significance of the Chatters case is to suggest that the supposed rule of thumb has no definite meaning in advance of decision, and affords no real advantage in certainty to compensate for occasional arbitrariness in application. Is “business transacted within the state” equivalent to a “transaction within the state,” and can a cause of action “arise” within the state although not connected with any corporate action within the state? Assuming agreement can be had as to the correct phrasing of the rule, the Supreme Court may deal less reverently with its own dicta than inferior federal courts. It may mold future interpre-
tations along lines of convenience, while the cases that do not get beyond the lower courts meet with more technical treatment, or with treatment either technical or practical according to the judge before whom the issue arises. Thus the rule does not obviate the uncertainty incident to differences of judgment as to what policy may require. It merely adds an element of uncertainty, as to when matters of policy will be deemed relevant.29

Besides actions against carriers, other situations will occur where the plaintiff's cause of action is in part the result of a contract made in one state, and in part the result of facts subsequently occurring in another. Insurance policies may be issued in one state and claims may be made in respect to losses occurring in another.30 Contest may be with respect to the validity or going into effect of the policy, the existence of a loss within its terms, performance of conditions as to the giving of notice and furnishing proof of loss, or perhaps there may be a question of waiver of such conditions. Is it enough that some conceivable issue under the policy may involve acts transpiring within the state, or must it appear likely from the complaint that all possible issues arose within the state, or will the court be impressed by what it assumes to be the most common issues arising under policies? Such questions of policy will have their part in determining the application of the test according to where the cause of action arises. Unfortunately emphasis on origin of the cause of action, rather than of the facts at issue, precludes inquiring as to what the actual ground of contest will be, and deciding with reference to it.

A rule that jurisdiction over foreign causes of action depends upon whether the plaintiff is a resident or non-resident,31 would

29 See Clark, Code Pleading (1928) 75–87, 308–11, 451–57, for a discussion of similar difficulty in interpreting such concepts as cause of action, and transaction, as used in code provisions.

30 Statutes to the effect that contracts on lives or property within a state shall be deemed to have been made in the state, will not prevent such questions from arising, as they do not cover cases where the property is taken or the insured goes to another state after the policy is made.

be more satisfactory to those who prefer plaintiffs' to defendants' convenience, but the facts of the Barrow Steamship case indicate that even this formulation of the exception to jurisdiction is too arbitrary. Insofar as the plaintiff's residence affects the jurisdiction, the essential thing is that the local forum is substantially nearer to it than any other which may be available. A New Jersey plaintiff who can not get jurisdiction at home, can make out just as good a claim as a New Yorker for having trial in New York rather than in a foreign country or in some remote state of the United States. To deny him access to the New York courts would not be to draw a distinction on grounds of procedural convenience but to discriminate against him as a non-citizen and quite likely to violate the privileges and immunities clause.32

III

All the foregoing arguments against a sweeping construction of foreign corporation acts excluding all foreign suits apply with even greater force against a similarly broad constitutional limitation under the due process clause. Once a defendant is subject to suit for any purpose, the due process clause can at most exclude jurisdiction as to actions which it is manifestly unreasonable to try within the state. This is true regardless of what theory is adopted as to the basis for jurisdiction over foreign corporations.33 It may be unreasonable to "imply" consent as to certain suits. It may be an unreasonable regulation of the local business of the corporation to provide for local action as to certain suits. It may even be so unreasonable and arbitrary as to deny due process notwithstanding the corporation's "presence." But the unreasonableableness dealt with by the due process clause must be more than disagreement with the Supreme Court's views on a matter of policy. Conceivably the Court may think it unsound to prefer plaintiff's to defendant's convenience in fixing the place of trial. It may think that the ease of administering a rule of thumb makes it

32 Discussion of this point is reserved for treatment in a subsequent article.
33 See Note (1929) 42 Harv. L. Rev. 1063, for a summary of theories of consent, presence, doing of business, and doing of acts. The "act" theory is the most recent, and does not purport to be an exclusive explanation. It is confined to jurisdiction over claims arising out of the act done within the state.
preferable to a more individualized treatment. But there seems little likelihood that it will hold that states differing from its own views on such points exceed the bounds of reason.

The argument that jurisdiction can extend only to causes of action arising locally rests largely on Old Wayne Life Ass'n v. McDonough34 and Simon v. Southern Ry.35 The cases involve the validity of default judgments which perhaps did not amount to authoritative state court determination of the scope of the state statutes involved. Hence the Supreme Court may only have construed the statutes as not authorizing service. The opinions though somewhat obscure give the impression that the Court thought it was deciding a point of constitutional law. On the other hand, the cases have subsequently been cited as dealing with construction of the state acts. At any rate, as pointed out in previous discussion of these cases, they are explainable on the ground enunciated in Wuchter v. Pizzutti,36 that unless the public official designated as process agent is required to notify the non-resident defendant, service on him is not sufficiently calculated to inform defendant of the action to constitute due process. They do not justify a holding that there would be a similar limitation on jurisdiction where there is a requirement that notice be given. Again, as was urged in discussing the supposed rule of construction, there is no reason to distinguish between methods of service so long as they tend to give adequate notice. Unless such distinctions are to be drawn, there are at least three cases, two prior to, and one later than, the Old Wayne and Simon cases, upholding jurisdiction as to foreign causes of action. They are all cases where process was served on an actual agent of the corporation. They are all cases where the plaintiff had some legitimate interest in seeking the local forum.37

