

THE POWER OF FEDERAL COURTS TO ENJOIN PROCEEDINGS IN STATE COURTS

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WERE constitutional and statutory provisions the sole determinants of the rules which govern the functioning of our dual system of courts, an inquiry into the power of federal courts to enjoin proceedings in state courts would be highly academic, for the provisions of the written law are clear. Since 1793 there has existed a federal statute expressly denying to the federal courts the power to enjoin state proceedings. The terms of the original statute were unqualified¹ and this blanket prohibition continues as Section 265 of the Judicial Code,² with but few legislative exceptions. Only in instances arising under laws relating to proceedings in bankruptcy,³ the Federal Insurance Interpleader Act,⁴ and the Act to Limit the Liability of Shipowners⁵ has Congress relaxed this prohibition to permit the use of the federal injunctive power.

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1. “. . . nor shall a writ of injunction be granted to stay proceedings in any court of a state.” Act of March 2, 1793, § 5, 1 STAT. 334 (1793).

2. 36 STAT. 1162 (1911), 28 U. S. C. § 379 (1926).

3. This exception is embodied directly in § 265 of the Judicial Code. 36 STAT. 1162 (1911), 28 U. S. C. § 379 (1926).

4. 44 STAT. 416 (1926), 28 U. S. C. SUPP. VI § 41 (26) (1932). This exception appears as an amendment of the original Interpleader Act which is found in 39 STAT. 929 (1917), 28 U. S. C. § 41 (26) (1926). It was enforced in *Fidelity & Deposit Co. v. A. S. Reed & Co.*, 16 F. (2d) 502 (E. D. Pa. 1926), where the right asserted by claimant had accrued before the amendment. See also *National Fire Insurance Co. v. Sanders*, 38 F. (2d) 212 (C. C. A. 5th, 1930).

5. 9 STAT. 636 (1851), 46 U. S. C. § 185 (1926). This exception has been spelled out of the statute by judicial construction. *The Amsterdam*, 23 Fed. 112 (S. D. N. Y. 1885); *In re Whitelaw*, 71 Fed. 733 (N. D. Cal. 1896); *Petition of Wheeler*, 51 F. (2d) 374 (E. D. N. Y. 1931); see *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 600 (1883). This construction of the statute is also recognized in Rule 51 of the Admiralty Rules promulgated by the Supreme Court, expressly authorizing the federal courts to issue injunctions against any and all suits upon the application of the shipowner. 28 U. S. C. § 923 (1926).

The liberal construction accorded to the Limited Liability Act has, in instances of ambiguous legislation, been denied. For instance, even before the 1926 amendment to the Interpleader Act, it was palpably inconsistent with the purpose of that Act that the federal court in which the interpleader

The historical explanation for the inclusion of the anti-injunction provision in the Act of 1793 is a matter of some uncertainty. The purpose of that Act as a whole was narrow and highly practical. In 1792, Chief Justice Jay and his associates had indicated to President Washington the hardships incident to eighteenth century circuit riding.⁶ The President's message at the opening of Congress in November, 1792, urged the necessity of revising the first Judiciary Act,⁷ and the representations of the Justices were laid before Congress.⁸ Although there are no reported debates⁹ on the bill which resulted, it seems clear from the sequence of events that the letter of the Justices was its immediate stimulus.¹⁰ The general scope of the bill as enacted¹¹ confirms the conclusion that it was not so much designed to correct or forestall abuses of federal jurisdiction as simply to alleviate in some measure the burdensome duties which had been imposed upon the judiciary by the Act of 1789, and to fill certain procedural lacunae of that Act.

proceeding was brought should have no power to protect the stakeholder by injunctions against pending state court actions as well as those in other federal courts. It was held, however, that there was no implied repeal *pro tanto* of the injunction statute. *Lowther v. New York Life Insurance Co.*, 278 Fed. 405 (C. C. A. 3d, 1922). See Chafee, *Interstate Interpleader* (1924) 33 YALE L. J. 685, 725; (1923) 2 TENN. L. REV. 102. Another indication that the courts, though quick to carve out judge-made exceptions to the injunction statute, are not disposed to allow it to be affected by other legislation unless the intention to modify is stated in clear terms, is found in the case of *Aultman & Taylor v. Brumfield*, 102 Fed. 7 (C. C. N. D. Ohio 1900), in which it was held that the power of federal courts to enjoin state court proceedings was in no way increased by the Civil Rights Act of 1871, 17 STAT. 13 (1871), 8 U. S. C. § 43 (1926). See also *Hemsley v. Meyers*, 45 Fed. 283 (C. C. D. Kan. 1891). But see *Tuchman v. Welch*, 42 Fed. 548, 558 (C. C. D. Kan. 1890).

6. AMERICAN STATE PAPERS (1834) 1 Misc. 51.

7. See 3 ANN. CONG. 607 (1792).

8. See *id.* at 611, 671.

9. It is apparent from the Annals, however, that there was considerable debate which is not reported. *Id.* at 875, 882, 654.

10. See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 22, n. 60. The suggestion is there made that the fact that the House Committee to which the letter of the Justices was referred was discharged from further consideration of the question immediately upon the report of the Senate bill to the House is convincing evidence that the Act of 1793 was in direct response to the Justices' representations. But see 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1926) 89.

11. The various sections of the Act dealt with the number of justices necessary at circuit court sittings; the procedure to be followed in case of disagreement between the justice and the district judge at a circuit hearing; the holding of special criminal sessions; the giving of bail in criminal cases; the issuance of subpoenas; court rules for the return of writs; and the appraisal of goods taken on execution.

It has been suggested that the prohibition of federal injunctions against state proceedings was included in the Act of 1793 as a result of the opposition, intensified at this time by *Chisholm v. Georgia*,¹² to extending the scope of federal jurisdiction at the expense of the states.¹³ But, aside from the failure of the terms or legislative history of the statute as a whole to reflect the current political issues thus urged to have been responsible for the presence of the injunction provision, the fact that a prohibition of similar import had been suggested by Attorney General Edmund Randolph in 1790¹⁴ indicates that strictly contemporary factors were not the fundamental reason for the enactment of this clause. It is possible, however, that the inclusion of the injunction provisions was the result in part of then prevailing prejudices against equity jurisdiction. This explanation is suggested by the fact that Oliver Ellsworth was an important member of the Senate committee which reported out the bill that became the Act of 1793.¹⁵ Although in no way caught up in the popular current of opposition to broad federal jurisdiction,¹⁶ Ellsworth had a pronounced dislike for chancery practice¹⁷ and indeed at one time joined forces with anti-federalists in urging an amendment to the first Judiciary Act of 1789 which would have required that the facts in federal equity suits be found by a jury.¹⁸

12. 2 Dall. 419 (U. S. 1793). This case held that a state might be sued in the federal courts by a citizen of another state. The result was the immediate adoption of the Eleventh Amendment to the Constitution. See Donahue, *Limits of State and Federal Jurisdiction* (1923) 9 A. B. A. J. 479; Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345, 348, n. 14.

13. See Warren, *supra* note 12, at 347. See also *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273, 292 (1906).

14. ". . . and no injunction in equity shall be granted by a District Court to a judgment at law of a State Court." AMERICAN STATE PAPERS (1834) 1 Misc. No. 17, p. 26. This suggestion was made in a report on the advisability of amending the first Judiciary Act, 1 STAT. 73 (1789). It has been said that Randolph's recommendation was the direct cause of the inclusion of the Injunction clause in the Act of 1793. See Warren, *loc. cit. supra* note 13. But this seems scarcely probable, as Randolph's proposed amendment was of much more limited scope than that eventually adopted, inasmuch as it operated only upon the district courts, applied only to *judgments at law* of the state courts, and was merely procedural in purpose. See AMERICAN STATE PAPERS (1834) 1 Misc. No. 17, p. 34, n. 8.

15. See 3 ANN. CONG. 616, 675 (1792).

16. See BROWN, LIFE OF OLIVER ELLSWORTH (1905) 209.

17. See BROWN, *op. cit. supra* note 16, at 194; MACLAY, JOURNAL OF THE SENATE (1890) 103.

18. See MACLAY, *op. cit. supra* note 17, at 103, 105, 107; Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 99.

But whatever the explanation for the enactment of this statutory prohibition against federal enjoinder of state proceedings, it may now fairly be said that it is a "thing of threads and patches" and that its vitality as an effective force in actual judicial administration has become seriously impaired. The Supreme Court has flatly declared¹⁹ that Section 265 is not a limitation upon the jurisdiction of the federal courts, but is merely a restriction upon the exercise of their power to grant equitable relief.²⁰ This constitutes an open avowal that even though the sole object of a federal suit is to enjoin proceedings in a state court, the federal court must nevertheless inquire into the merits of the controversy and determine whether or not the relief should be granted. In the following pages an endeavor has been made to classify and analyze the various situations in which such federal interference has been permitted.²¹

Removal Cases

The first indication of a departure from the categorical terms of the injunction statute arose out of the statutes allowing removal to the federal courts of cases begun in state courts.²² Under the early Removal Acts, what action might be taken by a federal court

19. *Smith v. Apple*, 264 U. S. 274 (1924). Accord: *Sovereign Camp Woodmen of the World v. O'Niell*, 266 U. S. 292 (1924); see *Russell v. Detrick*, 23 F. (2d) 175, 178 (C. C. A. 9th, 1927).

20. That the decision would have been otherwise were it not for the exceptions which the courts have carved out of the statute is indicated by a flatly contrary dictum in *Ex parte Schwab*, 98 U. S. 240, 242 (1878), to the effect that where the sole purpose of the federal suit is to enjoin state proceedings, the question goes to the jurisdiction of the federal court over the cause.

21. Very few cases involving the injunction statute arose prior to the broadening of federal jurisdiction in 1875. Early cases refusing injunctions against state proceedings are *Diggs v. Wolcott*, 4 Cranch 179 (U. S. 1807); *Peck v. Jeness*, 7 How. 612 (U. S. 1849); *Watson v. Jones*, 13 Wall. 679 (U. S. 1871); cf. *Orton v. Smith*, 18 How. 263 (U. S. 1856).

