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VENUE IN CIVIL CASES IN THE UNITED STATES DISTRICT COURT [1]

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1. JURISDICTION AND VENUE DISTINGUISHED

Jurisdiction and Venue Distinguished

Venue must first be carefully and accurately distinguished from jurisdiction.[2] "Jurisdiction", said Mr. Justice Brown,[3] "is the power to adjudicate a case upon the merits, and dispose of it as justice may require." Venue has reference merely to the *place* of the suit. Jurisdiction is a question of the power of the court; venue, of locality. Jurisdiction controls the judicial capacity to

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[1] This article forms part of a chapter in a book on federal procedure by the author, shortly to be published by the West Publishing Company. The remaining portion will deal with Venue under Special Statutes, and Venue under Criminal Statutes.

[2] See Dobie, *Venue in the United States District Court* (1914) 2 VA. L. REV. 1. The present article, however, is not a re-hashing of that article but is entirely new.

The distinction is thus aptly put by Mr. Justice Gray in *Interior Construction Co. v. Gibney* (1895) 160 U. S. 217, 219–220, 16 Sup. Ct. 272, 273: "Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

Many writers and judges use the term "jurisdiction over the subject matter" for jurisdiction, and "jurisdiction over the person" for venue. When the words are understood to be used in the designated technical sense, the nomenclature "jurisdiction" and "venue", though, is believed to be preferable.

[3] *The Resolute* (1897) 168 U. S. 437, 439, 18 Sup. Ct. 112, 113.

hear the case; venue[4] answers only the question of where the case should be heard.

The jurisdiction of the United States District Court concerns the various classes of cases that this court can decide, and defines and limits the powers of the United States District Court as a part of the judicial machinery of the federal government. It is only after the question of the jurisdiction of this court is answered in the affirmative that the question of venue ever arises. Then the geographical issue must be determined—where the suit is to be brought, the venue. It is obvious that if the United States District Court cannot entertain jurisdiction of a case, this effectually stifles any question of venue. A technical statement that the United States District Court has jurisdiction—connotes *first* that this case is within the constitutional grant of federal judicial power to the United States and *secondly* that the case falls under the part of that power conferred by Congress on the district court, leaving open the question which district court (district and sometimes division) should properly try the case. The contrary assertion that the United States District Court has not jurisdiction of the case means that no district court, whatever the district and division for which it sits, has power to adjudicate that case.

When the question of jurisdiction of the district court has been decided by that court adversely to the plaintiff, and a final judgment entered, this becomes res adjudicata, which can be attacked only upon appeal; it cannot be raised again by bringing the suit in the district court of another district. The decision of the question of venue adversely to the plaintiff, holding the venue improper, leaves the disappointed litigant free to bring this suit in the district court of another locality (district and division); and, if he does this, the question of the propriety of the second venue may then be raised and decided.

Venue may be Waived, either Expressly or Impliedly

As has already been pointed out,[5] jurisdiction can never be conferred on the district court by waiver or consent of the parties. It must affirmatively appear from the record; it is always before the court, both trial and appellate during the progress of the case; and the court, of its own motion without any suggestion from the litigants, may raise and pass on the question.

Venue, on the other hand, is freely waivable.[6] This is the most important legal difference flowing from the distinction between

[4] Questions of venue are quite ancient in the common law. A brief but interesting account of the historical and technical development of venue will be found in Scott, *Fundamentals of Procedure in Actions at Law* (1922) 18–23.

[5] *Supra* note 1.

[6] See cases cited in succeeding notes.

venue and jurisdiction. Venue is a mere personal privilege, the privilege (if the litigant cares to assert it) of being sued in a particular district or division. Unless the litigant himself[7] specially raises the question, it is not before the court, for the judge cannot, of his own motion, either raise or decide the question, even though the venue is manifestly improper.[8]

The only method by which this question of venue can be raised is by a special appearance *in limine* for that purpose; for any general appearance is a complete waiver, and venue once waived cannot be questioned subsequently in the case.[9] Thus venue is waived by a demurrer on other grounds going to the merits,[10] by filing an amended petition and stipulations for continuance,[11] by removing the case to the United States District Court from a state court,[12] by an affidavit of defenses going to the merits,[13] by proceeding beyond the pleadings and taking testimony.[14] Nor can a general appearance be united with a special appearance for the purpose of questioning the venue.[15] Whatever the nature of the appearance, consent or plea, if it amounts to a general

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[7] And only the litigant whose residence does not conform to the requirements of venue can raise it. *Central Trust Co. v. McGeorge* (1894) 151 U. S. 129, 14 Sup. Ct. 286; *Camp v. Gress* (1919) 250 U. S. 308, 39 Sup. Ct. 478; *Horn v. Pere Marquette Ry.* (1907, C. C. E. D. Mich.) 151 Fed. 626.

[8] See *In re Moore* (1908) 209 U. S. 490, 28 Sup. Ct. 585; s. c. 706, and cases subsequently cited.

[9] *Jones v. Andrews* (1870, U. S.) 10 Wall. 327; *St. Louis & San Francisco Ry. v. McBride* (1891) 141 U. S. 127, 11 Sup. Ct. 982; *Southern Pacific Co. v. Denton* (1892) 146 U. S. 202, 13 Sup. Ct. 44; *Ingersoll v. Coram* (1908) 211 U. S. 335, 29 Sup. Ct. 92; *General Investment Co. v. Lake Shore & M. S. Ry.* (1922) 260 U. S. 261, 43 Sup. Ct. 106; *Panama R. R. v. Johnson* (1924) 264 U. S. 375, 44 Sup. Ct. 391.

[10] *Ingersoll v. Coram, supra* note 8; *By-Products Recovery Co. v. Mabee* (1923, N. D. Ohio) 288 Fed. 401.

[11] *In re Moore, supra* note 8.

[12] *Lee v. Chesapeake & Ohio Ry.* (1923) 260 U. S. 653, 43 Sup. Ct. 230; *Memphis Savings Bank v. Houchens* (1902, C. C. A. 8th) 115 Fed. 96; *Baldwin v. Pacific Power & Light Co.* (1912, D. C. Or.) 199 Fed. 291.

[13] *United States v. Schofield Co.* (1910, C. C. E. D. Pa.) 182 Fed. 240. Also by motion to vacate an order going to the merits. *Bluefields S. S. Co. v. Steele* (1911, C. C. A. 3d) 184 Fed. 584.

[14] *General Electric Co. v. Wagner Mfg. Co.* (1903, C. C. S. D. N. Y.) 123 Fed. 101.