34 204 U. S. 8 (1907).
35 236 U. S. 115 (1915).
36 276 U. S. 13 (1928). This involved a non-resident motorist statute. The same principle was applied to a foreign corporation act in Consolidated Flour Mills Co. v. Moegge, 278 U. S. 559 (1928). The corporation actually did get notice of the action.
37 New York, Lake Erie & Western R. R. v. Estell, 147 U. S. 591 (1893); Barrow Steamship Co. v. Kane, 170 U. S. 100 (1898); Missouri, K. & T. Ry. v. Reynolds, 255 U. S. 565 (1921); for facts see opinions below in 224 Mass. 379, 113 N. E. 413 (1916), 228 Mass. 584, 117 N. E. 913 (1917), and 233 Mass. 32, 123
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The only question seems to be whether the due process clause precludes jurisdiction where no such interest of the plaintiff is involved. Those arguing that "presence" of the foreign corporation within the state is the true basis for jurisdiction over it contend that such presence should have the same consequences to it as physical presence of an individual has to him. The antiquity of the practice of subjecting an individual to suits wherever he may be found precludes him from invoking the due process clause, and why should the ill-favored foreign corporation fare better? One can only guess whether the argument for companions in misery will prevail upon the Supreme Court.

N. E. 235 (1919). See also Herndon Carter Co. v. Norris Son & Co., 224 U. S. 496 (1912); St. Louis, S. W. Ry. v. Alexander, 227 U. S. 218 (1913), involving somewhat similar facts and results, but in which the issues were less clearly presented to the Court.

The Barrow Steamship case has already been discussed in detail. In the Estell case plaintiff sued in a court of the state where he lived, for negligent injury to cattle, which occurred in Ohio. The shipping contract called for transportation by defendant and connecting carriers to a point in Missouri. The state court was held to have jurisdiction. The Reynolds case is a memorandum decision affirming on the authority of the Estell case the decision of the Supreme Court of Massachusetts exercising jurisdiction over a Kansas corporation. Plaintiff was suing on notes which had been made, issued, and negotiated outside of Massachusetts. It did not appear where he lived, or whether he was suing in his own right or as representative of the several holders of the notes. Other defendants were joined as "trustees" owing money to the principal defendant. This suggests that plaintiff may have gone to Massachusetts as the most available state to reach assets of the defendant. At any rate defendant's objection was only the technical one that the cause of action did not arise in Massachusetts. There was no showing that it was in fact unreasonable for plaintiff to sue there.

For an able exposition of the presence theory, see Henderson, Position of Foreign Corporations in American Constitutional Law c. V. Henderson was more absorbed in tracing the Supreme Court's struggles to escape Chief Justice Taney's dictum that a corporation can exist only in the state of its incorporation, than in the procedural consequences of his theories. In combating traditional dogma as to what happens when corporate agents act in another state, he was less sceptical as to the dogma that allegiance, consent, and presence are the only possible bases for jurisdiction. The first being out of the question, he assumed that by proving consent an inadequate explanation he established the theory of presence.

Conflict of Laws Restatement (Am. L. Inst. 1926) 23, seems to assume that it is necessary to choose between a rule excluding or allowing jurisdiction as to all cases arising outside the state. It sees no reason for distinguishing between notice through a public official and notice through an actual agent, and suggests that the Barrow case is a dubious precedent in view of the Old Wayne and Simon cases. But it cites Reynolds v. Missouri, K. & T. Ry., 255 U. S. 565 (1921), only in the

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ters Coöperative Co., 40 the Supreme Court of Minnesota had insisted upon entertaining a vexatiously imported action as against defendant's objections under both the due process and commerce clauses. The reversal of its decision was rested entirely on the commerce clause, and the due process point was expressly left open.

IV

The Davis case was the first to hold that the commerce clause affects the question of the proper state for trial. A Kansas corporation brought suit in a state court in Minnesota against the director general as agent of the Santa Fe railroad, another Kansas corporation. The suit was for loss of grain on a shipment between two points in Kansas. There was a showing, by affidavits filed in connection with the defendant's special appearance, and by reference to certain facts of which the court took judicial notice, of a severe burden on the road, and interference with its functions as an interstate carrier incident to defending suits in places remote from where the facts at issue arose; and that this was exaggerated by the prevalence of a practice among certain lawyers to solicit claims against railroads for trial in distant states. The practice was particularly notorious in Minnesota. This showing convinced the court that the commerce clause had been violated. Mr. Justice Brandeis, who wrote the opinion, reasoned that although the corporation's business is entirely interstate in character, this does not render it immune from such process as is required in the orderly, effective administration of justice — including, perhaps, although this was not decided,

"suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, or if plain-
tiff was, when it arose, a resident of the State. These questions are not before us; and we express no opinion upon them. But orderly, effective

state court. This view and a similar one expressed by Fead, supra note 8, at 647, are criticized by Bullington, supra note 8, at 160, for overlooking the Supreme Court's decision in the Reynolds case. Bullington's view is that following the "normal" method of service on an actual agent makes it immaterial where the cause arose. For an exhaustive collection of decisions of state and lower federal courts, see (1924) 30 A. L. R. 255.

40 262 U. S. 312 (1923).
administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. 41

Mr. Justice Brandeis has also written all of the decisions developing the doctrine of the Davis case. They display his characteristic reluctance to make sweeping generalizations, and leave undecided many questions as to when the orderly administration of local justice will justify the burden on interstate commerce incident to the trial of foreign causes of action. The fact that there are debts or tangible assets of the defendant within the state will not justify a clearly vexatious suit. 42 Nor will the fact that the suit is brought under the Federal Employers' Liability Act. 43 Change of residence by the plaintiff after the cause of action arose will not justify suit in the new and remote forum—at least not without a showing that the plaintiff has some motive for the change other than to facilitate bringing suit. 44 In all of the cases where the defendant succeeded in dismissing the suit, it had no line of railroad within the state, and apparently its local business was exclusively interstate in character. Whether the doctrine will apply to carriers also engaged in intrastate commerce or at all to other corporations remains undecided. 45