State courts have seldom attempted to enjoin federal court proceedings, and no cases have been found upholding such an injunction. Cf. *McKim v. Voorhies*, 7 Cranch 279 (U. S. 1812); *Weber v. Lee County*, 6 Wall. 210 (U. S. 1867); *United States v. Keokuk*, 6 Wall. 514 (U. S. 1867); *The Supervisors v. Durant*, 9 Wall. 415 (U. S. 1869); *Bank v. Stevens*, 169 U. S. 432 (1897); *Moran v. Sturges*, 154 U. S. 256 (1893); *United States v. King*, 74 Fed. 493 (C. C. E. D. Mo. 1896); *Central National Bank v. Hazard*, 40 Fed. 293 (C. C. N. D. 1892); *Chicago, Milwaukee, & St. Paul Ry. v. Schendel*, 292 Fed. 326 (C. C. A. 8th, 1923); *Ke-Sun Oil Co. v. Hamilton*, 61 F. (2d) 215, 217 (C. C. A. 9th, 1932).

22. The original provision for the removal of cases to the federal courts was embodied in the Judiciary Act of 1789, c. 20, § 12, 1 STAT. 73, 79 (1789). The various Removal Acts are listed in Warren, *supra* note 12, at 369.

where a state court erroneously refused to permit removal was never definitely settled.²³ But, with the vast extensions of the right to removal granted under the impetus of the excitement over State rights and nullification during the Civil War period, it was inevitable that the question would ultimately arise. *French v. Hay*,²⁴ decided in 1874, was the earliest case holding that exceptions to the ostensibly absolute prohibition of the injunction statute might be made. In that case, the defendant in a state court of Virginia who had removed the suit, after judgment, to the federal court, sought to enjoin further proceedings on the judgment by the plaintiff in a state court of Pennsylvania. The Supreme Court held that the federal court had prior and exclusive jurisdiction of the case and that Section 265 did not prohibit an injunction ancillary to the federal proceedings for the purpose of protecting that court's jurisdiction.²⁵

Since the injunction in the *French* case was issued *after judgment in the state court* to restrain further proceedings thereon, there have been occasional suggestions in later cases that the term "proceedings" in the statute refers only to *proceedings prior to judgment*, and that therefore the statute does not prohibit injunctions against action *subsequent* to judgment.²⁶ But that the *French* case did not rest on such a narrow basis, the Supreme Court made abundantly clear in *Madisonville Traction Co. v. St. Bernard Mining Co.*,²⁷ where the issuance of an injunction against proceedings prior to judgment was also held proper.²⁸ And it is now established

23. Cf. Warren, *supra* note 12, at 370. Mr. Warren appears to take the position that the Removal Acts prior to 1863 did not authorize a federal court in which a petition for removal had been filed to proceed with the case until the state court had authorized the removal. But see *Gordon v. Longest*, 16 Pet. 97, 104 (U. S. 1842); *Railroad v. Koontz*, 104 U. S. 5, 14 (1881). All of the Removal Acts from 1789 on seem to make the removability independent of any action by the state court. See *Fisk v. Union Pacific Rr. Co.*, Fed. Cas. No. 4,827, at 156 (S. D. N. Y. 1869).

24. 22 Wall. 250 (U. S. 1874).

25. Accord: *Dietzsch v. Huidekoper*, 103 U. S. 494 (1880).

26. See *Simon v. Southern Ry.*, 236 U. S. 115, 124 (1914). In *Essenay Film Mfg. Co. v. Kane*, 258 U. S. 358 (1922), which refused an injunction against proceedings *still pending* in a state court, Justice Pitney distinguished the *Simon* case on the ground that there the injunction issued against execution after judgment. See *id.* at 360. But see *Central Vermont Ry. v. Redmond*, 189 Fed. 683, 688 (C. C. D. Vt. 1919).

27. 196 U. S. 239 (1905).

28. Accord: *Baltimore & Ohio Ry. Co. v. Ford*, 35 Fed. 170 (C. C. D. W. Va. 1888); *Abeel v. Culbertson*, 56 Fed. 329 (C. C. E. D. Tex. 1893); *Alabama Great Southern Ry. Co. v. American Cotton Oil Co.*, 229 Fed. 11 (C. C. A. 5th, 1916); *Hunt v. Pierce*, 284 Fed. 321 (C. C. A. 8th, 1922); *Colleton Mercantile & Manufacturing Co. v. Savannah River Lumber Co.*, 280

that, where a suit has been properly²⁹ removed into a federal court, that court may issue an injunction ancillary³⁰ to the main proceedings to prevent any further action in the state court.³¹

The justification which the cases offer for making such an exception is that in issuing the injunction, the federal court is merely acting to protect its own jurisdiction.³² But the ground for federal jurisdiction usually invoked in these cases is diversity of citizenship, and it is now well settled that over such cases the federal courts do not have exclusive, but only concurrent, jurisdiction. In *Kline v. Burke Construction Co.*,³³ the Supreme Court held that a federal court could not "protect its jurisdiction" over a contract action originally instituted in the federal court, on the ground of diversity of citizenship, by enjoining proceedings in a suit subsequently commenced by the defendant in a state court on the same

Fed. 358 (C. C. A. 4th, 1922); *Queensboro National Bank v. Kelly*, 15 F. (2d) 395 (E. D. N. Y. 1926); *Dillinger v. Chicago, Burlington & Quincy Rr. Co.*, 19 F. (2d) 196 (C. C. A. 8th, 1927), *But cf. Missouri, K. & T. R. Co. v. Scott*, 13 Fed. 793 (C. C. N. D. Tex. 1882).

29. The federal court has no jurisdiction to proceed, and hence cannot enjoin a state court, until a certified copy of the record has been filed in the federal court. *Railroad v. Koontz*, 104 U. S. 5 (1881); see *Coeur d'Alene Ry. & Nav. Co. v. Spalding*, 93 Fed. 280 (C. C. A. 9th, 1889). Of course, if the case has been remanded to the state court as not properly removable, ancillary jurisdiction to enjoin disappears. *Southern Pacific Co. v. Waite*, 279 Fed. 171 (S. D. Cal. 1922); *Atchison, Topeka and Santa Fe Ry. Co. v. Smith*, 47 F. (2d) 223 (C. C. A. 9th, 1931).

30. To be distinguished from the problem here under consideration is that which arises when a suit is brought in a court of a state the sole object of which is to enjoin proceedings in another state court, and one of the parties seeks to remove to a federal court. In such a case, if the state court has already granted a temporary injunction, Section 265 does not prevent removal, and the injunction remains in full force until dissolved or made permanent by the federal court. *Bondurant v. Watson*, 103 U. S. 281 (1880); *Smith v. Schwed*, 6 Fed. 455 (C. C. W. D. Mo. 1881). But if the state court has not yet granted any restraining order, Section 265 prevents removal. *Lawrence v. Morgan's Railroad and Steamship Co.*, 121 U. S. 634 (1886).

31. See 2 HUGHES, *FEDERAL PRACTICE* (1931) § 1099; 2 FOSTER, *FEDERAL PRACTICE* (6th ed. 1920) §§ 270, 270a; Note (1922) 36 HARV. L. REV. 461.

32. See *Hunt v. Pierce*, *supra* note 28, at 325; *Dillinger v. Chicago, Burlington & Quincy Rr. Co.*, *supra* note 28, at 198; *French v. Hay*, 22 Wall. 250, 251 (U. S. 1874). A federal court will not, however, issue an injunction to protect the jurisdiction of another federal court. *Sand Springs Home & Title Guaranty & Trust Co.*, 16 F. (2d) 917 (C. C. A. 8th, 1926) (relitigation in state court of matters already adjudicated in a defunct federal court).

33. 260 U. S. 226 (1922). Accord: *Young v. Standard Oil Co.*, 35 F. (2d) 551 (N. D. Cal. 1929). *Contra*: *Garner v. Second National Bank*, 67 Fed. 833 (C. C. A. 1st, 1895); *Higgins v. California Prune & Apricot Growers*, 282 Fed. 550 (C. C. A. 2d, 1922). An attempt is made to distinguish the latter from the *Kline* case in Note (1926) 10 MINN. L. REV. 153, at 156, n. 15.

contract. The Court reasoned that, since the Constitution does not give the federal courts jurisdiction over cases involving diversity of citizenship,³⁴ but merely capacity to receive such jurisdiction from Congress, the plaintiff had no constitutional right to a federal adjudication of his cause of action, but only a statutory right to proceed in the federal court which was no greater than the defendant's right to proceed in the state court. Even the possibility that a judgment in the state court would be *res judicata* of the suit pending in the federal court was held to provide no basis for an exception to Section 265.

The exception developed since the *French* case cannot, therefore, rest upon an authority generally to protect federal jurisdiction over a controversy brought to the federal court. But it may be said that while there is nothing in the Constitution to prevent a party to a suit in a federal court from instituting an action in a state court on the same cause, yet the Removal Acts provide that when a suit in a state court has been removed to the federal court, "It shall then be the duty of the state court to . . . proceed no further in said suit."³⁵ This phraseology is strikingly reminiscent of the clause in the Shipowners' Limited Liability Act,³⁶ which enacts that from and after the transfer to a trustee of the shipowner's interest in the ship and freight all claims against the owner shall cease. As a matter of statutory interpretation, the soundness of the construction placed upon this Act, that it authorizes a writ of injunction to issue from the federal courts, is a matter upon which opinions may differ.³⁷ But assuming that such an interpretation is justified, no reason is perceived why the similar clause in the Removal Acts should not be given a like construction. If the courts in the removal cases had availed themselves of this statutory command as a ground of decision, they could have avoided the introduction of such unfortunately broad phrases as "protecting the prior jurisdiction of the federal court."