[15] *Jones v. Andrews, supra* note 9; *Southern Pacific Co. v. Denton, supra* note 9; *Western L. & S. Co. v. Butte & B. Cons. Min. Co.* (1908) 210 U. S. 368, 28 Sup. Ct. 720; *Baltimore & Ohio Ry. v. Doty* (1904, C. C. A. 6th) 133 Fed. 866; *Campbell v. Johnson* (1909, C. C. A. 9th) 167 Fed. 102. But see *Southern Pacific Co. v. Arlington Heights Co.* (1911, C. C. A. 9th) 191 Fed. 101.

appearance (and the Supreme Court seems prone so to construe it), then such appearance precludes the possibility of the question of venue being raised at any *later* stage of the proceedings. But when a defendant first objects seasonably and properly to the venue, and then, *after* his objection is overruled and proper exception taken, he pleads to the merits and goes to trial, he has not waived the question of venue and may again raise the question in the appellate court.[16]

Venue Important only in the District Court

Under the federal judicial system, the question of venue gives difficulty only in the district court. There are nine circuit courts of appeals, each with appellate jurisdiction only. Appeals go to the circuit court of appeals for the circuit embracing the state within which is the district for which the district court sits.[17] And there is only one Supreme Court.

2. THE GENERAL FEDERAL STATUTE OF VENUE

Section 51 of the Judicial Code provides:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This is the provision of widest general application on the subject of venue. A clear distinction is made by this section between cases in the district court (1) when diversity of state citizenship is the *only* ground of jurisdiction; (2) when jurisdiction may be based on any ground other than diversity of state citizenship.

Under (1), the plaintiff has an election between two districts —the district of the plaintiff or the district of the defendant— either of which is proper. Under (2), there is no election but only a single proper district—the district of the defendant. In neither case can suit be properly brought in one of more than two districts, the residence of the plaintiff or the residence of

[16] *Vidal v. South American Securities Co.* (1921, C. C. A. 2d) 276 Fed. 855. See also *Harkness v. Hyde* (1878) 98 U. S. 476, 479; *Southern Pacific Co. v. Denton, supra* note 9, at 206; *Goldey v. Morning News* (1895) 156 U. S. 518, 15 Sup. Ct. 559. Nor can he be deprived of this privilege by any rule of a lower federal court. *Davidson Marble Co. v. Gibson* (1909) 213 U. S. 10, 29 Sup. Ct. 324.

[17] Judicial Code, sec. 128 (a), as amended by the Act of February 13, 1925. Provision is also made for appeals from the courts in Alaska, China, the Canal Zone and the island dependencies.

the defendant. When the suit is between citizens of different states (no other ground of jurisdiction existing),[18] the districts of the plaintiff and defendant, and also their states, being necessarily different, the plaintiff has a choice (or at least a potential choice) between his own district and that of his adversary. There are, however, as will be seen, many restrictions, developed by the courts, which, even in these cases, greatly limit the exercise of this option.

These statutory restrictions, as construed by the federal courts, were enacted to safeguard the interests of defendants from the abuse of their rights as to the locality of suits against them. That same statute has seriously hampered the federal courts in the exercise of the jurisdiction and powers conferred upon them. It has given rise to many difficult questions; the cases dealing with those questions are legion.

Under this statute come the vast majority of these cases. In the "six succeeding sections" to Section 51, provision has been made for dealing specifically with certain exceptional cases. Thus, Section 52 applies, in suits not of a local nature, when a single state "contains more than one district." Under Section 53, provision is made, in suits not of a local nature, "when a district contains more than one division" for the division in which suit lies; and this section applies to both civil and criminal cases, to cases originally brought in the district court and to cases removed thereto. Section 54 applies in local actions, "where the defendant resides in a different district, in the same State, from that in which suit is brought"; while Section 55 covers suits of a local nature when the land "lies partly in one district and partly in another, within the same state." The powers of a receiver are broadened under Section 56 to cover land and fixed property "within different States in the same judicial circuit." Section 57, which is quite important, permits certain *in rem* proceedings to be instituted in the district where the *res* is situated, with provision for service on absent defendants. These will all in turn be discussed.

3. "INHABITANT" AND "RESIDENCE"

Resident, Inhabitant and Citizen

The words "resident" and "inhabitant" are synonymous here.[19]

[18] When jurisdiction can be grounded either on diverse citizenship or some other ground (*e.g.* federal question), then jurisdiction is not "founded *only* on the fact that the action is between citizens of different states", and the only proper venue is the district of the defendant. *Macon Grocery Co. v. Atlantic Coast Line Ry.* (1910) 215 U. S. 501, 30 Sup. Ct. 184; *Cound v. Atchinson, T. & S. F. Ry.* (1909, C. C. W. D. Tex.) 173 Fed. 527; *Trapp v. Baltimore & Ohio Ry.* (1922, N. D. Ohio) 283 Fed. 655.

[19] *United States v. Gronich* (1914, W. D. Wash.) 211 Fed. 548; *Thomas v. South Butte Mining Co.* (1916, C. C. A. 9th) 230 Fed. 968.

"The word 'inhabitant', in that act, was apparently used, not in any larger meaning than 'citizen', but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State." [20] "Residence" and "domicile", it is well known, have quite different technical meanings, but the two are generally used as synonymous in the Judicial Code.

Natural Persons

A natural person, who is a citizen of the United States and of a state, is an inhabitant of the district of that state within which he has his domicile or permanent home.[21] That is his district and, when he is the sole plaintiff or sole defendant, it is the district of the plaintiff or the district of the defendant. An individual who retains his citizenship in the United States (and thus is not an alien) but has no domicile in the United States, is neither a citizen of a state nor the inhabitant of a district.[22] Since an individual can have but a single domicile, he can have but one district. All the difficulties, both legal and factual, that beset the determination of an individual's domicile attend equally upon fixing his district.

Corporations

A corporation is an inhabitant of the state that creates it, the state of its incorporation, and of the district (when that state comprises more than one district) of the corporation's head office.[23] Thus the Albemarle Pippin Corporation, incorporated under the laws of Virginia, with its head office at Charlottesville, is an inhabitant of the Western District of Virginia, and of no other district.

By doing business in another district, however great its volume and however important its character, the corporation does not

[20] Mr. Justice Gray in *Shaw v. Quincy Mining Co.* (1892) 145 U. S. 444, 447, 12 Sup. Ct. 935, 936.