It has been held that there was no unreasonable burden on inter-

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41 Ibid. at 316–17.
45 Witort v. Chicago & N. W. Ry., 226 N. W. 934 (Minn. 1929), (1930) 18 CALIF. L. REV. 311, permitted suit by an Illinois resident against an Illinois corporation for an injury occurring in Illinois. The fact that the defendant was doing intrastate business in Minnesota and had tracks there was held to distinguish it from the Davis case. See also Erving v. Chicago & N. W. Ry., 171 Minn. 87, 214 N. W. 12 (1927); Kobbe v. Chicago & N. W. Ry., 173 Minn. 79, 216 N. W. 543 (1927); Gegeere v. Chicago & N. W. Ry., 175 Minn. 96, 220 N. W. 429 (1928). 42 HARV. L. REV. 131. A similar view was expressed in Harris v. American Ry. Express Co., 12 F. (2d) 487 (App. D. C. 1926), certiorari denied, 273 U. S. 695 (1926). The commerce question was not really involved. Contra: Iron City Produce Co. v. American Ry. Express Co., 22 Ohio App. 165, 153 N. E. 316 (1926).
state commerce where the plaintiff had a usual place of business within the state and sued in connection with a shipment deliverable in the state, and where "for all that appears" the negligence complained of occurred there.\textsuperscript{46} A suit in the state of the defendant's incorporation and in a county through which its road ran, was upheld, although the plaintiff did not reside and the cause of action did not arise within the state, and notwithstanding the defendant's affidavit that it would have to bring in eleven witnesses. There was no showing of any interest of the plaintiff in the forum he had selected; but it was less than 200 miles from the place where the accident had occurred, and hence the burden was not very great.\textsuperscript{47}

How are these cases to be fitted into the scheme which draws a distinction between venue and jurisdiction, and between jurisdiction over the defendant and jurisdiction over the subject matter? They do not involve jurisdiction over the subject matter, for it is "elementary" that this objection can not be waived even by the defendant's express submission to the court, and it is hard to believe that the objection could be raised after a defense on the merits.\textsuperscript{48} It is not easy to conceive of an objection to jurisdiction over the person as depending on the residence of the plaintiff and the place of origin of the claim. Moreover, in the \textit{Davis} case "it was assumed that the carrier had been found within the State."\textsuperscript{49} Clearly the objection has nothing to do with the physical power concept of jurisdiction, in view of its

\textsuperscript{46} St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200 (1924). Other cases overruling the objection because plaintiff had some legitimate interest in resorting to the local forum are: Maverick Mills v. Davis, 294 Fed. 404 (D. Mass. 1923) (plaintiff a resident and shipment deliverable in state); Griffin v. Seaboard Air Line Ry., 28 F.(2d) 998 (W. D. Mo. 1928) (plaintiff a resident individual); Rosenbiet v. Pere Marquette Ry., 162 Minn. 55, 202 N. W. 56 (1925) (same); Rouw Co. v. American Ry. Express Co., 173 Ark. 84, 294 S. W. 401 (1927) (plaintiff a domestic corporation). \textit{Contra}: Thurman v. Chicago, Milwaukee & St. Paul Ry., 254 Mass. 569, 151 N. E. 63 (1926).

\textsuperscript{47} Hoffman v. Missouri \textit{ex rel.} Foraker, 274 U. S. 21 (1927).

\textsuperscript{48} Cf. Pantsowwe Zaklady Graviozne v. Automobile Ins. Co., 36 F.(2d) 504 (S. D. N. Y. 1929), characterizing the objection as going to the court's jurisdiction over the subject matter, and permitting it to be urged after action which the court assumed amounted to a general appearance, but which did not involve actually defending on the merits or apparently result in any change of position by the plaintiff. \textsuperscript{49} See Michigan Cent. R. R. v. Mix, 278 U. S. 492, 496 (1929).
application to cases where garnishee process has reached rolling stock within the state and traffic balances owed by local carriers.\textsuperscript{50} One might conclude that it is not an objection to jurisdiction at all, but merely a constitutional requirement of a procedural nature, like the statutory requirement that in diversity of citizenship cases suit shall be brought in the district of residence of either the plaintiff or defendant.\textsuperscript{51} A stumbling block to this hypothesis is that in \textit{Atchison, Topeka \& Santa Fe Ry. v. Wells} \textsuperscript{52} a default judgment was set aside as void because of the violation of the commerce clause. From this the orthodox could deduce only that the defect was jurisdictional. Perhaps a council of legal prelates of learning and dignity comparable to the council assembled to deal with the classic controversy between homoiousians and homousians could redefine the existing concepts so as to make a place for the new born doctrine. Meanwhile the only way to gloss over its somewhat monstrous character is to dignify it with the appellation \textit{sui generis}.

V

Possibly the \textit{Wells} case may be explained as a peculiar consequence of the Texas practice and is not authority for a general holding that the commerce clause objection may be used for collateral attack. Unless the \textit{Wells} case really is authority to the contrary, it would seem that whenever a carrier is "found" within a state it is thereby subject to an initial determination, in the court where plaintiff's action is pending, of the issue whether the exigencies of local administration of justice justify the burden on interstate commerce incident to entertaining the action. Since the facts relied on by the carrier are such as may be shown by affidavit and the argument may be made by local counsel, geography has comparatively little to do with the burden of trying this issue. The burden is substantially the same in whatever court it is first presented, for in any event an adverse ruling may ultimately be reviewed by the United States Supreme Court. On the other hand, it may be very important to the plaintiff, if he has "plucked the wrong sow by the ear," that he find it out promptly. To allow