34. The same would, of course, be true whatever the basis of federal jurisdiction.

35. 18 STAT. 470 (1875), 28 U. S. C. § 72 (1926).

36. 9 STAT. 636 (1851), 46 U. S. C. § 185 (1926). See note 5, *supra*.

37. A prohibition against continuance of the action in the state court is certainly not necessarily a repeal *pro tanto* of the prohibition against issuance of injunctions to prevent such continuance. It may be plausibly argued that, had Congress intended the Removal Acts or the Limited Liability Act to authorize injunctions forbidden by the Act of 1793, it would have so provided in the Revised Statutes of 1874, as it did with respect to "any law relating to proceedings in bankruptcy."

Relitigation

Out of the same theory of protecting federal jurisdiction has sprung another judge-made exception to Section 265. While no basis was found for limiting the application of the Section in early cases involving the relitigation in a state court of issues adjudicated in a prior federal action,³⁸ the federal courts have now adopted a contrary position. In 1906³⁹ the Circuit Court for the District of Montana issued an injunction against a state action to enjoin the plaintiff from asserting any claim to property the title to which the federal court had previously adjudged to be in the plaintiff.⁴⁰ The injunction was found necessary in order to make effectual the judgment of the federal court in the previous action at law. This doctrine the Supreme Court later stamped with approval, by implication if not expressly,⁴¹ in *Supreme Tribe of Ben Hur v. Cauble*.⁴² A federal court had rendered a decree defining the rights of a class of members of a fraternal benefit association. It was held that the court had ancillary jurisdiction of a bill brought to enjoin certain members of the class from reopening in the state courts the questions thus settled by suits against the association, and that it might properly issue the injunction.⁴³

The same doubts which the principles underlying the *Kline* case throw upon the validity of the removal exception, render difficult a logical justification of the cases now under consideration. Moreover, the federal jurisdiction may be sufficiently protected by the availability of review in the Supreme Court. If the state court fails to give to the federal court's judgment the effect to which it

38. *Dial v. Reynolds*, 96 U. S. 340 (1877).

39. In the same year, the Supreme Court in *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273 (1906), rendered a decision which seems properly to fall in the "relitigation" category, but the decision was placed on the ground that the state had voluntarily submitted to the jurisdiction of the federal court by the attorney-general's appearance, and that the Act of 1793 only prevented federal courts from acting against the will and consent of a state.

40. *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 148 Fed. 450 (C. C. D. Mont. 1906). Accord: *Missouri Pacific Ry. Co. v. Jones*, 170 Fed. 124 (C. C. W. D. Mo. 1909).

41. The Court made no reference to either *Dial v. Reynolds* or Section 265 of the Judicial Code. It cited *Looney v. East Texas Ry. Co.*, 247 U. S. 214 (1918), which is generally taken as authority for wholly different propositions. See *infra*, pp. 1191 and note 106.

42. 255 U. S. 356 (1920).

43. Accord: *Wilson v. Alexander*, 276 Fed. 875 (C. C. A. 5th, 1921); *United States v. Reading Co.*, 300 Fed. 477 (E. D. Pa. 1924); *Hickey v. Johnson*, 9 F. (2d) 498 (C. C. A. 8th, 1925); *American Surety Co. of New York v. Baldwin*, 2 Fed. Supp. 679 (D. Idaho 1933).

is entitled under the Constitution, the party pleading *res judicata* may seek certiorari from the Supreme Court⁴⁴ and thus secure a federal determination of this "federal question."

Suits Involving Judicial Custody of Specific Property

It is in connection with suits where a court is dealing with, or may be obliged to deal with, specific property—so-called suits *in rem*—that the federal courts have made most frequent use of the doctrine that, in order to protect their own jurisdiction, it is legitimate to enjoin proceedings in state courts. Conflicts of jurisdiction over specific property involved in actions in both a federal and a state court occurred sporadically from a very early date.⁴⁵ The fundamental principle of comity between courts of concurrent jurisdiction upon which these conflicts were settled was that the court which first acquired jurisdiction over the property was entitled to retain its jurisdiction free from interference by other courts.⁴⁶ But the question of the applicability of Section 265 does not seem to have arisen during the first one hundred years following the adoption of the Constitution. In 1889, however, in the case of *Sharon v. Terry*,⁴⁷ it was once more made apparent that the Act meant much less than it seemed to on its face. Suit was brought in a federal court to have an alleged marriage contract declared void as a forgery. The defendant thereafter successfully maintained an action in a state court to have the same contract declared valid, and to entitle her to share in the community property. The federal court

44. *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141 (1887); See *Chicago, Rock Island & Pacific Ry. Co. v. St. Joseph Union Depot Co.*, 92 Fed. 22, 26 (C. C. W. D. Mo. 1898). Apparently federal determination could be immediately secured by removal of the controversy in the state court to a federal court. Failure to give effect to a decree of a federal court was held sufficient basis for removal in *South Dakota Central Ry. Co. v. Continental & Commercial Trust & Savings Bank*, 255 Fed. 941 (C. C. A. 8th, 1919); *Torquay Corp. v. Radio Corp. of America*, 2 Fed. Supp. 841 (S. D. N. Y. 1932).

45. See Warren, *supra* note 12, at 347, 366.

46. See *Harkin v. Brundage*, 276 U. S. 36, 43 (1928). It was early held that the state courts are without power to enjoin federal adjudications of title to realty [*McKim v. Voorhies*, 7 Cranch 279 (U. S. 1812)], and that the state courts cannot interfere with actions of federal officers [*McClung v. Silliman*, 6 Wheat. 598 (U. S. 1821)], or with their control of property [*Wallace v. McConnell*, 13 Pet. 136 (U. S. 1839)], or custody of persons [*Tarble's Case*, 13 Wall. 397 (U. S. 1872)]. Similarly, federal courts were denied the power to levy on property in the custody of state courts, [*Hagan v. Lucas*, 10 Pet. 400 (U. S. 1836)], or to discharge the liens established by prior state attachments [*Peck v. Jeness*, 7 How. 612 (U. S. 1849)].

47. 36 Fed. 337 (C. C. N. D. Cal. 1888), *aff'd*, 131 U. S. 40 (1889).

subsequently found that the purported contract was a forgery and, with the sanction of the Supreme Court, enjoined enforcement of the state court's decree on the ground that federal jurisdiction over the *res* had first attached. In 1903 this doctrine was extended by the Supreme Court, in *Julian v. Central Trust Co.*,⁴⁸ to allow an injunction to issue after the property which was the subject of the federal suit had passed out of the possession of the federal court.⁴⁹

Decisions similar to those in the *Sharon* and *Julian* cases have been rendered up to a very recent date.⁵⁰ But the scope of this exception is limited by the doctrine of comity out of which it grew. Thus it is only where the federal court has *prior* jurisdiction of a suit *in rem* that an injunction will issue against a state suit concerning the same property.⁵¹ Some question has inevitably arisen concerning the meaning of these phrases. A broad definition frequently given of a suit *in rem* is that it is one dealing, either actually or potentially, with specific property.⁵² But that suits *in rem* com-

48. 193 U. S. 93 (1903).

49. Accord: *Fidelity Insurance Trust etc. Co. v. Norfolk & Western Ry. Co.*, 88 Fed. 815 (C. C. W. D. Va. 1898); *Stewart v. Wisconsin Central Ry. Co.*, 117 Fed. 782 (C. C. N. D. Ill. 1902); *Munroe v. Raphael*, 53 Sup. Ct. 424 (1933).

50. *Lang v. Choctaw, Oklahoma, & Gulf Rr. Co.*, 160 Fed. 355 (C. C. A. 8th, 1908); *Swift v. Black Panther Oil & Gas Co.*, 244 Fed. 20 (C. C. A. 8th, 1917); *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123 (E. D. Mo. 1918); *Phipps v. Chicago, Rock Island & Pacific Ry. Co.*, 284 Fed. 945 (C. C. A. 8th, 1922); *Franz v. Franz*, 15 F. (2d) 797 (C. C. A. 8th, 1926); *Fiske v. State of Missouri*, 62 F. (2d) 150 (C. C. A. 8th, 1932); *cf. Wabash Rr. Co. v. Adelbert College*, 208 U. S. 38 (1907); Note (1908) 21 HARV. L. REV. 433. On the basis of the well-settled rule that a receiver may not be sued without the consent of the court appointing him, it has been held that a federal court may enjoin state suits against a receiver appointed by it. *Oklahoma v. Texas*, 265 U. S. 490 (1924). But under 24 STAT. 544 (1887), as amended by 25 STAT. 436 (1888), 28 U. S. C. § 125 (1926), a federal receiver, subject to the general equity jurisdiction of the federal court, may be sued for any act of his in carrying on administration of the property in his hands, regardless of leave of the court appointing him. It is held that, under this statute, federal courts cannot enjoin state suits against federal receivers. *Willcox v. Jones*, 177 Fed. 870 (C. C. A. 4th, 1910); *Smith v. Jones Lumber & Mercantile Co.*, 200 Fed. 647 (W. D. Wis. 1912); *American Brake Shoe and Foundry Co. v. Pere Marquette Rr. Co.*, 263 Fed. 237 (E. D. Mich. 1920), 278 Fed. 832 (E. D. Mich. 1922).

51. Where the state court's jurisdiction of the property was prior to that of the federal court, injunctions were denied. *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77 (1923); *Insurance Finance Corp. v. Phoenix Securities Corp.*, 42 F. (2d) 933 (D. C. Idaho, 1930); *cf. Cochran v. W. F. Potts Son & Co.*, 47 F. (2d) 1026 (C. C. A. 5th, 1931).

