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JURISDICTION OVER IMMOVABLES:
The Little Case Revisited After Sixty Years

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By the overwhelming weight of Anglo-American authority, trespass to land is considered a local action,[1] maintainable only in the state of the situs. The Minnesota court was the first American court to repudiate this common-law view, in the now-classic case of *Little v. Chicago St. P. M. & O Ry.*[2] decided in 1896. In the sixty years that have passed since then the doctrine adumbrated in the *Little* case has found increasing support among American writers and judges. The time is now ripe to assess the standing of the *Little* doctrine in that branch of the conflict of laws that goes under the delusive rubric of "jurisdiction over immovables."

THE PREVAILING DOCTRINE OF LOCALIZATION

With respect to the common-law rule one can say, with apologies to Justice Holmes, that a page of history will explain volumes of illogic. At early common law all actions in England were considered local. This rule had its origins in the established policy which required that jurors have personal knowledge of the facts in issue and therefore that a case be tried by a jury in the vicinage.[3] With such a system prevailing it was obviously impossible to give redress for a foreign tort, since it was strictly necessary that the neighborhood where the jury was summoned be that where the cause of action had arisen. This difficulty disappeared, however, when evidence could be presented to the jury by the testimony of witnesses. But there was another difficulty in England. Originally the jurisdiction of the king's court in personal actions was based upon the commis-

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1. For jurisdictional purposes a local action may be defined as one which must be brought in the state where the subject matter of the dispute arose. A transitory action, per contra, may be maintained in the courts of any state where the defendant can be legally served, though the operative facts which gave rise to the cause of action took place in a foreign jurisdiction.
2. 65 Minn. 48, 67 N. W. 846 (1896).
3. 5 Holdsworth, History of English Law 117 (3d ed. 1924).

sion of a breach of the king's peace, and, as this was a jurisdictional fact, the tort, including the breach of the peace, had to be laid as occurring at some place within the kingdom. This obstacle, like so many of the common-law technicalities, was circumvented by a fiction. A fictitious venue was laid at some place within the kingdom, and such allegation could not be disputed. From this time it became possible in England to sue for a foreign tort, and personal actions ex delicto were held to be transitory

One exception to this rule was made the action for trespass to land. As a result of the innate conservatism of the medieval judiciary with respect to matters affecting land, the courts refused to employ this fiction where the cause of action arose out of trespass to foreign realty The strongly territorial flavor of English procedure was overcome on all points save one the strict rule requiring a proper venue for trespass.

This anachronistic rule did not fit modern commercial society Lord Mansfield, the jurist who sought to grapple with so many of the obsolete technicalities of the common law, went out of his way in *Mostyn v. Fabrigas*[4] to refer to two earlier unreported decisions wherein he had entertained jurisdiction of actions for damages to real estate lying abroad. Mansfield characterized these actions as transitory The old rule was reverted to, however, in *Doulson v Matthews*[5] because, said Justice Buller, it was "too late" to consider whether the rule "was wise or politic."

The doctrine of the local nature of trespass actions now seems firmly entrenched in England as the result of the leading case of *British South Africa Company v. Companhia de Mocambique.*[6] In this case the plaintiff company alleged that it was in possession of large tracts of land and mines in South Africa and that the defendant company by its agents wrongfully broke and entered and took possession of these lands. The plaintiff claimed (1) a declaration that it was lawfully entitled to the lands, (2) an injunction restraining the defendant company from continuing to occupy or from asserting any title to the lands, and (3) damages for trespass. The High Court dismissed the action for want of jurisdiction. In the Court of Appeal the plaintiff formally abandoned its claim for a declaration of title and an injunction, and that court by a 2-1 majority declared that the High Court had jurisdiction to entertain the claim for damages for trespass. The House of Lords unani-

4. 1 Cowp. 161, 1 Smith's Leading Cas. 1087 (1774).
5. 4 Term. Rep. 503, 100 Eng. Rep. 1143 (1792).
6. [1893] A. C. 602.