\textsuperscript{50} \textit{Atchison, Topeka \& Santa Fe Ry. v. Wells}, 265 U. S. 101 (1924).
\textsuperscript{51} See \textit{Interior Construction Co. v. Gibney}, 160 U. S. 217 (1895); \textit{Scott, Cases on Procedure} 69.
\textsuperscript{52} 265 U. S. 101 (1924).
the commerce clause objection to be used as a basis for collateral attack on a default judgment, would involve possibilities of unduly protracting the litigation, and even of the Statute of Limitations running before the plaintiff can sue in another court. Moreover, it is also in the interest of a defendant, if he has a real defense on the merits, that the objection to the forum be raised directly. Otherwise he may lose the opportunity to present his defense in case he was wrong in assuming that he had a valid objection to the forum. The method of collateral attack after default would appeal only to defendants who, having no substantial defense and therefore nothing to risk, seek to tire out the plaintiff or to lead him into a procedural _cul de sac_. It seems therefore that the ends of justice would best be met by requiring the defendant to raise his objection by a prompt special appearance. At the very least, it would seem within the limits of reasonable state judgment as to what the ends of justice require, and for this reason alone not contrary to the commerce clause.

However, the Texas statute indicated a somewhat different judgment as to the appropriate method of raising the question. It provided that "if the citation or service thereof is quashed on motion of the defendant . . . the defendant shall be deemed to have entered his appearance to the succeeding term of the court." 53 Perhaps the statute was the result of a conviction that motions to quash the service, although ultimately held to be unsubstantial, may result in delaying trial, and that unless the defendant is sure enough of his objection to be willing to risk everything on it, he should not be allowed to present it. Whatever the reason for the law, its constitutionality had been upheld as applied to motions to quash based on the due process clause. 54 If the statute was constitutionally applicable to objections based on the commerce clause, then clearly the defendant would not be concluded by a default judgment. The legislation which expressly precluded raising the point directly would impliedly permit raising it collaterally, since obviously state legislation could not deprive the defendant of every opportunity of asserting his constitutional rights. But what of the subsequent decision in _Michigan Cent. Ry. v. Mix_ 55

(involving Missouri practice alleged to be similar) that where the objection is based on the commerce clause "no rule of local prac-
tice can prevent the carrier from laying the appropriate founda-
tion for the enforcement of its constitutional right by making a seasonable motion"? Assuming that what the court announced in the Mix case was also the law five years earlier when the Court decided the Wells case, will that justify interpreting the latter as if the Texas statute were not on the books? Was not the statute at least a valid indication of the legislative preference for not rais-
ing the point until after judgment, in case carriers should not insist on their constitutional rights? Could Wells have challenged its constitutionality, and did he purport to do so merely by be-
inning an action for his injuries?

In view of the important practical objections to invoking the commerce clause as a reason for collateral attack on a judgment, it is hoped that the Court will hold the Wells case controlling only where there is a similar local practice — or perhaps hold that the Mix case has indirectly overruled it.

The objection based on the due process clause has a different history, and serves, or rather served historically, a different pur-
pose. It goes back to the physical power criterion of jurisdiction and to the period prior to the Fourteenth Amendment when federal constitutional law concerned itself only with when a state could pronounce such judgment as would be entitled to faith and credit. The requisite power to do this either existed or it did not, and no judicial or legislative fiat could create it. Thus default could not preclude defendant's claiming the judgment was a nullity when it was sued on in another state. Can the Island of Tobago bind the whole world? 56 In 1878 the case of Pennoyer v. Neff 57 brought the due process clause into the picture, holding that unless there was jurisdiction over defendant a default judgment must be treated as a nullity even in the state where rendered. It was as-
sumed that the test of jurisdiction was the same whether the ques-
tion arose under the full faith and credit clause or the due process clause. The one required respect for a valid judgment; the other prevented giving effect to a void judgment. 58

56 Paraphrasing Lord Ellenborough in Buchanan v. Rucker, 9 East 191 (1808).
57 95 U.S. 714 (1878).
58 See Dodd, supra note 8, at 433; Magruder and Foster, supra note 7, at
First used merely for collateral attack, the due process clause was later found available as a means of direct attack — by special appearance and motion to dismiss or by plea or answer in abatement, whichever might be the local practice for objecting to the jurisdiction. Assuming the constitutional point has been appropriately presented and passed upon by a state court, the mere pronouncement of the judgment may be held a violation of the due process clause. Thus direct attack under the due process clause is possible wherever there might be collateral attack under it, or notwithstanding the full faith and credit clause.

But motions to quash, pleas in abatement, and so forth, may be appropriate to present objections to proceeding with an action which are not strictly jurisdictional in the narrow sense of the word. For instance, there may be a statutory rule of venue on which the defendant is relying, or he may challenge the rule of venue on which the plaintiff is relying, as unreasonably discriminatory and depriving him of equal protection of the laws. Included in this class also there may be objections based on the due process clause and perhaps, as suggested above, that of a foreign corporation subject to suit for some purposes, against vexatiously imported suits. This type of objection, if valid, would have nothing to do with the physical power concept of jurisdiction and is more like the objection which carriers have been permitted to urge under the commerce clause. Hence possibly these objections can only be urged directly. The unfortunate limitations of our legal vocabulary would permit the same word jurisdiction to be used in connection with both types of objections.

The excuse for the foregoing elaborate and perhaps unduly

815. These present an argument that a decision upholding a default judgment challenged under the due process clause amounts to a holding that the judgment would be entitled to full faith and credit if sued on in another state.