[21] *Shaw v. Quincy Mining Co., supra* note 20; *King v. United States* (1893, C. C. S. C.) 59 Fed. 9; *United States v. Gronich, supra* note 19.

[22] See the very interesting case of *Hammerstein v. Lyne* (1912, W. D. Mo.) 200 Fed. 165.

[23] *Shaw v. Quincy Mining Co., supra* note 20; *Galveston, Harrisburg & S. A. Ry. v. Gonzales* (1894) 151 U. S. 496, 14 Sup. Ct. 401; *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221, 16 Sup. Ct. 273; *Texas & Pacific Ry. v. Interstate Commerce Commission* (1896) 162 U. S. 197, 204, 16 Sup. Ct. 666; *Matter of Dunn* (1908) 212 U. S. 374, 29 Sup. Ct. 299 (corporation created by Congress); *Macon Grocery Co. v. Atlantic Coast Line Ry., supra* note 18. See also *Firestone Tire & Equipment Co. v. Vehicle Equipment Co.* (1907, C. C. E. D. N. Y.) 155 Fed. 676; *Lemon v. Imperial Window Glass Co.* (1912, N. D. W. Va.) 199 Fed. 927; *Guaranty Trust Co. v. McCabe* (1918, C. C. A. 2d) 250 Fed. 699. These last cases illustrate the difficulty sometimes encountered, of fixing the district of the head office of the corporation.

become an inhabitant of such other district.[24] In *Galveston, Harrisburg & San Antonio Railway Co. v. Gonzales*,[25] a Mexican (an alien) brought suit in the Western District of Texas against a Texas corporation with its principal office in the Eastern District of Texas, and, though the corporation operated a railroad and had stations in the Western District of Texas, the venue was held improper.

A stipulation by a corporation authorizing service of process within a certain state upon its agents there, or upon a designated officer of the state, does not make the corporation (incorporated in another state) an "inhabitant" of the state wherein the stipulation is filed. Such a stipulation concerns only the service of process, and is not a waiver of the corporation's privilege to be sued in the proper district as defined by the general statute of venue.[26]

Aliens

An alien individual is one who has not by virtue of either birth or naturalization citizenship in the United States; a corporation is an alien here when it is incorporated under the laws of a foreign country. No alien, individual or corporate, is an inhabitant of any district; he, or it, is districtless.

When an alien is a defendant, he is without the protection of the venue statutes,[27] and may be sued in any district in which he is found and where valid service of process may be made upon him.[28] "To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole." [29]

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[24] *McCormick Co. v. Walthers* (1890) 134 U. S. 41, 43, 10 Sup. Ct. 485; *Shaw v. Quincy Mining Co.* (1892) 145 U. S. 444, 12 Sup. Ct. 935; *Southern Pacific Co. v. Denton, supra* note 9; *Macon Grocery Co. v. Atlantic Coast Line Ry.* (1910) 215 U. S. 501, 509, 30 Sup. Ct. 184; *United States v. Shotter Co.* (1901, C. C. S. D. Ala.) 110 Fed. 1; *Wolff & Co. v. Choctaw O. & G. Ry.* (1904, C. C. E. D. Ark.) 133 Fed. 601; *McNeely v. Du Pont de Nemours Powder Co.* (1920, D. C. Del.) 263 Fed. 252.

[25] *Supra* note 23. See also *Southern Pacific Co. v. Denton, supra* note 9.

[26] *Southern Pacific Co. v. Denton, supra* note 9; *Platt v. Massachusetts Real-Estate Co.* (1900, C. C. Mass.) 103 Fed. 705; *Hagstoz v. Mutual Life Ins. Co.* (1910, C. C. E. D. Pa.) 179 Fed. 569.

[27] This was expressly provided in the original Judiciary Act of 1789. The same spirit remains, though this express provision has disappeared from subsequent statutes.

[28] *In re Hohorst* (1893) 150 U. S. 653, 14 Sup. Ct. 221; *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100, 18 Sup. Ct. 526; *Ricordi v. John Church Co.* (1902, C. C. S. D. N. Y.) 114 Fed. 1023; *Hall v. Great Northern Ry.* (1912, D. C. Mont.) 197 Fed. 488; *Bradshaw v. Bowden* (1914, W. D. Wash.) 226 Fed. 323.

[29] Mr. Justice Gray in *In re Hohorst, supra* note 28, at 660.

When the alien is plaintiff, however, in a suit against the citizen of a state (whether individual or corporation), the statute is applicable. Necessarily, then, the suit must be brought, as the only proper venue, in the district of the defendant.[30] Thus the venue statute controls suits by aliens but not suits against them.

4. COPLAINTIFFS, OR CODEFENDANTS, INHABITANTS OF DIFFERENT STATES

The rule of the general venue statute—(venue in diverse citizenship cases[31] may be the district of either the plaintiff or defendant; venue in other cases must be the district of the defendant)—is subject to an important qualification which greatly restricts venue. That qualification is that the terms "plaintiff" and "defendant" are both used collectively to mean *all the plaintiffs* or *all the defendants*.[32] With but a single plaintiff and a single defendant, this principle is never called into operation; with a plurality of litigants, it becomes tremendously important. For when the plaintiffs are from different districts, there is no district of the plaintiff; when the defendants are from different districts, there is no district whereof the defendant is an inhabitant.

Thus, when jurisdiction is not founded solely on diverse citizenship, so that the venue must be based on the residence of the defendant, if there are two or more defendants from different districts, since there is no district of (*i.e.* common to) all the defendants, there is then no district of the defendant, and hence no district in which the venue is proper. So that when a suit not founded solely on diverse citizenship is brought against A (of the Eastern District of North Carolina) and B (of the Western District of Virginia), neither of these districts is the district of all the defendants, and there is no proper venue in either district.

In diverse citizenship cases, though the district may be that of either the plaintiff or the defendant, the same principles are applicable. So that if A (of the Northern District of Florida) wishes to bring suit, based solely on diverse citizenship, against B (of the Western District of Virginia) and C (of the Eastern District

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[30] *Galveston, Harrisburg & S. A. Ry. v. Gonzales, supra* note 23; *Lehigh Valley Coal Co. v. Washko* (1916, C. C. A. 2d) 231 Fed. 42; *Vitkus v. Clyde Steamship Co.* (1916, E. D. N. Y.) 232 Fed. 288; *Vidal v. South American Securities Co., supra* note 16; *Coty v. Prestonettes, Inc.* (1922, C. C. A. 2d) 285 Fed. 501.