mously reversed this ruling on the ground that trespass was not a transitory action such that a claim arising abroad was cognizable by English courts. Although the essence of the *Mocambique* case was a clear conflict of title between plaintiff and defendant, the judgment of Lord Herschell seemed to rest on broader grounds. By expressly repudiating the holdings of Lord Mansfield and approving the ruling of *Doulson v. Matthews,* the House of Lords seemed to invoke a blanket rejection of jurisdiction.[7]

In the United States the question whether a trespass action is local or transitory was first considered in *Livingston v. Jefferson.*[8] The dramatic facts of that case arose in the field of high politics. Jefferson, shortly after the Louisiana purchase, ordered Livingston, one of the most prominent Federalist leaders, ejected from lands in New Orleans to which the President claimed title as part of the public domain. When Jefferson's term of office was over, Livingston brought a personal action for damages in the only place where personal service could be had, viz. Virginia. Jefferson pleaded to the jurisdiction, alleging simply that the land in question was situated outside the district of Virginia in which the federal court was located. Chief Justice Marshall, sitting on circuit, sustained this plea and dismissed the action. Marshall conceded that on reason such actions were transitory, being only for damages. He expressed his approval of the statement of Lord Mansfield that the true distinction in respect to jurisdiction was between proceedings which are in rem, therefore appropriately triable only at the situs, and proceedings against the person, appropriately triable wherever the person can be found. In making a contrary holding, however, Marshall declared that he yielded to the compulsion of precedent. But the great Federalist must have welcomed the common-law doctrine as an expedient to avoid deciding on the merits a case which was so full of political gunpowder.[9]

7 Later English cases seem to have established three exceptions to the *Mocambique* rule. (1) English courts have jurisdiction to adjudicate upon rights in foreign immovables, if the defendant is affected by some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which in the view of a court of equity would be unconscionable. Deschamps v. Miller, [1908] 1 Ch. 856. (2) Where an English court has jurisdiction to administer an estate or a trust, and the property includes movables or immovables situated in England and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration. In re Hoyles, [1911] 1 Ch. 179. In re Ross, [1930] 1 Ch. 377 (3) English courts have jurisdiction to entertain an action in rem against a ship to enforce a maritime lien on the ship for damage done to foreign immovables. The Tolten, [1946] P. 135.

8. 15 Fed. Cas. 660, No. 8411 (C. C. D. Va. 1811).

9. See 4 Beveridge, Life of Marshall 103-116 (1919); 1 Warren, The Supreme Court in United States History 401-403 (1922).

Marshall's holding induced a vast proliferation of precedent in the state and federal courts, virtually every case following the old common-law doctrine and citing *Livingston v. Jefferson* as authority [10] The *Restatement*[11] thus summarizes what has always been the great weight of opinion in the United States "No action can be maintained in one state to recover compensation for a trespass upon or harm done to land in another state." It was in the face of this long line of precedent and authority that the Minnesota court decided the *Little* case.

Criticism of the Doctrine

The *Little* case involved an action for damages to realty in Wisconsin brought in a Minnesota court. The defendant railroad company asserted no title to the land involved, and the damage was negligently inflicted so that the action was in the nature of trespass on the case. Allowing the maintenance of such an action in the face of the common-law rule, the court said

> "We recognize the respect due to judicial precedents, and the authority of the doctrine of stare decisis, but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor."[12]

Until 1952, however, the *Little* case stood alone in America as the only example of direct judicial repudiation of the common-law rule localizing all trespass actions.[13] Although practically every American court which adopted this rule condemned it, it seemed that only the Minnesota court had the courage to break with stare decisis and attack the rule frontally

But in 1952 the Arkansas Supreme Court rendered its judgment in *Reasor-Hill Corp v. Harrison*[14] and in so doing added its weight to the holding of the Minnesota court. Here a Missouri landowner had engaged an Arkansas flying service to spray his cotton crop. When the crop was damaged as a result of the spraying, the landowner sued in Arkansas, joining as defendants the flying service