59 See Riverside Mills v. Menefee, 237 U. S. 189 (1915). The Court did not cite York v. Texas, 137 U. S. 15 (1890), holding that the due process clause is not violated by a state practice which confines defendant to collateral attack as a means of invoking the protection of the clause. That the mere rendering of a judgment by a court without jurisdiction may be a deprivation of property, becomes easy to understand when we conceive of special appearances as giving a court power to pass on its own jurisdiction, subject to ultimate review by the Supreme Court, so that on failure to appeal the jurisdictional issue may become res judicata. See Note (1928) 41 Harv. L. Rev. 1055.

theological discussion of what might seem a rather narrow point of practice, is that the future development of the constitutional limitations on the place of trial is tied up with the question of how they are to be raised. Are these doctrines to be kept flexible and adaptable to the infinite variety of situations which may arise? Or will there be crystallization into new categories which may turn out to be as arbitrary and unsatisfactory as the old? The real need of protecting defendants from vexatiously transported litigation can be met without creating new traps for unwary plaintiffs only if the defendants are required to be prompt in coming in and pointing out their objections to the forum selected.

At its best, development of the constitutional limitations implicit in the due process and commerce clauses can not solve all the difficulties as to the proper place of trial. The method of constitutional limitation is only calculated to deal with the grossest errors of judgment on the part of state courts and legislatures, with cases of obvious unfair discrimination, or obvious failure to exercise any judgment at all as to what the ends of justice may require. The states must be left free to handle as they see fit the cases where there is room for reasonable differences of opinion as to the appropriate place of trial. Due regard for the volume of business which the Supreme Court can handle would alone preclude its taking upon itself the making of nicer adjustments.

VI

What devices are there, then, outside the field of constitutional law? A direct, simple, and flexible way of meeting the issue is to dismiss or stay an action whenever it appears that some other available forum would better meet the ends of justice — to recognize something like the civil law plea of forum non conveniens. A recent article marshals convincing evidence that while Anglo-American courts have not been employing the Latin phrase they have been dismissing actions on grounds of convenience.61 However, partly owing to a distrust of discretionary powers and partly owing to a supposed constitutional difficulty, there have been many decisions flatly denying that a court with jurisdiction has

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any choice but to exercise it. One result of this notion we have already seen—the various attempts to limit jurisdiction with reference to what place of trial is appropriate. The growth of constitutional limitations would have been much less luxuriant had state courts felt free to dismiss on discretionary grounds.

Realization that many courts would insist on showing undue hospitality to imported claims has led to attacks on the problem in the states where they arise. There have been futile legislative attempts to make causes of action non-exportable. The statutes have taken the form of providing that there shall be no liability unless suit is brought within the state of origin. These restrictions have been disregarded when plaintiffs have sued in courts of other states, and the Supreme Court has held that this does not violate the full faith and credit clause. A state which creates a cause of action inherently transitory in character can not curb its flight. The result fits in with the generalization that procedure depends upon the law of the forum. Back of the judicial hostility to this type of legislation may also be a conviction that the legislation is too drastic. It does not allow for the cases where there would be a failure of justice if the plaintiff could sue only in the state of origin, as where he has to go to another state to get jurisdiction over a defendant who has withdrawn after the injury, or to find property, or for cases where the plaintiff may have been injured while temporarily in the state and wants to sue at home. Legislation can not hope to anticipate the various situations which may arise.

No such objection applies to restraining the export of causes of action by injunction. The equity tradition is adapted to a nice weighing of all the interests involved, and to imposing conditional decrees as occasion may require. For instance, plaintiff's claim that he needs to go elsewhere to attach property could be met by conditioning the injunction on the equity of plaintiff's giving bond to satisfy any judgment obtained against him in a local court of law, or, if the Statute of Limitations has run since the foreign

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action was begun, plaintiff could be required to stipulate to waive it, or he might be required to cooperate in expediting trial.

The fact that the court has jurisdiction over the parties and can pass intelligently on the appropriateness of the foreign forum does not prove that it is proper for it to do so. The real question is whether any court other than that invoked to decide the merits of a controversy should decide initially whether the latter is the appropriate court to do so. The possibility of retaliation must give courts pause before they tread on one another's toes. It has always been regarded as a very delicate matter to interfere with the free access of suitors to another court of equal dignity and competent jurisdiction. The domestic forum does not have the excuse of acting defensively to prevent embarrassing interference with its own administration of justice, for it has not been asked to make any decision on the merits, and usually cannot be invoked by the person against whom a claim is pending, to adjudicate his non-liability. Nor is there ordinarily any substantial advantage, based on its location, of having the home court determine the proper place for trial. Matters of fact affecting the question are for the court and are normally settled by affidavits, and it is a relatively simple matter to engage local attorneys by correspondence to make whatever argument is necessary. The principal reason for issuing injunctions is fear that the foreign court will not decide the issue properly, and conviction that the home state has a strong interest in having the issue determined according to its own views.

63 For recent exhaustive study, see Messner, The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State (1930) 14 Minn. L. Rev. 494, 495–506. See also N → (1919) 33 Harv. L. Rev. 92; Pound, The Progress of the Law, 1918–1919 Equity (1920) 33 Harv. L. Rev. 420, 425–28; N → (1922) 22 Col. L. Rev. 360; (1925) 25 Col. L. Rev. 372.

64 The recent extensive adoption of declaratory judgment acts suggests the possibility that the law defendant may request the home state to adjudicate his non-liability, and that such judgment might bar the further maintenance of the foreign action, thus obviating the difficulty of enforcing injunctions which do not involve passing on the merits. The writer knows of no instance where this was done. The legislation involved in Atchison, Topeka & Santa Fe Ry. v. Sowers, 213 U. S. 55 (1909), contained ingenious provisions for summary determination of liability in case plaintiff should attempt to sue abroad contrary to its provisions.