52. *Baltimore & Ohio Ry. Co. v. Wabash Rr. Co.*, 119 Fed. 678 (C. C. A. 7th, 1902). Thus it is generally held that the following are suits *in rem*:

prise not only controversies where the court by the very nature of the action *must* deal with specific property,⁵³ but include also proceedings "where, in the progress of the litigation, the court *may* be compelled to assume the possession and control of the property to be affected,"⁵⁴ is demonstrated by cases holding that suits involving the legality of public utility rates are suits *in rem*.⁵⁵ Similarly, there has been dispute as to the meaning of *prior* jurisdiction. Where both the federal and state suits are *in rem*, the court in which proceedings were first instituted is regarded as having acquired constructive possession of the property involved, and, consequently, that its jurisdiction is prior to that of a court in which proceedings are subsequently instituted, even though actual possession of the property is first taken by the latter court.⁵⁶ But in cases where

bills to quiet title [Franz v. Franz, *supra* note 50]; actions of ejectment [Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294 (1884); *cf.* Hull v. Burr, 234 U. S. 712 (1914)]; to foreclose mortgages [Mercantile Trust & Deposit Co. v. Roanoke & S. Ry. Co., 109 Fed. 3 (W. D. Va. 1901)]; to impress trusts on property [Insurance Finance Corp. v. Phoenix Securities Corp., *supra* note 51]; to have a receiver appointed [Gay v. Hudson River Electric Power Co., 182 Fed. 279 (C. C. N. D. N. Y. 1910)]; to establish a right of user in the flow of a stream [Rickey Land and Cattle Co. v. Miller and Lux, 218 U. S. 258 (1910)]. On the other hand, it is equally clear that suits on contracts for damages are strictly *in personam*. Kline v. Burke Construction Co., 260 U. S. 226 (1922). A garnishment suit *quasi in rem* is not a suit *in rem* within the meaning of the exception under discussion. National Fire Insurance Co. v. Sanders, 38 F. (2d) 212 (C. C. A. 5th, 1930). Disagreement has arisen, however, concerning the character of bills for the cancellation of contracts. Compare Sharon v. Terry, *supra* note 47 (action to annul marriage contract regarded as one *in rem*), with Great North Woods Club v. Raymond, 54 F. (2d) 1017 (C. C. A. 6th, 1931) (suit for cancellation of insurance policy held not *in rem*).

53. It is to be noted that a criminal defendant's person is a *res*, federal jurisdiction over which may be protected by injunction against state interference. United States v. Brown, 281 Fed. 657 (C. C. A. 8th 1922); see Ponzi v. Fessenden, 258 U. S. 254, 260 (1922).

54. See Farmers' Loan & Trust Co. v. Lake Street Elevated Rr. Co., 177 U. S. 51, 61 (1900).

55. People's Gas Light & Coke Co. v. City of Chicago, 192 Fed. 398 (C. C. N. D. Ill. 1911); Pacific Telephone & Telegraph Co. v. Star Publishing Co., 2 F. (2d) 151 (W. D. Wash. 1924); Pacific Telephone & Telegraph Co. v. Agnew, 5 F. (2d) 221 (C. C. A. 9th, 1925). For a clear exposition as to why this is true, see Consolidated Gas Co. of New York v. Newton, 267 Fed. 231 (S. D. N. Y. 1920).

56. Palmer v. Texas, 212 U. S. 118 (1909); see SIMKINS, FEDERAL PRACTICE (1923) 752. *Cf.* Amusement Syndicate Co. v. El Paso Land Co., 251 Fed. 345 (W. D. Tex. 1918). But *cf.* Franzen v. Chicago, Milwaukee, & St. Paul Ry. Co., 278 Fed. 370 (C. C. A. 7th, 1921); Weaver v. Field, 16 Fed. 22 (C. C. E. D. La. 1883). Patterson v. Veasey, 295 Fed. 163 (N. D. Ga. 1924). A case illustrating these last two rules is Havner v. Hegnes, 269 Fed. 537 (C. C. A.

the courts are not of concurrent jurisdiction, or the subject matter in litigation is not within the cognizance of one of the courts,⁵⁷ it is held that jurisdiction over property attaches to the court which first takes actual possession of it.⁵⁸

But even when the federal court has prior jurisdiction of specific property, if the state action is not of such a nature that its independent determination will hinder or impede the federal court in its administration of the property, the state action may not be enjoined. This notion is a logical development of the rule laid down in *Kline v. Burke Construction Co.*⁵⁹ that the mere pendency in courts of concurrent jurisdiction of two suits *in personam* involving the same parties and issues affords no ground for the issuance of an injunction by the court in which suit is first instituted. The qualification of this holding developed in cases where specific pro-

8th, 1920). Here the plaintiff sued in the federal court for the appointment of a receiver; before a receiver was appointed, a state court in a suit subsequently instituted appointed a receiver who took actual possession of the property. The federal court restrained further proceedings in the state court and directed the state receiver to surrender the property.

57. See *Harkin v. Brundage*, 276 U. S. 36, 43 (1928); *cf. In re Prunotto*, 51 F. (2d) 602 (W. D. Va. 1931).

58. *Moran v. Sturges*, 154 U. S. 256 (1894); *Empire Trust Co. v. Brooks*, 232 Fed. 641 (C. C. A. 5th, 1916); *cf. Gross v. Irving Trust Co.*, 53 Sup. Ct. 605 (U. S. 1933). In the former case a state court in which proceedings for the winding-up of a corporation had been first instituted, but which had no jurisdiction to enforce the collection of maritime liens on vessels included in the corporation's assets, was held not to have jurisdiction concurrent with that of a federal court which had taken actual possession of the boats under proceedings subsequent to those in the state courts.

Where jurisdiction is concurrent, a suit for the appointment of a receiver subsequent to a suit *in personam* in another court vests the former court with such jurisdiction over the property as to prevent levying execution thereon under the suit *in personam*. *Jackson v. Parkersburg & Ohio Electric Co.*, 233 Fed. 784 (N. D. W. Va. 1916). But if a suit *in personam* results in the attachment of property before a suit for a receiver is instituted, the court appointing the receiver gets no jurisdiction over the attached property. *Gates v. Bucki*, 53 Fed. 961 (C. C. A. 8th, 1893); *Lydick v. Neville*, 287 Fed. 479 (C. C. A. 8th, 1923); *Ke-Sun Oil Co. v. Hamilton*, *supra* note 21. But *cf. Pacific Coast Pipe Co. v. Conrad City Water Co.*, 245 Fed. 846 (C. C. A. 9th, 1917). Similarly, where a state suit *in personam* has resulted in judgment, and the judgment lien has attached, a receiver subsequently appointed in a federal court cannot enjoin enforcement of the lien. *Bortman v. Urban Motion Picture Industries*, 4 F. (2d) 913 (C. C. A. 2d, 1925); *Baker v. Ault*, 78 Fed. 394 (C. C. D. Wash. 1897). But the result is contrary if the judgment is not docketed, so that its lien has not attached when the proceedings for receivership are begun. *Davis v. Seneca Falls Mfg. Co.*, 8 F. (2d) 546 (W. D. N. Y. 1925), modified in 17 F. (2d) 546 (C. C. A. 2d, 1927); *Quinn v. Bancroft Jones Corp.*, 12 F. (2d) 958 (W. D. N. Y. 1926).

59. Note 33, *supra*.

erty is involved, should be limited to cases where practical considerations indicate the advisability of a single determination of all questions in dispute involving the property. A most important decision indicating that an exception to Section 265 will only be made in cases where such considerations are present, is the recent Supreme Court case of *Riehle v. Margolies*,⁶⁰ in which the Court refused to enjoin continuance of a personal action in a state court against a corporation for which the federal court had appointed an equity receiver. The Court's decision was predicated upon the ground that a state action *in personam* does not necessarily interfere with a federal court's custody and administration of an estate in receivership. It is uncertain whether or not the implications of this decision will be permitted to extend its effect beyond the precise holding, as the opinion laid some stress upon the circumstance that the state suit was pending when the federal receivership proceeding was instituted.⁶¹ In cases where the state suit was commenced after the federal court had taken jurisdiction over the property, an injunction has been denied in one instance⁶² but granted in another.⁶³

The decisions, however, of Judge Mack in *Stansbury v. Koss*⁶⁴ and of Judge Learned Hand in *In re Putnam*,⁶⁵ may both be regarded as extending the principle of the *Riehle* case to such situations, and as carrying out its implicit declaration that the principles of the *Kline* case may be applied to federal suits *in rem*. In the *Stansbury* case the defendants, executors of the will of the wealthy Ella V. VonE. Wendel offered the will for probate in a New York state court. Subsequently, the plaintiff filed a bill in the federal court alleging that she had been fraudulently induced to execute an agreement not to contest the will and praying for its cancellation and for an injunction against its use in connection with the probate

60. 279 U. S. 218 (1929). See also *International & Great Northern Ry. Co. v. Adkins*, 14 F. (2d) 149 (S. D. Tex. 1926).

61. See 279 U. S. 218, 225 (1929).

62. *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43 (C. C. A. 8th, 1909).

63. *Guaranty Trust Co. v. Broadway and Seventh Avenue Rr. Co.*, 43 F. (2d) 130 (S. D. N. Y. 1930).