10. The citation of these cases would be endless. They are collected in Note, 42 A. L. R. 196 (1926).

11. Restatement, Conflict of Laws § 614 (1934).

12. Little v. Chicago St. P M. & O. Ry., 65 Minn. 48 at 53, 67 N. W 846 at 847 (1896).

13. However in Peyton v. Desmond, 129 Fed. 1 (8th Cir. 1904), the United States Circuit Court followed the rule of the *Little* case upon the ground that the question was a local one, as to which the federal court was bound by the decision of the state court.

14. 249 S. W 2d 994 (1952)

and the manufacturer of the insecticide. On the basis of the rule that suits for injury to realty can only be brought in the state where the land is located, the manufacturer sought a writ of prohibition to prevent the lower court from assuming jurisdiction. The Arkansas Supreme Court denied the writ, holding the action to be transitory and therefore triable in the court below. In support of this decision the Arkansas court relied on the *Little* case and supported its judgment by quotations from this earlier decision denouncing the common-law rule as archaic and unjust.

The validity of this stricture in the *Little* case has received another recognition—albeit non-judicial—from the New York state legislature which abolished the common-law rule by statute in 1917.[15] So far, however, few states have followed the example of New York in expressly conferring on its courts jurisdiction to try actions involving damage to foreign realty.

The Missouri court, nevertheless, has adopted the position that the state statutory abolition of local *venue* in trespass cases is a sufficient ground for rejecting the doctrine that trespass actions are local for jurisdictional purposes.[16] Like Missouri, many other states have expressly abrogated the common-law requirement of local venue for trespass actions where no question of title is involved. If, by such a statute, an action may be brought in any county of a state, is it logical for the courts of that state to hold that such actions are local as between states? Only the Missouri court has declared that the statutory abolition of local venue for trespass actions has worked an implied repudiation of the *Livingston v. Jefferson* rule. The House of Lords in the *Mocambique* case[17] and the New York Court of Appeals per Cardozo in *Jacobus v. Colgate*[18] both held that the statutory abolition of local venue did not enlarge their jurisdiction in respect of injuries to foreign land, since venue and jurisdiction are to be sharply distinguished.[19]

Many state venue statutes, on the other hand, require actions for trespass to land to be brought in the county where the land is

15. N. Y. Real Prop. Law § 536 (1939).

16. Ingram v. Great Lakes Pipe Line Co., 153 S. W. 2d 547 (Mo. App. 1941), holding that an action for trespass to realty could be maintained in Missouri though the property was located in Kansas.

17. British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602.

18. 217 N. Y. 235, 111 N. E. 837 (1916).

19. Venue refers to the place of trial, whereas jurisdiction refers to the power to hear the case. Venue assumes that jurisdiction is present, but defines the place of its exercise. Venue is procedural, jurisdiction (over the subject matter) is substantive. Venue can be waived, jurisdiction (over the subject matter) cannot.

situated. That the distinction between local and transitory actions is still preserved in this respect as between counties in the same state has been given as an argument against repudiating the common-law rule in respect to actions for trespass to land situated in another state. Both the Minnesota court in the *Little* case and the Arkansas court in the *Reasor-Hill* case rejected this argument and repudiated the common-law rule even in the face of local venue statutes.[20] It might appear, however, that from a policy viewpoint the reasons supporting the intrastate localization of trespass actions apply a fortiori to their interstate localization because of the greater distances involved and because of the interstate non-compellability of witnesses. Such an argument poses this question If a trespass action must be brought within one county of a state, is it logical for the courts of that state to hold that such action could be transitory as between states? The answer is probably yes. The intrastate localization of an action merely specifies the place of trial in one county but allows service of process to run throughout the state. Interstate localization, on the other hand, confines not only the place of trial but the territorial limits within which process must run. Only if summons from one state court were servable throughout the nation, would localization as between counties be an argument for localization as between states.