65 Cf. Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899) (New Jersey defendant enjoined from continuing divorce action in North Dakota where he was falsely claiming to be domiciled).
Fear of the foreign court’s decision must be based on a rule of law to which it is committed, and not on a distrust of its ability to act fairly and impartially in the exercise of the discretion open to it.\(^6\) If the foreign court would dismiss an action on the ground that it is not an appropriate forum, there would be no excuse for the local equity court arrogating to itself the decision of this issue. Injunctions are granted on the assumption that the foreign forum will entertain transitory actions whenever the defendant is subject to its jurisdiction. That this may also be the view of the home court, will not prevent an injunction from issuing.\(^7\) The injunction is used not because there is any need for an equitable remedy, nor because of any advantages of equity practice, but to secure a new deal where the rule at law seems to have reached an unsatisfactorily rigid state.

There is an analogy in the closely related question of enjoining foreign actions brought to “evade” the local law. To simplify analysis, it will be assumed that both parties live where the cause of action arose. This has been the situation in most cases where


\(^7\) Compare Smith v. Empire State-Idaho Mining & Dev. Co., 127 Fed. 462 (D. Wash. 1904); Reynolds v. Day, 79 Wash. 499, 140 Pac. 681 (1914), intimating that there is no discretion to decline jurisdiction with respect to claims of non-residents arising in Idaho, with Northern Pac. Ry. v. Richey & Gilbert Co., 132 Wash. 526, 232 Pac. 355 (1925), enjoining as unduly burdensome on the equity plaintiff an action in Minnesota. Compare Eingartner v. The Illinois Steel Co., 94 Wis. 70, 68 N. W. 664 (1896), holding constitution prevents denying an Illinois resident the privilege of suing an Illinois corporation in Wisconsin, with Chicago, Milwaukee & St. Paul Ry. v. McGinley, 175 Wis. 565, 185 N. W. 218 (1922), intimating that it is proper to enjoin Wisconsin plaintiff from taking his suit to a forum remote and burdensome to defendant, but refusing to enjoin action in adjoining county in Minnesota. Compare Pullman Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897), denying power to dismiss, with Fisher v. Pacific Mut. Life Ins. Co., 112 Miss. 30, 72 So. 846 (1916), recognizing foreign injunction as a reason for dismissing, and approving the issuance of an injunction against vexatious exportation of suits. See also cases cited in note 68, infra. For a view regarding the injunction cases as authority for dismissal by the law forum, see concurring opinion of Cassidy, C. J., in Eingartner v. The Illinois Steel Co., supra, approved by the writer of the Note in (1924) 32 A. L. R. 6, 19. The Louisiana cases seem consistent with this view. See Stewart v. Litchenberg, 148 La. 195, 86 So. 734 (1920), prohibiting lower court from entertaining suit by Nebraska plaintiff against Nebraska defendant temporarily in Louisiana, and Missouri Pac. Ry. v. Harden, 158 La. 889, 105 So. 2 (1925), which approves issuing an injunction in an appropriate case, although denying that the instant facts warranted it.
injunctions have issued. The implication of the word "evade" is that the local equity court thinks a particular transaction ought to be governed by its own law and that if it allows the foreign action to go on, the law of the forum will be applied. It may be that the same judge in a law case would apply the domestic law to a similar foreign claim. 68

Here the injunction is used because of the unsatisfactory extent to which Anglo-American courts have pushed the dogma that procedure depends upon the law of the forum. To a certain extent the rule is founded on a practical necessity. It would be an intolerable burden on court and counsel, and consequent expense and delay would be enormous, if those at the forum were compelled to master all the intricacies of an unfamiliar practice. To the extent that it is impossible to trace a definite connection between the application or non-application of a particular procedural rule and the outcome of the case, it does not shock us to follow the rule of the forum. We look on the two systems as different means to a common end. Who shall say which is the better?

But what of such matters as exemption laws, rules against giving preferences, rules of limitations, rules excluding a particular type of testimony or witness? It is easy to see how the giving of relief and the character of the relief if given may depend upon the choice between the *lex fori* and the *lex loci* as to some one of these. Those who think of our system of justice as something more than a game of chance are shocked that matters so vitally affecting the outcome of the litigation should depend on anything so fortuitous

68 Compare East Tenn., Va. & Ga. R. R. v. Kennedy, 83 Ala. 462, 3 So. 852 (1887) with Allen v. Buchanan, 97 Ala. 399, 11 So. 777 (1892); Mumper v. Wilson, 72 Iowa 163, 33 N. W. 449 (1887), with Lyon & Co. v. Callopy, 87 Iowa 567, 54 N. W. 476 (1893); Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380 (1895), with Baltimore, etc. R. R. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136 (1903); Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173 (1904); Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58 (1907). For other cases, see (1905) 1 L. R. A. (N.S.) 195; (1907) 15 L. R. A. (N.S.) 1008. In National Tube Co. v. Smith, 57 W. Va. 210, 50 S. E. 717 (1905), wages exempt by the law of the domicil of plaintiff and defendant were garnished in state A, and resort was had to equity in A. An injunction was denied, the court reasoning that the practice of issuing injunctions at the domicil recognizes lack of any remedy at the forum. A few cases refuse to permit garnishment of wages on account of exemption laws of the state where plaintiff and defendant reside, saying that they will not permit plaintiff to "evade" the law of his domicil. 487
as the place of trial. This feeling is doubtless responsible for the
tendency of some American and most continental courts to clas-
sify many of these as matters of substance and apply the *lex loci*. 
The more orthodox Anglo-American courts of law seem to ignore
these practical considerations in order to preserve the logical sym-
metry of the distinction between procedure and substantive law. 
The only escape has been resort to equity, which has enforced its
view that the local law should govern, by confining the law plain-
tiff to suit in a local court of law. 69 The commonest and most
generally accepted instances for issuing the injunction are to
prevent "evasion" of the local exemption and insolvency laws. 70
There is less authority for and more criticism of injunctions to pre-
vent the law plaintiff from taking advantage of more favorable
foreign rules for determining the issues of fact — or as to what
may be a defense. 71 Where the equity plaintiff can only show that
the foreign procedure decreases his chance of victory without be-
ing at all certain to lead to a different result, he has little chance
of getting his injunction. 72 There must be a strong case.