64. S. D. N. Y., Dec. 24, 1931.

65. 55 F. (2d) 73 (C. C. A. 2d, 1932). With the *Stansbury* and *Putnam* cases should be contrasted a recent decision in the Fourth Circuit, which holds that the power of the federal courts to protect their jurisdiction by enjoining state proceedings is not confined to suits *in rem*, but extends to any situation where the jurisdiction of the federal court may be impaired. *Brown v. Pacific Mutual Life Insurance Co.*, 62 F. (2d) 711 (C. C. A. 4th, 1933). The court's treatment of the *Kline* case is wholly unsatisfactory.

of the will. Judge Mack ruled that, although the prior probate proceeding was *in rem*, the federal court had jurisdiction.⁶⁶ This decision is equally applicable to cases where a federal court with prior jurisdiction of a *res* is requested to enjoin a subsequent state action *in personam*. He said:

"Probate proceedings are *in rem*; moreover, in this country they are within the exclusive jurisdiction of the state courts. But it is well settled that actions or suits *in personam*, though affecting or establishing rights against the estate, such as the claims of creditors or beneficiaries, and thus incidental to the probate proceedings in which the judgments or decrees may have to be filed in order to share in the estate, are within the jurisdiction of the federal courts, if there be the essential diversity of citizenship. See *Riehle v. Margolies*, 279 U. S. 218, 225-26 and cases cited. Such a suit 'neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of the jurisdiction, nor lead to a conflict of authority where each court acts in accordance with the law.' *Kline v. Burke Construction Co.*, 260 U. S. 226, 232 (1922) . . ." ⁶⁷

In the *Putnam* case, despite the settled construction of the Ship-owners' Limited Liability Act of 1851 as giving federal courts, in which proceedings to limit liability have been instituted, power to enjoin the prosecution in state courts of claims against the owner of the vessel,⁶⁸ the Circuit Court of Appeals for the Second Circuit appears to have applied to federal proceedings for the limitation of liability the principles of the *Kline* case. It held that, since the limitation proceedings did not involve any *res* which the federal court was called upon to administer, an injunction against state actions on claims against the owner would not issue. The language of Judge Learned Hand strongly manifests the increasing reluctance to extend the scope of existing exceptions to Section 265. After observing that the doctrine which supposedly controls the disposition of these cases is that of exclusive jurisdiction in the court first securing control of the *res*, he declares:

"There are perhaps no greater practical difficulties in allowing two suits *in rem* to proceed together than two suits *in personam*, and it is well settled that the plea of *lis alio pendens* is not good between state and federal courts. *McClelland v. Carland*, 217 U. S. 268 . . .; *Kline v. Burke*

66. *Cf. Mercantile Trust Co. v. Lamoille Valley Rr. Co.*, Fed. Cas. No. 9, 432 (C. C. D. Vt. 1879); *Berrara v. City Real Estate Co.*, 64 F. (2d) 498 (C. C. A. 2d, 1933). See *Watson v. Jones*, 13 Wall. 679, 720 (U. S. 1871); *Russell v. Detrick*, *supra* note 19, at 177.

67. See note 64, *supra*.

68. See note 5, *supra*.

Const. Co., 260 U. S. 226 . . . Therefore the doctrine must rest upon the formal requisite that jurisdiction in suits *in rem* depends upon actual possession of the res—or power at any time to assume it—and that a scramble for possession would be an unedifying spectacle.

“The case at bar does not present that situation. The claimant’s proposed action is *in personam*; no interest in the yacht is at stake. Execution will run against the petitioner’s assets generally . . . ; indeed against his person . . . ; if his assets fail . . . The statute (U. S. C., tit. 46, Sec. 183) . . . does not presuppose any pre-existing res of which the court is to take possession . . . When there is but a single possible claim, a contrary result would only remove the cause from the tribunal properly vested with jurisdiction; in short, avoid a jury trial. The statute intended nothing of the sort, and the effort is to be discountenanced.”⁶⁹

It is the language and attitude of the court in the *Stansbury* and *Putnam* cases, rather than the actual holdings, which are significant. They strongly suggest the incipient breakdown of the heretofore crystallized rule of law that federal jurisdiction over specific property necessarily draws to the court exclusive jurisdiction over all matters affecting such property. The wisdom of this new approach to the exception which has been created with respect to federal suits *in rem* can hardly be doubted. The acknowledged policy of the statute is to guard against the friction which invariably accompanies jurisdictional conflict. Even if other considerations of policy, such as the desirability of a single determination of all questions involving administration of specific property, are taken to justify a departure from the ban on the operation of injunctions between courts of concurrent jurisdiction, still the rule allowing these departures should be no broader than the policy to which it purports to give effect. The *Riehle*, *Stansbury*, and *Putnam* cases have made it apparent that judges do not find it invariably necessary that all issues which may possibly affect specific property be determined by a single court.

A related question of great importance is the effect which should be given to adjudications in suits *in personam* in other courts, by the court under whose jurisdiction the property is being administered. The problem is of particular and timely interest in the case of federal equity receiverships. For clearly, even though it be held that a federal receivership does not in itself justify injunctions against state suits *in personam* which do not threaten interference with the course of administration, the state proceedings will, nevertheless, frequently be robbed of all utility if they are not held conclusive of the amount or validity of claims against the debtor

69. *Supra*, note 65, at 74-75.

whose estate is in receivership. It has long been settled that a judgment *in personam* is conclusive in a receivership proceeding of the amount and validity of the claim, both when rendered before appointment of a receiver in another court⁷⁰ and when rendered after such appointment, provided the receiver intervened or otherwise took part in the suit.⁷¹ But the state courts have been in conflict with reference to the situation where the receiver is not in any way a party to a judgment rendered after he was appointed.⁷² As far as federal receiverships are concerned, *Riehle v. Margolies*⁷³ held the state judgment conclusive where the suit was begun before the receivership.⁷⁴ Whether a judgment in a state suit begun after proceedings for a receivership had been instituted would likewise be conclusive was expressly left undecided.⁷⁵ However, Judge Mack's conclusion in the *Stansbury* case that the federal court had jurisdiction to determine the validity of the complainant's agreement not to challenge probate of the will at least shows that such distinction

70. *Hopkins v. Taylor*, 87 Ill. 436 (1877); *cf.* *Stearns v. Lawrence*, 83 Fed. 738 (C. C. A. 6th, 1897).

71. *Bereth v. Sparks*, 51 F. (2d) 441 (C. C. A. 7th, 1931); *cf.* *Smith v. United States Express Co.*, 135 Ill. 279, 25 N. E. 525 (1890). While the courts often talk the language of estoppel in these cases, it has been correctly pointed out that the principles of *res judicata* are quite sufficient to support the conclusions. See Beach, *Judgment Claims in Receivership Proceedings* (1921) 30 YALE L. J. 674, 674-76.

72. Massachusetts has held such judgments inconclusive, and that the receiver may properly hear and determine the claim *de novo*. *Attorney-General v. Supreme Council American Legion of Honor*, 196 Mass. 151, 81 N. E. 966 (1907). The New York courts have reached the opposite conclusion. *Pringle v. Woolworth*, 90 N. Y. 502 (1882).

73. 279 U. S. 218, 228 (1929).

74. *Accord: Mercantile Trust Co. v. Pittsburgh & Western Rr. Co.*, 29 Fed. 732 (C. C. W. D. Pa. 1887); *Pine Lake Iron Co. v. Lafayette Car Works*, 53 Fed. 853 (C. C. D. Ind. 1893); *Pennsylvania Steel Co. v. New York City Ry. Co.*, 161 Fed. 786 (C. C. S. D. N. Y. 1908). The converse should, of course, be equally true; federal judgments *in personam* should be regarded as binding adjudications of the amount and validity of claims in state receivership proceedings. See *United States v. Illinois Surety Co.*, 238 Fed. 840, 846 (E. D. N. C. 1917). If the suit *in personam* has not been brought to judgment by the time when distribution of the assets in the hands of the receiver is to be made, probably distribution will not wait upon determination of the state suit, and the receiver himself may adjudicate the claim. *Pennsylvania Steel Co. v. New York City Ry. Co.*, *supra*; see *Riehle v. Margolies*, 279 U. S. 218, 224 (1929); *cf.* *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 229 Fed. 120 (C. C. A. 2d, 1915).

75. See *Riehle v. Margolies*, 279 U. S. 218, 225 (1929). In *Pringle v. Woolworth*, *supra* note 72, a judgment of a foreign court was held conclusive although that action was instituted after the New York court had appointed a receiver.

need not necessarily be drawn. For, in that case, the federal suit *in personam* was instituted after the petition for probate had been filed in the state court, and on the well-established doctrine of constructive possession the state court had already acquired exclusive jurisdiction of all matters directly affecting distribution of the decedent's assets. If in such a situation the federal court may hear related suits *in personam*, it would seem to follow that state courts may with equal propriety determine suits *in personam* commenced after the appointment of a federal receiver.⁷⁶

Void or Inequitable Judgments

Behind all the judge-made exceptions to the injunction statute thus far discussed has been the notion that the injunction against state proceedings is in the nature of an ancillary remedy granted for the purpose of protecting the previously acquired jurisdiction of a federal court. In 1891, however, in *Marshall v. Holmes*,⁷⁷ the Supreme Court introduced into the statute an exception which bears no relation to the protection of federal jurisdiction. In that case it was held that a federal court might enjoin a litigant from enforcing a judgment obtained in a state court by fraudulent means. The decision was rested on the ground that the injunction would not act upon the court itself but merely upon the person of the party litigant by taking from him the benefit of a judgment obtained by fraud. Obviously, the interference with state courts which Section 265 prohibits is no less substantial where the proceedings are stayed by process issued against the litigants therein than where the court itself is enjoined. Moreover, considered purely as a matter of general chancery practice, apart from any considerations peculiar to the relation between state and federal courts, it has long been settled that an injunction against court proceedings should always issue only against the plaintiff, never against the judge before whom the cause is being tried.⁷⁸ Even during the reign of James the First, when the conflict between law and equity was most bitter, the chancellors did not presume to exercise the injunctive power against the judges themselves.⁷⁹ It is hardly to be supposed, therefore, that the framers of the injunction statute were seeking only

76. But see *Porter v. Sabin*, 149 U. S. 473, 479 (1893).

77. 141 U. S. 589 (1891).

78. *Home National Bank of Cleburne v. Wilson*, Judge, 265 S. W. 732 (Tex. Civ. App. 1924); see (1925) 25 COL. L. REV. 371.