The relevance of state venue statutes to jurisdictional problems, then, is not clear. The retention of the requirement of local venue for trespass actions could be construed as an affirmation of the common-law doctrine. The abolition of local venue for trespass actions involving no title dispute could be construed as a pro tanto repudiation of that doctrine. The weight of authority is against both constructions, and the fundamental arguments against the common-law doctrine exist independently of any particular state venue rule.

The main arguments against the common-law rule are two. First, the localization rule may permit the defendant to escape all liability if he prevents suit in the state where the land lies by keeping beyond service of process in that jurisdiction. If the courts of the situs cannot secure jurisdiction of the defendant, and the courts of the defendant's domicile refuse jurisdiction of the subject of the action, then our federal system can result in a total denial of justice Obviously a wronged plaintiff should not be denied redress merely

20. Minn. Stat. Ann. § 542.02 (1947), Ark. Stat. Ann. § 27-601 (1947) Both courts met the objection based upon the statute by the statement that the statute applies only to causes of action arising within the state, and has no application to causes of action arising out of the state.

because of the interposition of a state line between the injured property and a wily tortfeasor. This consideration is referred to in both the *Little* case and the *Reasor-Hill* case merely as a reason for repudiating the general rule and not as a condition of its repudiation. It was admitted in the *Little* case that the defendant might have been sued in the state in which the property was situated, but in the *Reasor-Hill* case this was not so. The frequency of situations in which the defendant can escape process under the localization rule has been disputed.[21]

The second argument is that there is no logical distinction between taking jurisdiction in cases of contract respecting foreign land and cases involving torts committed on the same land. The distinction made between trespass and other in personam actions is a mere historical fortuity, based on archaic common-law rules of venue. "It would seem on principle that proceedings in personam, including actions to recover damages for trespass to land, should be held to be transitory."[22] Logically, the distinction between local and transitory actions should coincide with that between actions in rem and actions in personam.

These two arguments, then, the one based on considerations of justice and the other on considerations of logic, militate against the prevailing *Livingston v. Jefferson* doctrine. The argument that application of the doctrine will leave the plaintiff remediless is the more cogent, where applicable. Although it was applicable in the *Reasor-Hill* case, both the Arkansas and Minnesota courts seem to have relied mainly on the logical argument.

Arguments for the Doctrine

Several substantial policy considerations might be suggested as favoring the localization of actions involving injury to land. These can best be summed up in one phrase, "trial convenience." The considerations of convenience may be grouped under two headings, convenience to the litigants and convenience to the court itself.

Convenience to the litigants. There are a number of factors here. Trial at the situs facilitates access to sources of proof since in a trespass action the larger number of witnesses is almost always

21. "Instances may occur where a person having no property in a state may commit an injury to real property therein and leave the state, thereby defeating a recovery, but it is rarely the case that serious injury may be perpetrated with such expedition and secrecy as to prevent an action being begun and service of summons upon him." Montesano Lumber Co. v. Portland Iron Works, 78 Ore. 53 at 67, 152 Pac. 244 at 248 (1915).

22. 3 Beale, Conflict of Laws 1652 (1935).

near the location of the land. If trial is in another forum, the parties are unable to compel the attendance of unwilling witnesses resident at the situs, and the cost of obtaining attendance of willing witnesses at a distant forum might well be prohibitive. The possibility of a view of the premises by a local jury reduces the hazard of speculation on the issue of damages. Obviously such a view cannot be had by a jury in a distant forum. Finally, trial in a distant forum might present an opportunity to the plaintiff to vex and inconvenience the defendant out of all proportion to what is necessary for a fair presentation of the plaintiff's own case—or, what is worse, to use the threat of such vexation to coerce settlement of a doubtful claim otherwise than on the basis of its merits. The common-law rule prevents the vexatious importation of a trespass action into a distant forum.