Assuming an injunction is obtained, will it be of avail to the law
defendant? 73 If the law plaintiff continues his residence or has

69 This generalization as to the continental law is based exclusively on the
footnotes to Lorenzen, *Cases on Conflict of Laws* (2d ed. 1924) c. IV, Pro-
cedure. See also Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923)
32 Yale L. J. 311, 327.

70 The constitutionality of issuing the injunction was approved by a divided
Court in Cole v. Cunningham, 133 U. S. 107 (1890).

71 See Weaver v. Alabama Great So. R. R., 200 Ala. 432, 76 So. 364 (1917),
enjoining suit in Georgia court which would not apply the Alabama rule that failure
to stop, look, and listen requires a directed verdict for defendant. Meeting the
law plaintiff's argument that this was procedural and that by Alabama law the *lex fori*
should govern, the court said there would be ground for an injunction if Georgia
law disqualified the only witness. Culp v. Butler, 69 Ind. App. 668, 122 N. E. 684
(1919), enjoined an Illinois action on a claim barred by the Indiana Statute of
Limitations. Cases of this type are criticized in N ➔ (1919) 33 Harv. L. Rev. 92,

72 See Chicago, Milwaukee & St. Paul Ry. v. McGinley, 175 Wis. 565, 185 N. W.
218 (1921); Chicago, Milwaukee & St. Paul R. R. v. Wolf, 226 N. W. 297 (Wis.
1929); Missouri-K. -T. R. R. v. Ball, 126 Kan. 745, 271 Pac. 313 (1928); American
Express Co. v. Fox, 135 Tenn. 489, 187 S. W. 1117 (1916); Reed's Adm'rx v.
Illinois Cent. R. R., 182 Ky. 455, 206 S. W. 794 (1918) (injunction issued because
of remoteness of foreign forum, the court expressly denying that differences in
procedure were relevant).

73 For careful analysis of cases, see N ➔ (1930) 39 Yale L. J. 719. See also
permanent property there, the equity court has adequate power to compel obedience to its decree. Unfortunately it is likely to be impotent in one of the most frequent cases of vexatiously transported litigation — where an impecunious personal injury claimant has put his case in the hands of a foreign ambulance chaser who offers to support him while it is pending. The ambulance chaser has only to persuade him to remove to the state where suit is to be brought. He may then defy with impunity the processes of the equity court at his former home.  

The efficacy of the injunction depends upon whether the foreign court will recognize it as a reason for dismissing the law action brought or continued in defiance of it. Does the full faith and credit clause require recognition of it? It is hard to see why the equity decree should be entitled to any greater recognition than a statute of the same state prohibiting the export of causes of action.  

There is no finding of fact with respect to the matter in dispute between the parties — only an expression of the local policy with respect to the place where trial ought to take place. At one time there was doubt whether the equity court could issue an injunction without denying full faith and credit to the judicial proceedings of the foreign law court. This difficulty was circumvented by saying that it was not the foreign court but the equity defendant whose action was enjoined. If the equity decree were  

Messner, supra note 63, at 500; Conflict of Laws Restatement (1929) § 493, and explanatory note.  

74 "Ambulance chasing" was involved in Reed's Adm'tx v. Illinois Cent. R. R., supra note 72 (granting injunction); Chicago, Milwaukee & St. Paul Ry. v. Wolf, 226 N. W. 297 (Wis. 1929) (denying injunction because of insufficient showing of hardship on defendant). See facts shown and taken notice of in Davis v. Farmers Co-operative Co., 262 U. S. 312 (1923).  

75 See supra note 60. See Langmaid, The Full Faith and Credit Required for Public Acts (1929) 24 Ill. L. Rev. 383, 403, 408, suggesting that whether the law forum is required to give full faith and credit to the equity decree depends on whether such decree is constitutional, and challenging the soundness of the doctrine of Cole v. Cunningham. The author's thesis is that substantially similar credit is to be extended to statutes and to decrees attempting the same thing. Atchison, Topeka & Santa Fe Ry. v. Sowers, and Tennessee Coal Co. v. George, both supra note 62, are explained on the ground that the legislatures at the situs had no jurisdiction to legislate with reference to suit in other states on actions transitory in nature. Possibly a statute limited in terms to the usual case where injunctions issue would have fared better.  

76 See Messner, supra note 63, citing Cole v. Cunningham, 133 U. S. 107 (1890), and Dehon v. Foster, 4 Allen 545, 550 (Mass. 1862).
entitled to full faith and credit, the injunction would be in everything but form an order restraining the foreign court itself. Accordingly there is almost no substantial authority for compulsory recognition of the decree in the foreign law court.\textsuperscript{77}

It seems doubtful whether the problem would be greatly changed by Congress passing the American Bar Association bill for extending the full faith and credit clause to all equitable decrees. While Congress is given power to prescribe the manner in which public acts, records, and judicial proceedings shall be proved, and the effect thereof,\textsuperscript{78} the existing legislation, which dates from 1790, seems so far as judicial proceedings are concerned to be as sweeping as the constitutional grant of power. After providing for the manner of authenticating another state’s records and exemplifications it requires that they "shall have such faith and credit given to them \ldots as they have by law or usage in the courts \ldots of the state \ldots from which they are taken." \textsuperscript{79}