79. Note, *Common Pleas* (1626), LITTLETON, p. 37; see *Lofft* 38 (c. p. 1626) Eng. Rep.; see WILSON, *LIFE OF JAMES I.* pp. 94-95; 2 CAMPBELL, *LIVES OF THE LORD CHANCELLORS* (1846) 241 *et seq.*

to prevent federal injunctions against a state court as such. Indeed, if there is substance in the distinction taken by the Court, it is difficult to see why it should not justify an injunction even against pending state proceedings, of whatever nature, whenever sufficient equitable grounds are shown, provided the injunction is so framed as to run only against the litigants. In spite of the fallacy on which this distinction rests, however, it has frequently been made in the lower federal courts:⁸⁰ injunctions sought against a sheriff to prevent him from levying execution under a state court judgment have been denied,⁸¹ while injunctions against judgment creditors, to prevent them from causing execution to be levied, have been freely granted.⁸²

In 1914, in *Simon v. Southern Railway*,⁸³ the Supreme Court undertook to spell out at greater length the theory on which was based the power of federal courts to enjoin the execution of state judgments. In this case, the state judgment whose enforcement was enjoined was not one which had been fraudulently obtained, but one which was void for want of personal jurisdiction over the defendant. The Court declared that while Section 265 prohibits enjoining *pending* proceedings, yet "when the litigation has ended, and a judgment has been obtained, and the plaintiff tries to use such judgment, a new state of facts not within the statute may arise."⁸⁴ After using the dubious authority of *Julian v. Central Trust Co.*⁸⁵ for the proposition that a federal court may enjoin the inequitable use of a state judgment, the Court continued:

"If in a proper case a plaintiff holding a valid state judgment may be enjoined by a federal court from its inequitable use, by so much more can the federal court enjoin him from using that which purports to be a judgment, but which is in fact an absolute nullity . . . That conclusion is inevitable, or else the federal court must hold that a judgment—void for want of service—is a 'proceeding in a state court' even after the pretended litigation has ended and the void judgment has been obtained.

80. *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593 (C. C. A. 8th, 1903); *Schultz v. Highland Gold Mines Co.*, 158 Fed. 337 (C. C. D. Ore. 1907); *Chicago, Rock Island & Pacific Ry. Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8th, 1920); *Hewitt v. Hewitt*, 17 F. (2d) 716 (C. C. A. 9th, 1927). But see *Mercantile Trust Co. v. Binford*, 6 F. (2d) 285, 287 (N. D. Tex. 1925); *Rosa Dew Stansbury v. Koss*, *supra* note 64; *Security Trust Co. v. Union Trust Co.*, 134 Fed. 301, (C. C. E. D. Pa. 1904).

81. *Leathe v. Thomas*, 97 Fed. 136 (C. C. A. 7th, 1899).

82. See cases cited in note 80, *supra*.

83. 236 U. S. 115 (1914).

84. *Id.* at 124.

85. 193 U. S. 93 (1904).

Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes." ⁸⁶

It seems clear that the Court's decision is based upon a construction of the word "proceedings" in the statute. It is not clear, however, whether the Court means that judicial business of which the forum has no jurisdiction is not a "proceeding" within the statute, or that nothing which may transpire after judgment *in any case* is such a "proceeding." There seems little reason to believe that the word "proceeding" was used in the statute in any more limited sense than to include any application to a state court for aid in the enforcement of rights. But, however that may be, any quibble over this point would now be unprofitable, for the rule that the enforcement of a void judgment may be enjoined is well settled.⁸⁷ This exception to the statute cannot, however, be justified on the ground that the injunctive power is necessary to secure federal protection to aggrieved litigants, for the question of the lack of personal jurisdiction is a federal question under the due process clause of the Fourteenth Amendment, and not only may the state judgment be directly reviewed by the Supreme Court, but it may, if in fact rendered without due process, be questioned defensively as in *Pennoyer v. Neff*.⁸⁸

Subsequent decisions have clarified the principles upon which the *Simon* case may be said to rest. In *Essanay Film Manufacturing Co. v. Kane*,⁸⁹ a federal court was asked to enjoin an action for conversion which was being brought against the complainant in a state court of New Jersey, again on the ground that the state court was without personal jurisdiction. This time, however, the state action had not yet gone to judgment. The Court seized upon this fact as being a sufficient bar to the complainant's bill, and contented itself with distinguishing the *Simon* case on the ground that there the litigant was enjoined from "enforcing a *final* judgment."⁹⁰

86. 236 U. S. 115, 125, 128 (1914).

87. *Atchison, Topeka and Santa Fe Ry. Co. v. Wells*, 265 U. S. 101 (1924); *Seay v. Hawkins*, 17 F. (2d) 710 (C. C. A. 8th, 1927). But *cf.* *Fenwick Hall Co. v. Saybrook*, 66 Fed. 389 (C. C. D. Conn. 1895); *Union Pacific Rr. Co. v. Flynn*, 180 Fed. 565 (C. C. W. D. Mo. 1910); *Seaboard Airline Co. v. Fowler*, 275 Fed. 239 (W. D. N. C. 1921). See (1923) 35 HARV. L. REV. 472. Of course, enforcement of a state judgment will not be enjoined merely because the state court erred in its application of the law. *Wagner Electric Co. v. Lyndon*, 282 Fed. 219 (C. C. A. 8th, 1922). But *cf.* *Danciger v. Stone*, 187 Fed. 853 (C. C. E. D. Okla. 1909).

88. 95 U. S. 714 (1878).

89. 258 U. S. 358 (1922).

90. *Id.* at 360. (Italics supplied).

But if a case in which the state court is without jurisdiction is not in fact a "proceeding" within the meaning of the statute *after* judgment, it may be questioned whether it is any the more a proceeding *before* judgment. The judgment can be no more a nullity than is that from which it sprang. Viewed in the light of the *Essanay* case, the *Simon* case must be taken to mean, not that the lack of jurisdiction deprives the state court's action of the character of a "proceeding,"⁹¹ but that the fact that judgment has been rendered does so.⁹² In other words, "proceedings," which alone the statute embraces, last only up to judgment; thereafter, the action taken by the officers of a court in a case—such as the levying of execution under the judgment by the sheriffs—must be called by some other name.⁹³

The decision in the *Simon* case, as it appeared before the *Essanay* case, would clearly be no authority for the issuance of a federal injunction against inequitable state judgments. For, although a judgment rendered without personal jurisdiction is a nullity, the same is not true of one which is obtained by fraud or in breach of

91. It is no ground for a federal injunction against a pending state proceeding that the state court is acting without jurisdiction. *Detroit Monroe & Toledo Shore Line Ry. Co. v. City of Monroe*, 262 Fed. 177 (E. D. Mich. 1919).

92. In 1885, the Supreme Court had squarely refused to recognize any such distinction by disallowing an injunction against the enforcement of a state judgment. *Sargent v. Helton*, 115 U. S. 348 (1885).

It is impossible to find any basis of statutory interpretation for holding that the statute does not apply to steps taken after judgment. Furthermore, if it be true that the statute was to a large extent the result of the proposal made by Edmund Randolph (see note 14, *supra*), the instant exception removes from the operation of the statute the very cases which were foremost in Randolph's mind as the ones in which state courts should be assured of freedom from federal interference, since Randolph was primarily concerned with preventing a separation of law and equity between the state and federal courts after a case had proceeded to judgment in the state courts.

93. However, it has been frequently held that "proceedings" within Section 265 include all steps taken in a suit from its inception to and including final process. *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S. D. Cal. 1921); *Mills v. Provident Life & Trust Co.*, 100 Fed. 344 (C. C. A. 9th, 1900); *American Association v. Hurst*, 59 Fed. 1 (C. C. A. 6th, 1893); *Daly v. Sheriff*, Fed. Cas. No. 3553 (C. C. D. La. 1871); *Security Trust Co. v. Union Trust Co.*, 134 Fed. 301 (C. C. E. D. Pa. 1904); *Union Pacific Ry. Co. v. Flynn*, *supra* note 87; *cf. Yick Wo v. Crowley*, 26 Fed. 207 (C. C. D. Cal. 1886); *Wayman v. Southard*, 10 Wheat. 1 (U. S. 1825). But *cf. Rennselaer & S. R. Co. v. Bennington & Rutland Rr. Co.*, 18 Fed. 617 (C. C. D. Vt. 1883). The decision to the contrary in *Cropper v. Coburn*, Fed. Cas. No. 3416 (C. C. D. Mass. 1855), is said to have been overruled by *Freeman v. Howe*, 24 How. 450 (U. S. 1860).

contract.⁹⁴ Hence, if the *Essanay* case had not placed the *Simon* case in a new light, it would be more difficult to understand the court's citing the latter case, along with *Marshall v. Holmes*,⁹⁵ as authority for the decision in *Wells Fargo & Co v. Taylor*,⁹⁶ decided in 1920. There the defendant, an employee of the plaintiff express company, had, in violation of a contract with the plaintiff to assume all risk of injury incident to his employment, obtained a judgment in a state court against a railway company, which the express company had contracted to indemnify in respect of claims for damages by express company employees injured while travelling on the railway. The Supreme Court upheld an injunction against enforcement of the judgment, on the insubstantial ground that Section 265 was a mere rule of comity which must yield where it "would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and laws of Congress."⁹⁷

The upshot of the matter is that wherever there exist these particular equitable grounds for enjoining proceedings in general, the federal courts, after judgment has been rendered in the cause, will act precisely as would any other court of equity, not hedged about by the inhibitions of Section 265.⁹⁸ But is that all? The answer given in the very recent case of *Western Union Telegraph Co. v. Tompa*⁹⁹ is that it is not. The federal court, it was declared, need not wait until the state judgment has been rendered to issue its

94. *Christmas v. Russell*, 5 Wall. 290 (U. S. 1866).

95. 141 U. S. 589 (1891).

96. 254 U. S. 175 (1920).

97. *Id.* at 133.