[31] This phrase—"Diverse citizenship cases"—will be used in this article to indicate cases where the jurisdiction is founded only on the fact that the action is between citizens of different states.

[32] *Smith v. Lyon* (1890) 133 U. S. 315, 10 Sup. Ct. 303; *Sweeney v. Carter Oil Co.* (1905) 199 U. S. 252, 26 Sup. Ct. 55; *Camp v. Gress, supra* note 6; *Freeman v. American Surety Co.* (1902, C. C. N. D. Iowa) 116 Fed.

of North Carolina), then, since there is no district common to all the defendants, the venue must be based on the district of the residence of the single plaintiff, A; and the only proper venue would be the Northern District of Florida.[33] Or, to take a more distressing case, suppose A (of the Northern District of Florida) and B (of the Southern District of Georgia) wish as plaintiffs to sue, on the ground of diverse citizenship, in the United States District Court, C (of the Western District of Virginia) and D (of the Eastern District of North Carolina) as defendants. Here there is no district in which the venue is proper, for there is no district common either to all the plaintiffs or to all the defendants. If these parties were all indispensable, and if the defendants would not waive the impropriety of the venue (the plaintiffs, of course, would waive it by bringing the suit in any district court), then no district court of the United States in any district would entertain the suit.

When Parties are not Indispensable

Section 50 of the Judicial Code provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

This partly alleviates the rigor of the qualification introduced by a plurality of litigants. It applies broadly in terms to both actions at law and suits in equity, when a judgment or decree is possible as to the parties before the court without prejudicing the rights of the absent parties.[34] When the absent party, however, is indispensable[35] (as distinguished from merely proper or

548; *McAulay v. Moody* (1911, C. C. Or.) 185 Fed. 144; *Revett v Cline* (1913, W. D. Wash.) 207 Fed. 673; *Turk v. Illinois Central Ry.* (1914, C. C. A. 6th) 218 Fed. 315; *Gotter v. McCulley* (1923, E. D. Wash.) 292 Fed. 382.

[33] See *Camp v. Gress*, *supra* note 7; *Hardin v. Southern Ry.* (1924, N. D. Ga.) 300 Fed. 417. In *Sweeney v. Carter Oil Co.*, *supra* note 32, A (of Pa.) and B (of N. Y.) sued the C corporation (incorporated in W. Va., with its head office in the Northern District of W. Va.) in the Northern District of West Virginia. The venue was held to be proper. Since the plaintiffs were from different states, no other proper venue could be found.

[34] *Waterman v. Canal-Louisiana Bank & Trust Co.* (1909) 215 U. S. 33, 48, 30 Sup. Ct. 10.

[35] In *Shields v. Barrow* (1854, U. S.) 17 How. 130, 139, indispensable parties are described as "persons who not only have an interest in the

necessary), so that no judgment or decree can be had without affecting his rights, then Section 50 does not apply.[36]

Somewhat similar, but much narrower in scope, is Equity Rule 39, which prevents the abatement of suits for non-joinder of necessary or proper parties. It, too, is inapplicable to indispensable parties.[37]

5. VENUE AND PROCESS

Venue Complicated by Process

In the main, Congress (except as to districts within the same state) has dealt with districts rather as separate states than as counties within the same state. So that the ordinary civil process in the district court does not run beyond the confines of the district in which it is issued.[38] Under the "due process" clause of the Constitution this normally implies that no *in personam* judgment can be obtained against a defendant unless such defendant is served in the district in which the suit is brought. Thus is introduced another complication, rendering the practical problem of suitable venue often difficult, sometimes impossible. Process and venue are quite distinct, yet each qualifies and limits the other. After a district, proper on the score of venue, has been selected, there yet remains the question of whether the defendant can be validly served in this district. A plurality of defendants in both cases lends still further complications to the problem.

A flesh and blood individual may be served in any district in which he may be physically found with the process of that district. Apart from methods of service (not appropriate for discussion here), individuals usually present little legal difficulty.

Service of Process on Corporations

Normal and perfect service on a corporation would contemplate service in the single district of which it is an inhabitant. Very frequently, however, it is necessary to serve process upon the

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controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

[36] *Waterman v. Canal-Louisiana Bank & Trust Co., loc. cit. supra* note 34; *Bogart v. Southern Pacific Co.* (1913) 228 U. S. 137, 33 Sup. Ct. 497; *Camp v. Gress, supra* note 7; *United Shoe Machinery Co. v. United States* (1922) 258 U. S. 451, 456, 42 Sup. Ct. 363. See also *Brown v. Crawford* (1918, D. C. Or.) 252 Fed. 248; *Niles-Bement-Pond Co. v. Iron Moulders' Union* (1920) 254 U. S. 77, 41 Sup. Ct. 39; *McLean v. Bradley* (1922, N. D. Ohio) 282 Fed. 1011.

[37] *Nelson v. Herbert* (1924, C. C. A. 5th) 296 Fed. 445. See also *Supreme Tribe of Ben Hur v. Cauble* (1921) 255 U. S. 356, 41 Sup. Ct. 338; *Lecouturier v. Ickelheimer* (1913, S. D. N. Y.) 205 Fed. 682.

[38] *Toland v. Sprague* (1838, U. S.) 12 Pet. 300, 330; *Herndon v. Ridgway* (1854, U. S.) 17 How. 424; *Insurance Co. v. Bangs* (1880) 103 U. S. 435.

corporation in some district other than its own. Then is encountered another limitation: the corporation cannot be validly served in a district unless it is "doing business" in that district; and this is true even though the president and other corporate officers may at the time be physically present within the district. This principle has, in many cases, been rigidly upheld by the federal courts.[39]

Thus in a suit, based solely on diverse citizenship, by A (of Charlottesville, Va.) against the B corporation (incorporated in Maryland, doing no business in the Western District of Virginia), while the Western District of Virginia (district of the plaintiff) would be technically proper from the venue standpoint, the plaintiff, A, since the defendant could not be served in that district, would be driven to sue in the defendant's district, the District of Maryland. Or suppose a suit based on diverse citizenship, by this same A, as plaintiff, against this same B corporation and C (of Delaware), as defendants. Here, since the defendants are from different districts, the venue must be the district of the single plaintiff; but in this district (though the venue is proper), no valid service can be had on the B corporation. Accordingly, unless this defect be waived, the plaintiff is denied entrance into the United States District Court.