\textsuperscript{77} The issue has not been directly passed on by the Supreme Court. A dissenting opinion of a state court was all that could be found by the writer\textsuperscript{77} Note (1930) 39 \textit{Yale L. J.} 719. He cites the following cases refusing recognition and points out that even the few cases granting it do not hold that recognition is obligatory. Nichols & Shepard Co. v. Wheeler, 150 Ky. 169, 150 S. W. 33 (1912) (Tennessee interlocutory decree held no bar, without discussion); State \textit{ex rel.} Bossung v. District Court, 140 Minn. 494, 498, 168 N. W. 589, 591 (1918); Frye v. Chicago, R. I. \& Pac. Ry., 157 Minn. 52, 195 N. W. 629 (1923), \textit{certiorari} denied, 263 U. S. 723 (1924); Union Pac. R. R. v. Rule, 155 Minn. 302, 305, 193 N. W. 161, 162 (1923); Kepner v. Cleveland, C. C. \& St. L. Ry., 15 S. W. (2d) 825 (Mo. 1929) (evidence of foreign injunction rejected). The explanatory note to § 493 of \textit{Conflict of Laws Restatement} (1929), raises the question whether, if a statute can not vest in a domiciliary receiver title to property elsewhere, even as against domestic creditors, any greater effect should be accorded an injunction against foreign suits. The restatement makes the question turn on whether the injunction affects the merits, but gives as an illustration:

"2. A, a creditor of B, is enjoined in a court of state X, the domicil of both, from obtaining payment of his claim in any state in competition with other creditors. A makes an attachment on property of B in state Y. On the injunction in X being shown to the court in Y, by another creditor, the attachment will be dissolved."

\textsuperscript{78} U. S. Const. Art. IV, § 1.

\textsuperscript{79} The quoted language dates from 1 Stat. 122 (1790). The present form is found in 28 U. S. C. § 688 (1926). For history of the legislation, see Langmaid, \textit{supra} note 75, at 387. For amendments not here relevant, see 2 Stat. 298 (1804); 16 Stat. 419 (1871). For text of proposed bill, see (1927) 52 A. B. A. Rep. 292, 319. It provides for registration and thereupon giving the same effect as if originally rendered in the court where registered, "to every judgment, decree or order" of
The statutory paraphrase of the constitutional provision makes the existing decisions turn on the extent of the constitutional obligation, and not merely on the interpretation of existing federal legislation. The proposed bill would simplify the procedure in cases where a foreign decree would now be entitled to recognition. Insofar as the bill attempts anything more, its enactment would be significant only as an expression, more specific than heretofore, of how far Congress thinks the full faith and credit clause should extend. As such it would be only persuasive, and not even that except on points still open under the existing decisions. It may be that under the proposed bill or possibly even under existing legislation, faith and credit will be generally extended to such equitable decrees as relate to disposal of the merits of the controversy. But before we are ready for compulsory recognition of injunctions against suit in particular courts there must be a clearer demarcation of the extent to which the granting of such injunctions is consistent with due respect for the foreign court of law — of the extent to which any court other than the law forum should have ultimate power to decide whether it shall try a cause against a defendant subject to its jurisdiction. Perhaps it is proper to lodge this ultimate power in a court which is at the domicile of both parties and where the cause of action arose. It certainly would not be appropriate to accord such power to every court that happens to get jurisdiction over the law defendant.

A stronger case can be made for discretionary recognition of the equity decree. If the court in which the law action is pending would not as a court of law entertain the law defendant's plea that it is an inappropriate forum, but would as a court of equity issue an injunction to prevent one of its own residents from bringing a vexatious action abroad, it can not regard a similar decree of another court as an unwarranted interference. It should respect the foreign decree and hope that foreign courts will respect its own similar decrees. The same argument would apply in favor of discretionary foreign recognition of injunctions to prevent "evasion" of local exemption laws and the like.

a court of a state, having jurisdiction, "requiring that money be paid, or that any act shall or shall not be done, or establishing a status, or investing any person with authority over property." — Note (1930) 39 Yale L. J. 719, 725.

80 Conflict of Laws Restatement (1929) § 493.
There is some authority for discretionary recognition. Many of the cases disregarding the equity decree may be explained as results of the recently exploded notion that the privileges and immunities clause requires the same treatment for a citizen of a sister state suing away from his home as would be accorded a citizen of the forum who wants to sue at his home. The extreme of this mechanistic concept was the view of the Minnesota court that since it would permit one of its own citizens to sue, notwithstanding the foreign injunction of another state, it must permit a citizen of another state to sue, although in defiance of a court at his domicil. Another reason for denying any effect to the injunction may be a feeling that the law forum should itself decide what cases it will try.

The difficulty both in obtaining and enforcing the injunction makes it appear a rather inadequate makeshift, of some use in correcting certain of the more extreme abuses resulting from the dogma that a court of law will entertain transitory actions wherever the defendant may be found. The chief significance of the equity cases, like the decisions developing constitutional limitations, is to indicate the need of meeting the issue directly by staying or dismissing pending actions whenever another forum is more appropriate. The recent case of Douglas v. New York, N. H. & H. R. R. points to the possibility of future development along this line. It is hoped to deal with this possibility in a subsequent article, and to touch upon the parallel problem of determining the appropriate county for trial, and upon the criteria which should govern, once a court is free to exercise discretion as to the place of trial.

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81 Fisher v. Pacific Mut. Ins. Co., 112 Miss. 30, 72 So. 846 (1916); Allen v. Chicago Great Western R. R., 239 Ill. App. 38 (1925). It is doubtful how to classify Gilman v. Ketchman, 84 Wis. 60, 54 N. W. 395 (1893) (injunction against interfering with receiver's claim to foreign assets); see note 77, supra.

82 See Note (1930) 39 Yale L. J. 719.

83 State ex rel. Bossung v. District Court, supra note 77. The constitutional difficulty seems to have been removed by Douglas v. New York, N. H. & H. R. R., 279 U. S. 377 (1929); see Note (1930) 18 Calif. L. Rev. 159.

84 See note 83, supra.