Convenience to the court itself. Trial in another forum results in the unnecessary injection into the suit of problems in conflict of laws and in foreign law Also, from the viewpoint of judicial administration it is impracticable to try foreign title disputes away from their source. For the trespass actions which involve issues of title, trial at the situs obviates this difficulty

The weakness of all these arguments, save the last, is that they prove too much. Most of the considerations of convenience apply equally to all transitory actions, meeting the objections posed would consequently involve localizing all litigation. The argument based on the impracticability of trying foreign title disputes, on the other hand, has more substance, focusing as it does on a unique aspect of our problem. Hence it has been the point most propounded by courts attempting to rationalize the common-law rule.

If there is one principle firmly embedded in Anglo-American jurisprudence, both historically and conceptually, it is this A controversy directly affecting title to land is exclusively determinable not only by the law of the situs but by the courts of the situs. The application of this principle to our problem, however, is by no means as apparent as often assumed. Many actions for injuries to realty involve no issue of title whatever, none, for example, was involved in the *Little* and *Reasor-Hill* cases. Even if the issue is involved, the determination of the foreign title for the purposes of the suit would seem to be merely the incidental determination of a fact such as any court is compelled to make daily There are other species of action, regularly entertained by American courts, which sometimes involve title to land outside the state, e.g. specific performance actions

for breach of contract relating to foreign land.[23] A distinction between trespass and specific performance cases can, however, be made. The inconvenience of foreign trespass cases results from the circumstance that the witnesses and other sources of proof are generally to be found near the land. In contract cases, on the other hand, there is a greater resort to books and documents which are readily transportable. Thus a contract can be brought into a distant court, while land is peculiarly immobile. Trespass cases are in their very nature, then, more highly localized so that the court of the situs is likely to be the most appropriate forum.

Forum Non Conveniens an Alternative Doctrine

The situs is *likely* to be the most appropriate forum but will not necessarily be so in all cases. The arguments discussed above simply emphasize certain considerations of fact which point to the probable convenience of one forum—the situs—as against the probable inconvenience of any other forum for the trial of a trespass action. These fact considerations, however, in no way derogate from the cogency of the arguments against the common-law rule. The problem of determining the proper forum for any particular civil action should be viewed as a problem in social engineering. In the case of trespass actions a more flexible solution to this problem is needed, a solution which meets the arguments against the common-law rule and yet takes into account the desirability of localizing controversies affecting land.

Such a solution might be to hold all trespass actions transitory, so that any proper state court having jurisdiction over the parties would have the power (though not the duty) to hear the case, but place limits on the exercise of this power by application of the doctrine of forum non conveniens. This broad doctrine "deals with the discretionary power of a court to decline to exercise a possessed

23. Actions for conversion of timber and minerals on foreign land may also involve title disputes. It has been held that even though tort liability may turn upon the issue of ownership of the land itself, such actions may be maintained. Stone v. U. S., 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127 (1897); Arizona Commercial Mining Co. v. Iron Cap Copper Co., 119 Me. 213, 110 Atl. 429 (1920); Copper State Mining Co. v. Kelvin Lumber & Supply Co., 111 Tex. Com. Rep. 48, 227 S. W. 938 (1921). *Contra:* Arizona Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4 (1920). But when an action is brought for removal of timber or minerals from land, the action is transitory only if the plaintiff chooses to make the gravamen of his suit the conversion; it is local if recovery is sought for the damage done to the land itself. Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895). "It is suggested that the distinction [is] very much like that between tweedledum and tweedledee, which is a matter of the ending only." Potomac Milling & Ice Co. v. B. & O. Ry., 217 Fed. 665, 668 (D. Md. 1914).

jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere."[24] Since each state is free to determine for itself the extent to which its courts shall hear actions arising outside the state, deciding that a court is empowered to adjudicate a controversy involving foreign land would not be conclusive of the question of whether it must do so.