What Constitutes "Doing Business"

There are literally hundreds of cases dealing with the question of what constitutes "doing business" on the part of a corporation so as to render it amenable to service.[40] The dominant idea seems to be that the term "doing business" in this connection connotes

See also the recent case of *Munter v. Weil Co.* (1923) 261 U. S. 276, 279, in which the court said: "The service on Munter was void. The District Court of Connecticut had no power to send its process to New York for service." See also *Robertson v. Railroad Labor Board* (1925, U. S.) 45 Sup. Ct. 621.

[39] *Ex parte Schollenberger* (1877) 96 U. S. 369; *New England Mutual Life Ins. Co. v. Woodworth* (1884) 111 U. S. 138, 4 Sup. Ct. 364; *Conley v. Mathieson Alkali Works* (1903) 190 U. S. 406, 23 Sup. Ct. 723; *Geer v. Mathieson Alkali Works* (1903) 190 U. S. 428, 23 Sup. Ct. 807; *Kendall v. American Automatic Loom Co.* (1905) 198 U. S. 477, 25 Sup. Ct. 768; *Green v. Chicago, Burlington & Quincy Ry.* (1907) 205 U. S. 530, 27 Sup. Ct. 595; *Lumiere v. Mae Edna Wilder, Inc.* (1923) 261 U. S. 174, 43 Sup. Ct. 312; *Goepfert v. Compagnie Générale Transatlantique* (1907, C. C. E. D. Pa.) 156 Fed. 196; *Noel Construction Co. v. Smith & Co.* (1911, C. C. Md.) 193 Fed. 492; *Ostrander v. Deerfield Lumber Co.* (1913, N. D. N. Y.) 206 Fed. 540; *Moore Dry Goods Co. v. Commercial Industrial Co.* (1922, C. C. A. 9th) 282 Fed. 21. See also *Mechanical Appliance Co. v. Castleman* (1910) 215 U. S. 437, 30 Sup. Ct. 125; *Riverside Mills v. Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579.

[40] For an exhaustive digest on the general question, see *Report of the Commissioner on State Laws Concerning State Laws Concerning Foreign Corporations* (1915) 156–168. See also *Words & Phrases* under "Doing Business". The question arises in many connections other than the one

some continuity, a series of transactions in the line of the corporation's business rather than one transaction or even several single, and somewhat isolated and unrelated, transactions. No extended discussion can be attempted here beyond the consideration of a few representative cases.

A railroad company which has no tracks within the district is not "doing business" therein merely because it hires an office and employs an agent (within the district) for the merely incidental business of solicitation of freight and passenger traffic.[41] Nor does a railway company do business in the district merely because another railway company, of which it owns practically the entire capital stock, does business therein.[42]

"A fire insurance company which issues its policies upon real estate and personal property situated in another State is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. If not doing business, in such case, what is it doing? . . . This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the State. . . . Many contracts of the nature of the one in suit were entered into by the company covering property within the State." [43]

"At the office in Philadelphia, the corporation kept its regular business ledgers, its stock transfer books and stock ledgers. The bookkeeper of the company had his desk in the office at Philadelphia, made his entries in the corporation books kept there, and conducted general correspondence in relation to the Company's business at that office. The treasurer of the company maintained the only treasurer's office of the company there, and had there his desk, papers, and books. The company had four bank accounts in Philadelphia, into which accounts, from time to time, was deposited the surplus of cash not needed in the active operation of the company." [44] The company was held to be amenable to process in the Eastern District of Pennsylvania.

6. LOCAL ACTIONS

Local and Transitory Actions

This distinction between local and transitory actions goes back to very far off days, yet the line of demarcation between the two

now under discussion. Many of the cases are in more or less direct conflict.

[41] *Green v. Chicago, Burlington & Quincy Ry.*, *supra* note 39.

[42] *Peterson v. Chicago, Rock Island & Pacific Ry.* (1907) 205 U. S. 364, 27 Sup. Ct. 513. See also the recent case of *Cannon Mfg. Co. v. Cudahy Packing Co.* (1925) 267 U. S. 333, 45 Sup. Ct. 250.

[43] Mr. Justice Peckham in *Pennsylvania Insurance Co. v. Meyer* (1905) 197 U. S. 407, 415, 25 Sup. Ct. 483.

[44] Mr. Justice Day in *Washington-Virginia Ry. v. Real Estate Trust Co.* (1915) 238 U. S. 185, 188, 35 Sup. Ct. 818.

has been, and still remains, obscure and uncertain. Most of the judges have followed ancient saws and sayings with little or no attempt to analyze the nature and validity of the underlying reasons.

"The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place any where; but are local, where their cause is, in its nature, necessarily local." [45] This is the stock distinction which says little and affords scant assistance.[46]

"The courts have drawn a distinction between transitory and local actions, holding that the former may be brought in any jurisdiction, the latter only in a particular jurisdiction. What is the nature and what is the basis of this distinction? It is obvious that *an action to recover possession of specific land, or to affect the title thereto or some interest therein,* is maintainable only in the jurisdiction in which the property involved is situated. Unless it has jurisdiction of the property, a state has no power to afford the remedy sought, and cannot confer jurisdiction upon its courts. Such proceedings, which are called proceedings *in rem,* are properly held to be local, in that they can be brought only in the particular jurisdiction where the property sought to be affected thereby is situated. . . . It would seem on principle that the natural distinction is between proceedings *in rem* and proceedings *in personam;* that proceedings *in rem* should be, and under well-settled principles of the conflict of laws, must be local, but that proceedings *in personam* should be transitory. In other words, the character of the remedy sought, rather than the character of the plaintiff's rights, should determine whether an action is local or transitory." [47] It is respectfully suggested that Professor Scott here suggests the only basis of distinction that can stand rational analysis on principle.

On both reason and authority, such actions as ejectment[48] and partition[49] seem local; for they clearly affect the title to land or some interest therein. The great clash has come on actions for

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[45] Chief Justice Marshall in *Livingston v. Jefferson* (1811, C. C. Va.) 1 Brock. 203, 209.

[46] See Bouvier's Law Dictionary and Cyclopedic Law Dictionary under "Local Action."

[47] Scott, *op. cit. supra* note 4, at 2, 31 (Italics the present writer's). This little book contains one of the most scholarly discussions to be found in the books of the distinctions between local and transitory actions and between jurisdiction and venue.

[48] *Northern Indiana Co. v. Michigan Cent. Co.* (1853, U. S.) 15 How. 233; *Elk Garden Co. v. Thayer Co.* (1910, C. C. W. D. Va.) 179 Fed. 556; *Kentucky Coal Lands Co. v. Mineral Development Co.* (1914, C. C. A. 6th) 219 Fed. 45.