98. The cases in which it has been held that enforcement of a state court's judgment may be enjoined by a federal court wherever it can be shown that such enforcement would be contrary to principles of equity are numerous. *Fetzer v. Johnson*, 15 F. (2d) 145 (C. C. A. 8th, 1926); *Mohawk Oil Co. v. Layne*, 270 Fed. 841 (W. D. La. 1921); *Hartford Life Insurance Co. v. Johnson*, 268 Fed. 30 (C. C. A. 8th, 1920); *Union Ry. Co. v. Illinois Central Rr. Co.*, 207 Fed. 745 (C. C. A. 6th, 1913); *Linton v. Safe Deposit Co.*, 147 Fed. 824 (W. D. Pa. 1906); see *Riverside Oil & Refining Co. v. Dudley*, 33 F. (2d) 749, 752 (C. C. A. 8th, 1929). The fact that the sheriff is about to levy execution on the plaintiff's property under a judgment rendered against another person is held to be no ground for enjoining the levy. *Republic Power & Service Co. v. Security Bank & Trust Co.*, 9 F. (2d) 476 (W. D. La. 1925); *Mill v. Provident Life & Trust Co.*, *American Ass'n v. Hurst*, *Daly v. Sheriff*, all *supra* note 93.

99. 51 F. (2d) 1032 (C. C. A. 2d, 1931). The facts of this case are substantially identical with those of the *Wells Fargo* case. See note 96, *supra*. The language of the court is significant: ["Section 265] does not extend to the issuance of an injunction against the enforcement of a judgment obtained in a state action where the prosecution of the state suit would be enjoined but for [Section 265]." *Id.* at 1034.

injunction, but may forthwith enjoin the defendant from doing anything to enforce any judgment he may obtain in the pending state action and leave him otherwise to proceed as he may be advised. At least there is nothing insidious in this disposition of the case; it gives the defendant due warning and bids him proceed, if he dares, with advance knowledge of the futility of so doing. But certain it is that the language of the case, if followed, completely emasculates the statute, for it allows an injunction the intended and inevitable effect of which is to stop the state proceeding, in any case in which a plaintiff can show grounds upon which any other court of equity, not subject to Section 265, would grant an injunction.

*The Federal Injunction as a Device for Testing the
Constitutionality of State Statutes*

It has been pointed out that the peg upon which the Supreme Court hung its decision that federal courts might enjoin the enforcement of void or inequitable state judgments was a definition of "proceedings" which excluded activity subsequent to judgment. A further exception to the statute had, even earlier, been worked out through the use of this same device. When state statutes embodying exercise of the police power, particularly statutes or orders of commissions fixing public utility rates, precipitated a flood of federal questions under the Fourteenth Amendment, various considerations led the utilities to prefer that the litigation take place in the federal courts.¹⁰⁰ This gave rise to a common practice of testing the validity of allegedly unconstitutional statutes by a bill in the federal courts praying for an injunction, issuing against state officers, to enjoin the prosecution of civil or criminal actions seeking to enforce the statutes.¹⁰¹

To this practice the objection was made that injunctions against the enforcement of state statutes were forbidden by Section 265. Some support for this contention, in cases where injunctions were sought against criminal proceedings, was found in the decision in *Harkrader v. Wadley*,¹⁰² to the effect that a federal court which had taken charge of the assets of a corporation could not enjoin a criminal prosecution of an officer of the corporation for embezzle-

100. Cf. Lockwood, Maw, Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426, 450-452, 454.

101. Cf. Warren, *supra* note 12, at 373-74; Lilienthal, *The Federal Courts and State Regulation of Public Utilities* (1930) 43 HARV. L. REV. 379, 380; Lockwood, Maw, Rosenberry, *supra* note 100, at 426.

102. 172 U. S. 148 (1898). See also *Milwaukee, St. Paul & S. S. M. Ry. v. Milner*, 57 Fed. 276 (C. C. W. D. Mich. 1893).

ment. But the *Harkrader* case did not prove a substantial obstacle, for the contention that the injunctive method of testing constitutionality violated Section 265 was overthrown in *Ex parte Young*¹⁰³ where it was decided that threatened action in the state courts by state officers was not a "proceeding" within the meaning of the statute. On the other hand, it was expressly declared in a dictum that, if the proceedings had already been instituted in the state court, Section 265 would apply, and the injunction could not issue.¹⁰⁴ The distinction thus established has been consistently followed in the lower federal courts.¹⁰⁵ If this distinction were the sole determining factor, it would seem to follow that whenever the state officials actually bring suit to enforce the statute, their action would then assume the character of a "proceeding" and the issuance of an injunction become no longer proper. But this has not proved to be unqualifiedly true, for the concept of "protecting the jurisdiction of the federal courts" has been made the basis for enjoining actual state court proceedings to enforce a state statute, where such a suit is instituted subsequent to the filing of a bill in the federal court to determine constitutionality by means of a prayer to enjoin state administrative or legislative activity or threatened prosecutions.¹⁰⁶

The practice of testing the validity of state legislation by federal equity procedure has given rise to some friction between the federal government and the states.¹⁰⁷ It has certainly encountered the disapproval of commentators.¹⁰⁸ But here, as in the case of suits in-

103. 209 U. S. 123 (1908).

104. See *id.* at 161.

105. *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 547 (C. C. A. 5th, 1892); *Glucose Refining Co. v. City of Chicago*, 138 Fed. 209 (C. C. N. D. Ill. 1905); *Western Rr. Co. v. Rr. Commission of Alabama*, 171 Fed. 694 (C. C. N. D. Ala. 1909); *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500 (W. D. Mo. 1912); *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532 (W. D. Mo. 1912); see *St. Louis S. F. R. Co. v. Allen*, 181 Fed. 710 (W. D. Ark. 1910); *Fenner v. Boykin*, 3 F. (2d) 674 (N. D. Ga. 1925), *aff'd*, 271 U. S. 240 (1926); *cf. Prout v. Starr*, 110 Fed. 3 (C. C. D. N. C. 1901), *aff'd*, 188 U. S. 537 (1903); *Camden Interstate Ry. Co. v. City of Catlettsburg*, 129 Fed. 421 (E. D. Ky. 1904); *Danciger v. Stone*, 187 Fed. 853 (E. D. Okla. 1909).

106. *Looney v. Eastern Texas Rr. Co.*, 247 U. S. 214 (1918). But *cf. Grubb v. Public Utilities Commission*, 281 U. S. 470 (1930).

107. See Warren, *supra* note 12, at 374-376; Lilienthal, *supra* note 101, at 381. At a convention of the Attorney-Generals of the several states in 1907 a resolution was adopted recommending that Congress pass a law prohibiting federal courts from restraining state officers and administrative boards from instituting proceedings to enforce state laws or orders of legislative commissions. See 65 CENT. L. J. 304 (1907).

108. It has been suggested that the improvement of state procedure would largely obviate the necessity for federal interference in this category of cases. See Frankfurter, *The Federal Courts* (1929) 58 NEW REPUBLIC 273, 275.

volving jurisdiction over specific property, signs of a change of viewpoint are not lacking. The authority of the federal courts to enjoin the non-judicial proceedings of state tribunals was subjected to limitations of comity in *Prentis v. Atlantic Coast Line Co.*,¹⁰⁹ where the Supreme Court declared that a federal court must wait until the state has spoken its final legislative word before issuing an injunction. And recently, in *Interborough Rapid Transit Co. v. Gilchrist*,¹¹⁰ the Court definitely indicated that the doctrine of comity which prompted the decision in the *Prentis* case is of sufficient importance to justify further restrictions of discretion on the issuance of injunctions against state officers and commissions.¹¹¹ The *Interborough* decision makes it clear that the *Prentis* doctrine will be adhered to even where it is in fact perfectly plain that the administrative or legislative action taken will be unfavorable to the claims of the complainant.¹¹²

Federal Injunctions Sought by the United States Government

The most recent exception made to the injunction statute, and one which has not yet received the sanction of the Supreme Court,¹¹³ was announced in the case of *United States v. Inaba*.¹¹⁴ In substance, the scope of this exception is that where the United States government as plaintiff is seeking a federal injunction against state judicial proceedings, for the protection of its own rights or property, Section 265 is no bar to the injunction. The Court, in granting the injunction in the *Inaba* case, reasoned that, inasmuch as the United States cannot be sued without its consent, to deny it any relief in the federal court would be to force it by indirection to subject itself to the jurisdiction of the state court for the protection

109. 211 U. S. 210 (1908); see Note (1909) 18 YALE L. J. 349.

110. 279 U. S. 159 (1929).

111. It should be noted in connection with both the *Prentis* case and the original bill in the *Interborough* case, that the precise holdings are that non-judicial proceedings will not be enjoined until the final legislative action is taken; the cases taken together, however, seem to indicate that injunctions against *threatened judicial proceedings* are subject to the same limitation.

112. See the comments upon the significance of the *Interborough* case in Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1928* (1929) 43 HARV. L. REV. 33, 61-62. And compare *Hawks v. Hamill*, 288 U. S. 52 (1933), in which the Supreme Court has very recently held that, where jurisdiction is predicated solely upon diversity of citizenship and the questions involved are purely local, the federal courts will not grant an injunction against action on the part of state officers unless the case is absolutely clear.

113. But *cf.* *United States v. Lee*, 106 U. S. 196, 222 (1882).

114. 291 Fed. 416 (E. D. Wash. 1923); see (1923) 37 HARV. L. REV. 387.

of its rights. Moreover, said the Court, the United States could not even voluntarily intervene in the state action without congressional authority, since the United States District Attorney has no power to appear for the United States in such a way as to submit it to the jurisdiction of a state court; consequently, if the injunction were not granted, the government in such circumstances would have fewer rights than a private litigant would have. It has been suggested, however, that although the United States cannot be made a defendant in a state court without congressional authority, which has never been given, it can be, and frequently has been, made a plaintiff in such an action.¹¹⁵ If this be true, the major premise of the court's argument fails, since it would only have been necessary for the United States to enter the suit as party plaintiff.