[49] *Greeley v. Lowe* (1894) 155 U. S. 58, 15 Sup. Ct. 24; *German Savings & Loan Society v. Tull* (1905, C. C. A. 9th) 136 Fed. 1, certiorari denied (1906) 200 U. S. 621, 26 Sup. Ct. 757.

damages for trespass to land. In the classic case of *Livingston v. Jefferson,*[50] Chief Justice Marshall, deciding the case in favor of his arch enemy Jefferson, held that it was local. This great jurist decided the case under the principle of *stare decisis,* taking pains to point out the illogicality and injustice of the decision. Yet that, unfortunately, seems to be the law to-day both in the federal courts and those of the states;[51] although the proceeding, since it seeks only the recovery of damages, is clearly *in personam.*

Local Actions Must be Brought Where the Land Lies

The general provisions of the venue statute, requiring suit to be brought in the district of either plaintiff or defendant, do not apply to local actions; for such actions must be brought in the district in which the land is situated.[52] Yet there seems to be no federal statute expressly requiring this. And federal process, save where express statutory warrant is found therefor, is still limited to the district of the suit.[53] Chief Justice Waite once said:

"The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included

[50] 1 Brock. 203.

[51] Professor Scott, in the book quoted from (*supra* note 47), attacks the decision with reasons that are believed to be eminently sound. But see *Ellenwood v. Marietta Chair Co.* (1895) 158 U. S. 105, 15 Sup. Ct. 771; *Kentucky Coal Lands Co. v. Mineral Development Co.* (1911, C. C. E. D. Ky.) 191 Fed. 899; *Potomac M. & I. Co. v. Baltimore & Ohio Ry.* (1914, D. C. Md.) 217 Fed. 665. See also *Dodge v. Colby* (1888) 108 N. Y. 445, 15 N. E. 703; *Montesano Lumber Co. v. Portland Iron Works* (1915) 78 Or. 53, 152 Pac. 244. The Supreme Court of Minnesota, however, bravely broke away from *Livingston v. Jefferson* in *Little v. Chicago, St. P., M. & O. Ry.* (1896) 65 Minn. 48, 67 N. W. 846.

[52] *McKenna v. Fisk* (1843, U. S.) 1 How. 241; *Northern Indiana Ry. v. Michigan Central Ry.* (1853, U. S.) 15 How. 233, 242; *Mississippi & Missouri Ry. v. Ward* (1862, U. S.) 2 Black, 485; *Casey v. Adams* (1880) 102 U. S. 66, 67; *Ellenwood v. Marietta Chair Co., supra* note 51; *Livingston v. Jefferson, supra* note 50; *Kentucky Coal Lands Co. v. Mineral Development Co., supra* note 48.

[53] "The general rule is that the circuit court for each district sits in and for that district, and the process of a circuit court cannot be served without the district in which it is established without the special authority of law therefor." Circuit Judge Simonton in *Cely v. Griffin* (1902, C. C. S. C.) 113 Fed. 981. See also *Toland v. Sprague, supra* note 38; *Munter v. Weil Corset Co., supra* note 38; *Robertson v. Railroad Labor Board, supra* note 38; *Winter v. Koon, Schwartz & Co.* (1904, C. C. Or.) 132 Fed. 273, 274; *Horn v. Pere Marquette Ry., supra* note 7, at 631.

This principle in *Livingston v. Jefferson, supra* note 50, denied admission in the U. S. Courts to Livingston. He could not, under the decision, sue Jefferson in Virginia, where he could serve process on Jefferson; the venue was proper in Louisiana where the land was, but, suing there, he could not get valid service on Jefferson.

such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." [54]

Local Actions—Different Districts in Same State

Sections 54 and 55 of the Judicial Code relax, as to local actions, the rigidity of the rules just discussed when there are two or more districts in the same state. These two sections, however, have no application whatsoever to districts situated in different states. Section 54 provides:

"In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."

This covers only the case where the land lies in one district, where the suit is brought, and the defendant resides in another district of the same state. Process may then be served on the defendant, the process being directed to the marshal of the defendant's district.[55] Section 55 provides:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

Here the scope is even narrower, covering only the unusual case where the land (or other subject matter of a fixed character) is situated in both of two districts within the same state, partly in one of these districts and partly in another.[56]

Venue and Process in Specified Proceedings in Rem

Of infinitely greater importance, and far wider in scope than the two sections just discussed, is section 57 of the Judicial Code. In certain specified proceedings *in rem*, this permits service out of the district of the *res*, or even substituted service. This is discussed in the next section.

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[54] *Casey v. Adams, loc. cit. supra* note 52.

[55] This statute was applied in *Collett v. Adams* (1919) 249 U. S. 545, 39 Sup. Ct. 372. Process here is directed to the marshal of the district in which the defendant resides. *Kuzma v. Witherbee, Sherman & Co.* (1915, E. D. N. Y.) 232 Fed. 286.

[56] Under this section, where a corporation owns lands in more than one district in the same state, a district court of one of these districts may appoint a receiver with power over all this land. *Horn v. Pere Marquette Ry., supra* note 7. See also *City of Shelbyville v. Glover* (1910, C. C. A. 6th) 184 Fed. 234.

7. VENUE AND PROCESS IN SPECIFIED PROCEEDINGS IN REM

Without some such provision as this, the rule of *Livingston v. Jefferson*[57] broadly applied and the principle that federal process does not transcend the limits of the district of issuance would have worked almost intolerable hardship upon litigants in the federal courts. Only cases of different districts within the confines of a single state were covered by Sections 54 and 55 of the Judicial Code. There was crying need for some broader provision to cover the case where the land or personalty was in one state while the defendant or defendants were in other states. To satisfy this need Section 57 was enacted, admirably adapted for this purpose. This is a statute of venue and process only; there must also exist some ground, usually diverse citizenship, as well as the other requisites for the exercise of jurisdiction by the district court.[58]

The Text of the Statute

Reproduction in full of the exact words of Section 57 of this statute (the Judicial Code), to which the reader can refer during the discussion, seems justified by its practical importance.

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when

[57] *Supra* note 50.

[58] *Ladew v. Tennessee Copper Co.* (1910) 218 U. S. 357, 31 Sup. Ct. 81; *Louisville & N. Ry. v. Western Union Telegraph Co.* (1914) 234 U. S. 369, 34 Sup. Ct. 810; *Kentucky Coal Lands Co. v. Mineral Development Co.*, *supra* note 48; *Doherty v. McDowell* (1921, D. C. Me.) 276 Fed. 728.

a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

Venue Under the Statute

In cases within the purview of the statute, the venue is here determined by the location of the property or *res,* the suit being brought in the district in which the property or *res* is located without regard to the residence of the plaintiffs or defendants, no one of whom need be a resident of the district.[59]

Cases Falling within the Purview of the Statute

Led by the Supreme Court, the federal judges have given a very strict and rigid interpretation to the words of the statute defining its scope. The cases are legion, many of them illustrating the struggle of litigants who, finding their situation otherwise desperate or hopeless, have sought protection under the sheltering arm of Section 57. Two limitations, in particular, are of prime importance. First, the proceeding must be truly *in rem* rather than *in personam,* to enforce a claim to property rather than to impose a personal obligation upon the defendant; the mere fact that the suit arose out of dealings with specific property is quite insufficient. Secondly, the proceeding must be in aid of a pre-existing claim, existing prior to the suit, and not a proceeding to create for the first time a claim as the effect of the proceeding itself. These will appear in the discussion of the cases, now to be attempted. Two classes of cases, in terms, are covered by the statute: (1) Suits to *enforce* any legal or equitable *lien* upon or claim to real or personal property within the district; (2) Suits to *remove* any *incumbrance* or *lien* or *cloud* upon the title to such property.

Ejectment[60] falls rather clearly within the statute and, perhaps

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[59] *Greeley v. Lowe, supra* note 49; *Ladew v. Tennessee Copper Co., supra* note 58; *Louisville & N. Ry. v. Western Union Telegraph Co., supra* note 58; *Texas Co. v. Central Fuel Co.* (1912, C. C. A. 8th) 194 Fed. 1; *Albert v. Bascom* (1917, W. D. Tex.) 245 Fed. 149. The burden of proving the situation of the property within the district is on the complainant. *Chase v. Wetzlar* (1912) 225 U. S. 79, 32 Sup. Ct. 659.

[60] *Spencer v. Kansas City Stock-Yards Co.* (1893, C. C. W. D. Mo.) 56 Fed. 741; *Elk Garden Co. v. Thayer Co., supra* note 48; *Kentucky Coal Lands Co. v. Mineral Development Co., supra* note 48.

even more clearly suits for partition[61] of land. Suits to remove clouds upon title to realty are included in terms.[62] Suits to quiet title[63] to, and suits to foreclose mortgages[64] of, realty are suits to enforce pre-existing claims to specific property. So are suits to enforce the lien of a judgment on property within the district,[65] as well as suits to set aside the lien of a judgment claimed to have been procured by fraud.[66] A close case, held to come within the statute, was a suit by unsecured creditors of an insolvent corporation to set aside a conveyance of certain property to secure several preferred creditors.[67]

An interesting contrast is afforded by the cases of *Goodman v. Niblack*[68] and *Fayerweather v. Ritch*.[69] In the *Goodman* case, held within the statute, a bill in equity was filed to enforce a claim or lien as to a specific fund. The *Fayerweather* case, held without the statute, was a suit by heirs against trustees to recover a residue in the trustees' hands; but no specific property, real or personal, was sought to be affected.

Now for the negative side of the picture. Suits to abate nuisances,[70] suits to compel specific performance either of contracts to convey realty[71] or of contracts to pay the purchase price[72] are actions *in personam*, not *in rem*, so the statute excludes them.[73]

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[61] *Greeley v. Lowe, supra* note 49; *German Savings & Loan Society v. Tull, supra* note 49.

[62] *Dick v. Foraker* (1894) 155 U. S. 404, 15 Sup. Ct. 124; *Louisville & N. Ry. v. Western Union Telegraph Co., supra* note 58. See also *Citizens' Savings & Trust Co. v. Illinois Central Ry.* (1907) 205 U. S. 46, 27 Sup. Ct. 425, in which the suit was to cancel certain deeds and leases constituting a cloud on the title.

[63] *United States v. Southern Pacific Co.* (1894, C. C. S. D. Calif.) 63 Fed. 481.

[64] *Seybert v. Shamokin & Mt. C. Ry.* (1901, C. C. M. D. Pa.) 110 Fed. 810; *Burke v. Mountain Timber Co.* (1915, W. D. Wash.) 224 Fed. 591.

[65] *De Hierapolis v. Lawrence* (1899, C. C. S. D. N. Y.) 99 Fed. 321; *Hultberg v. Anderson* (1909, C. C. Kan.) 170 Fed. 657. See also *Perez v. Fernandez* (1911) 220 U. S. 224, 31 Sup. Ct. 412.

[66] *McDaniel v. Traylor* (1905) 196 U. S. 415, 25 Sup. Ct. 369.

[67] *Mellen v. Moline Iron Works* (1889) 131 U. S. 352, 9 Sup. Ct. 781. It would seem that this case can be sustained only on the theory that this property constituted for these creditors a trust fund as to which they had an equitable title. See *Graham v. Railroad Co.* (1880) 102 U. S. 148, 161. But see *Bank of Commerce & Trust v. McArthur* (1918, S. D. Fla.) 248 Fed. 138, holding that a creditor, having no lien, cannot under Judicial Code, sec. 57, sue to set aside a transfer of personalty by a creditor.

[68] (1880) 102 U. S. 556.

[69] (1898, C. C. S. D. N. Y.) 89 Fed. 385. See also *Hannan v. Slush* (1922, E. D. Mich.) 283 Fed. 211; s. c. (1924, C. C. A. 6th) 299 Fed. 1022.

[70] *Ladew v. Tennessee Copper Co., supra* note 58.

[71] *Municipal Investment Co. v. Gardiner* (1894, C. C. Ind.) 62 Fed. 954; *Gotter v. McCulley* (1923, E. D. Wash.) 292 Fed. 382.

[72] *Nelson v. Husted* (1910, C. C. Minn.) 182 Fed. 921.

[73] The same is true of a mere suit to cancel or rescind a contract. *Insurance Co. v. Bangs, supra* note 38; *Camp v. Bonsal* (1913, C. C. A. 4th)

Condemnation suits under the power of eminent domain are not included; for here there is no *pre-existing* title to the property sought to be condemned, no claim or lien thereon, *anterior* to the condemnation proceeding.[74]

By its very terms, the statute applies to personal property as well as to real; in practice, though, the realty cases greatly predominate. Since, as has been pointed out, the venue is the district in which the property is situated, this involves the question of the situs of property. As to realty, which is necessarily fixed and immovable, there is little trouble; in connection with personalty, particularly intangible personal property such as notes[75] and corporate stock,[76] even under this statute, there is grave difficulty. The question of the situs of personal property cannot well be discussed here.