There was admittedly no precedent for the decision in the *Inaba* case. On the contrary, the Supreme Court had previously held in *United States v. Parkhurst-Davis Co.*,¹¹⁶ in which the United States sought to enjoin the defendants from prosecuting state actions against certain Indian allottees, that Section 265 forbade the injunction. This decision was distinguished on the ground that in the former case the Indians on whose behalf the government was suing held patent allotments of land in fee, and, since they were *sui juris*, they could defend on their own behalf in the state action, whereas in the *Inaba* case the government held title to the land in trust for an Indian ward, and was acting to defend its own property. This reasoning has been affirmed in decisions in subsequent cases where the government is seeking to protect its title to property,¹¹⁷ or to remove obstructions to the operation of federal instrumentalities.¹¹⁸ The theoretical basis of this exception has, therefore, come to be that the federal courts have exclusive jurisdiction over suits to which the United States is a party in interest, and that Section 265 is no bar to injunctions in aid of that jurisdiction. This rationale, like those supporting other exceptions, involves a departure from the clear import of the terms of the statute. It might, therefore, have been preferable to base the exception in cases where the United States is a party, upon the common law rule that general

115. See (1923) 72 U. PA. L. REV. 192 and cases cited.

116. 176 U. S. 317 (1900).

117. *United States v. McIntosh*, 57 F. (2d) 573 (E. D. Va. 1932).

118. *United States v. Babcock*, 6 F. (2d) 160 (D. Ind. 1925), modified in 9 F. (2d) 905 (C. C. A. 7th, 1925). The District Court based its conclusion on the fact that the United States was suing to protect its own interests, and therefore Section 265 was not applicable. In modifying the decree below, the Circuit Court of Appeals held that the proceedings sought to be enjoined were not judicial in character, citing *Public Service Commission v. Corboy*, 250 U. S. 153 (1919).

words in a statute do not include the sovereign unless the sovereign is expressly mentioned.¹¹⁹

Conclusion

The cases which have been examined are a startling revelation of the fate of a statute which does not command the respect of the courts. Although sweeping and unqualified in its terms, it does not limit the jurisdiction of the federal courts, but only their equity powers; it does not bind them prior to the institution of state suits, nor after judgment therein; if deemed necessary to make effective their own jurisdiction, it is ignored altogether. Whichever of the various historical explanations of the statute is embraced, it seems a safe assertion that the cases in which injunctions against state proceedings were sought to be prevented are the very ones in which the statute has been refused operation.¹²⁰ To say that the statute merely enacts a doctrine of comity which already existed, and that the limitations on that doctrine may therefore be enforced though not in terms included in the enactment, is little more than a circumlocution announcing that the statute will be departed from whenever, in the judgment of the court, necessity or convenience invites the departure. To assert that prevention of the unseemly conflict between courts which the statute was designed to obviate necessitates deviation from its letter in order to observe its spirit is rationalization of no higher order.

But several of the limitations which the courts have placed upon the statute are now so crystallized that discussion of their intrinsic merit is purely academic. It is in connection with judicial administration of insolvents' and decedents' estates, and in the field of corporate reorganization, that expansion or contraction of the scope of the statute is most likely to present a practical problem. The enormous growth in the administrative activity of courts must give rise with increasing frequency to situations where, although the pendency of a state action does not deprive the federal court of jurisdiction (or vice-versa), special circumstances make it advisable that a race for judgment between the litigants in each of the courts should be averted. In several instances such a situation has been taken care of through a voluntary stay of proceedings by the

119. See *United States Fidelity & Guaranty Co. v. Bramwell*, 108 Ore. 261, 269, 217 Pac. 332, 335 (1923).

120. Section 265 is not the only statute limiting federal injunctive powers which has been judicially flouted. Similar treatment has been accorded the statute which declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U. S. C. § 154 (1926); *cf. Miller v. Nut Margarine Co.*, 284 U. S. 498 (1932).

court in which suit was last commenced, pending determination of the issues in the suit previously instituted.¹²¹ One such situation occurred in *Langnes v. Green*,¹²² where it was held that, although the federal court had jurisdiction to entertain a shipowner's suit for limitation of liability despite the pendency of a prior action in a state court, the fact that the case involved but one possible claimant and but one owner required that the federal court should, as a matter of discretion, stay proceedings pending the outcome of the state suit. *In re Putnam*¹²³ went a step farther by staying proceedings in the federal court in favor of actions not yet pending in the state court, but which might be brought within a reasonable time. Similarly, in the *Stansbury* case,¹²⁴ Judge Mack ruled that, while the complainant had a statutory right of recourse to the federal courts, since the constitutional requisites of jurisdiction existed, it was nevertheless within the discretion of the federal court to stay proceedings there pending the outcome of the state suit. And the fact that the federal suit for cancellation of the consent to probate was vitally related to the probate proceedings¹²⁵ over which the state court had exclusive jurisdiction, he found to be such a circumstance as justified the federal court in declining to exercise immediately its admitted jurisdiction.

What special circumstances must exist in order that the federal court shall be entitled to grant a stay of proceedings cannot be categorically stated. The Supreme Court has made it plain that this discretionary power by no means exists in all cases of concurrent jurisdiction. In *McClelland v. Carland*¹²⁶ the plaintiffs sued in a

121. *Zimmerman v. So Relle*, 80 Fed. 417 (C. C. A. 8th, 1897); *Bunker Hill Mining Co. v. Shoshone Mining Co.*, 109 Fed. 504 (C. C. A. 9th, 1901); *In re Lasserot*, 240 Fed. 325 (C. C. A. 9th, 1917); cf. *Bridges v. Sheldon*, 7 Fed. 17 (C. C. D. Vt. 1880); *Keystone Dairy Co. v. New York Life Insurance Co.*, 19 F. (2d) 68 (C. C. A. 3d, 1927).

122. 282 U. S. 531 (1931).

123. Note 65, *supra*.

124. Note 64, *supra*.

125. The federal courts have shown particular reluctance to interfere with state proceedings involving probate matters. *Haines v. Carpenter*, 91 U. S. 254 (1875); *Freney v. First National Bank*, 16 Fed. 433 (C. C. D. Neb. 1882); *Evans v. Gorman*, 115 Fed. 399 (C. C. E. D. Ark. 1902); *Smith v. Jennings*, 238 Fed. 48 (C. C. A. 5th, 1915); *King v. Fernley*, 283 Fed. 451 (S. D. Fla. 1922); *Tussing v. Central Trust Co.*, 34 F. (2d) 312 (E. D. Mich. 1923); cf. *Wickham v. Hull*, 60 Fed. 326 (C. C. N. D. Iowa 1894). A recent rather extreme case in the opposite direction is *Mississippi Valley Trust Co. v. Franz*, 51 F. (2d) 1047 (C. C. A. 8th, 1931). Cf. *Yonley v. Lavender*, 21 Wall. 276 (U. S. 1874) (holding that a federal judgment may establish a right to share in a decedent's estate being administered by a state court); *Byers v. McAuley*, 149 U. S. 608, 620 (1892).

126. 217 U. S. 268 (1910).

federal court to establish rights in a decedent's estate. On motion of the Attorney-General of South Dakota the federal court entered an order staying proceedings until the state could bring an action in its own courts to determine its rights in the estate by way of escheat. The Supreme Court held that it was the duty of the federal court to hear the plaintiff's case, and granted mandamus to vacate the stay order. This case was followed in *Great North Woods Club v. Raymond*,¹²⁷ which was decided only a few weeks before the *Stansbury* case and which held that the pendency in a state court of a suit to cancel an insurance policy gave a federal court in which the beneficiary subsequently brought an action on the policy no discretion to stay proceedings in favor of the state suit. The court stated that it is usually true that, where the federal court has jurisdiction of the parties and the subject matter, the plaintiff has an absolute right to have his case proceed to trial.¹²⁸

The very nature of the problem is such that to lay down a rigid rule governing the right of a federal court to decline to exercise jurisdiction in deference to a state court is neither practicable nor desirable.¹²⁹ Necessarily, much must be left to depend upon whether or not the facts of a particular case present a situation in which to take jurisdiction would be to interrupt the harmonious concurrent activity of federal and state tribunals which the principles of comity are designed to promote, or would be to run counter to the policy of non-interference which the successful maintenance of a dual system of courts requires.

It will not do to assume that we have passed beyond the days when conflicts between states and nation may impair the smooth functioning of the federal system. Adjustment is still necessary to insure harmony. The vast areas of judicial business which federal and state courts continue to share still provoke situations in which one or the other must yield if the action of either is to be effective. Unrestrained interference with the one by the other cannot obviate or mitigate sources of friction, and continuous disregard of a

127. Note 52, *supra*.

128. Accord: *Mercantile Trust Co. v. Lamoille Valley Rr. Co.*, Fed. Cas. No. 9,432 (C. C. D. Vt. 1879).

129. Cf. *Stanton v. Embrey*, 93 U. S. 548 (1876); *Gordon v. Gilfoil*, 99 U. S. 168 (1878); *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945 (C. C. A. 8th, 1904); *City of Ironton v. Harrison Construction Co.*, 212 Fed. 353 (C. C. A. 6th, 1914); *Slaughter v. Mallet Land & Cattle Co.*, 141 Fed. 282 (C. C. A. 5th, 1905); *City of Mankato v. Barber Asphalt Paving Co.*, 142 Fed. 329 (C. C. A. 8th, 1905); *Defiance Water Co. v. City of Defiance*, 100 Fed. 178 (C. C. N. D. Ohio 1900); *Fradella v. United Marine Contracting Corp.*, 36 F. (2d) 510 (E. D. N. Y. 1928); see *Green v. Underwood*, 86 Fed. 427, 429 (C. C. A. 8th, 1898).

restraint imposed upon interference cannot contribute to the solution. These considerations, and the revived attitude of respect for the statute and its underlying principles which clearly appears in recent decisions of both the Supreme Court and lower federal courts, strongly suggest the possibility and desirability of the revitalization of Section 265. Other decisions lend weight to a belief that in the future delicate problems of conflicting jurisdiction will be solved in the federal courts more often by a stay of their own proceedings than by the manufacture of ingenious devices for evading the statute. Such an approach seems to offer the most promising solution of the ramified problems arising out of judicial administration of estates and insolvent enterprises in a nation whose political structure is still in great measure decentralized. Real and critical these problems must continue to be as long as that decentralization persists.