Ordinary proceedings by foreign attachment are not contemplated here; for attachment in the federal courts is merely an incident to personal suit, which requires valid service of process on the defendant conferring jurisdiction over him personally.[77]

Procedure under the Statute

The statute prescribes the procedure under it. If "one or more of the defendants therein shall not be an inhabitant of nor found within the said district or shall not voluntarily appear thereon," the court may make an *order* directing absent defendants to appear or plead by a certain day. This *order* shall be served; if that is practicable, on such defendants wherever found (even in

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203 Fed. 913. But suit is possible under the statute on contracts giving a lien on property. *Citizens' Savings & Trust Co. v. Illinois Central Ry., supra* note 62; *Texas Co. v. Central Fuel Oil Co., supra* note 59. See also *Waterloo Creamery Co. v. National Bank* (1922, E. D. Mich.) 282 Fed. 197, in which suit for accounting and for loss of property was held without the statute. See also *General Investment Co. v. Lake Shore & M. S. Ry.* (1922) 260 U. S. 261, 43 Sup. Ct. 106, holding an injunction suit to prevent railroad companies from consolidating to be *in personam*.

[74] *Western Union Telegraph Co. v. Louisville & N. Ry.* (1912, E. D. Tenn.) 201 Fed. 932. See the remarkable case of *Mutual Life Insurance Co. v. Painter* (1915, D. C. Md.) 220 Fed. 998, in which the plaintiff unsuccessfully tried to bring under this statute a claim for the examination of the vital organs of a dead policy holder.

[75] *Critchton v. Wingfield* (1922) 258 U. S. 66, 42 Sup. Ct. 229. See as to situs of patent right under this statute *Standard Gas Power Co. of Georgia v. Standard Gas Power Co. of Delaware* (1915, N. D. Ga.) 224 Fed. 990.

[76] *Jellenik v. Huron Copper Co.* (1900) 177 U. S. 1, 20 Sup. Ct. 559; *Blake v. Foreman Bros. Banking Co.* (1914, N. D. Ill.) 218 Fed. 264; *Hudson Navigation Co. v. Murray* (1916, D. C. N. J.) 236 Fed. 419; *Doherty v. McDowell, supra* note 58; *Vidal v. South America Securities Co., supra* note 16; *Myers v. Occidental Oil Corporation* (1923, D. C. Del.) 288 Fed. 997; *American Seating Co. v. Bullard* (1923, C. C. A. 6th) 290 Fed. 896.

[77] *Ex parte Railway Co.* (1880) 103 U. S. 794; *Big Vein Coal Co. v. Read* (1913) 229 U. S. 31, 33 Sup. Ct. 694; *Pratt v. Denver & R. G. W. Ry.* (1922, D. C. Minn.) 284 Fed. 1007.

districts in other states),[78] and also on the persons in possession of the property, "if any there be." Service on absent defendants in districts in other states must be the service of this *order* of the court by the marshal of the district in which the defendant is found;[79] and there can be no service of the ordinary federal process by such marshal.[80] Since the statute is an exception to, and its terms therefore the warrant for departing from, the general principle that federal process is limited to its own district, the federal courts are inclined to insist on a rather strict compliance with the statutory provisions.

When actual personal service of the *court order* on the absent defendant is not practicable in any district, then the *court order* "shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks." Before issuing a direction for service by publication, the court should be assured that reasonable efforts have been made to serve the order personally on the defendant without success.[81]

When all the defendants can be served within the district of the suit, this should be done; for the provisions as to the court order do not then apply. It would seem as to a defendant residing in a different district of the same state that Judicial Code 54 would apply, permitting service of ordinary process by the marshal of such district; though this has been denied.[82] Probably, in such a case, the court order would be safer.

Effect of the Judgment or Decree

As to absent defendants, those served with the court order either personally or by publication who do not appear in the suit, the adjudication affects "only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."[83] The judgment or decree is then strictly *in rem*, binding the *res* completely, but no *in personam* judgment can be entered; so that in a suit to enforce a lien on property in the district, the court can subject all this property to the lien, yet cannot enter a personal decree against the defend-

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[78] *Mellen v. Moline Iron Works, supra* note 67.

[79] *Evans v. Charles Scribner's Sons* (1893, C. C. N. D. Ga.) 58 Fed. 303.

[80] *Jennings v. Johnson* (1906, C. C. A. 5th) 148 Fed. 337; *Seybert v. Shamokin & Mt. C. Ry., supra* note 64. See also *Greeley v. Lowe, supra* note 49. And see *Doherty v. McDowell, supra* note 58, as to the strictness with which this order must be carried out.

[81] *McDonald v. Cooper* (1887, C. C. Or.) 32 Fed. 745; *Hicks v. Crawford Coal & Iron Co.* (1911, C. C. M. D. Tenn.) 190 Fed. 334.

[82] *Seybert v. Shamokin & Mt. C. Ry., supra* note 64.

[83] But provision is made where the property is within the same state but in different districts.

ant for the excess of the plaintiff's claim beyond the value of the property.[84]

When, however, service of ordinary process is had on the defendant within the district of suit, or when the defendant subjects himself personally to the jurisdiction of the court by a general appearance, it would seem that the suit becomes one *in personam* and a valid personal judgment could be entered against him. One final proviso in the statute permits "any defendant or defendants not actually personally notified as above provided" to appear "within one year after final judgment", have the judgment set aside, plead "on payment of such costs as the court shall deem just;" and thereupon the suit "shall be proceeded with to final judgment according to law." The Supreme Court has made two things clear: first, this proviso applies only when the service of the court order was by publication, not by personal service of the order in any district (but in service by publication, information of the pendency of the suit by letter of extraneous information is immaterial); secondly, the right within the year to have the case reopened (in a proper case) under the proviso is a genuine right which cannot be conditioned on any terms save the payment of costs.

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[84] "It is fundamental that relief of that (a personal decree) character cannot be had against non-resident defendants without personal service of process within the jurisdiction or such general appearance in the case as amounts thereto". *Grable v. Killits*, (1922, C. C. A. 6th) 282 Fed. 185, at 194, citing *Pennoyer v. Neff* (1877) 95 U. S. 714. See also *Robertson v. Railroad Labor Board, supra* note 38.