It has been contended that the principle that actions for trespass to foreign land will not be entertained is a special manifestation of the doctrine of forum non conveniens.[25] Such a view is erroneous. The doctrine of forum non conveniens involves a discretionary denial of jurisdiction on an ad hoc basis after a consideration of the particular facts of each case. The common-law doctrine of localization, on the other hand, involves a blanket rejection of jurisdiction in all foreign trespass cases without any discretionary determination of the appropriateness thereof. It is the former doctrine which is contended for. The courts of the chosen forum should be free to accept or decline jurisdiction in their own discretion after full consideration of the arguments (described above) for and against localization as they apply to each particular case. If the plaintiff cannot secure service in the state where the land is located, then obviously the action should be entertained elsewhere. If the plaintiff has an available forum at the situs, however, he probably should be remitted to that forum. The right to seek redress is fundamental, but the privilege to seek redress in one particular set of courts should be discretionary

It must be admitted, however, that only a few courts have recognized the doctrine of forum non conveniens;[26] most American courts seem to follow the open-door policy with respect to all foreign transitory litigation.[27] This means that any transitory action is held triable as of right wherever the defendant can be served. Such an extreme position makes courts reluctant to abandon the common-law doctrine localizing all trespass actions, a position representing the other extreme. Admitting the transitory nature of trespass actions, but placing some limits on their free maintenance abroad,

24. Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929).

25. *Ibid.*

26. Goodrich, Conflict of Laws 23 (3d ed. 1949) The Restatement does not recognize the doctrine as such. Several recent Supreme Court decisions have, however, recognized the doctrine. See Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947), Koster v. Lumbermen's Mut. Casualty Co., 330 U. S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947)

27 See, for example, H. Rouw Co. v. Railway Exp. Agency, 154 S. W 2d 143, 145 (Tex. Civ. App. 1941)

represents a middle course promising the most feasible solution to the problem of the proper forum.[28]

CONCLUSION

There is a genuine reason for the distinction between transitory and local actions, that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. All proceedings in rem should be, and under the settled principles of the conflict of laws, are, local. But all in personam actions, including trespass, should be considered transitory, maintainable wherever service on the defendant can be obtained subject to the doctrine of forum non conveniens.

The common-law rule is otherwise. Apparently this rule does not distinguish between the different kinds of actions relating to land. The phrase "jurisdiction over immovables" used in conflict treatises as a general rubric for these cases only perpetuates this confusion, since in most cases the jurisdiction sought to be invoked is not over the land itself but over the person of the defendant who has infringed the plaintiff's interest (possessory or proprietary) in the land.

Three views are tenable as to the precise scope of the common-law rule:

(a) Courts have no jurisdiction to adjudicate upon the title to foreign land. In a significant English case[29] Scott L. J. expressed the view obiter that the House of Lords might hereafter restrict the scope of the *Mocambique* rule to this narrow proposition and might grant damages for trespass to foreign land. Although the parent American case of *Livingston v. Jefferson,* like the *Mocambique* case, arose out of a title dispute, later American cases have shown no inclination to confine the rule to this narrow a scope. On the other hand both the *Little* and *Reasor-Hill* cases, which purported to overrule the common-law doctrine, did not dispute this narrow proposition.

(b) Courts have no jurisdiction to adjudicate upon the title to foreign land or to grant damages for trespass quare clausum fregit. This view seems to be adopted by Cheshire,[30] but there is no clear judicial support for confining the rule to this precise scope.

28. Such a solution, of course, imposes a heavier burden on the court of the chosen forum. The problem of deciding which little cause of action goes to market and which little cause of action stays home may well involve time-consuming preliminary hearings.

29. The Tolten, [1946] Prob. 135.

30. Cheshire, Private International Law 715 (3d ed. 1947).

(c) Courts have no jurisdiction to adjudicate upon the title to foreign land or to grant damages for either trespass q.c.f. or trespass on the case (e.g. for nuisance or negligence) There is no English case which carries the *Mocambique* rule as far as this, though there are Canadian cases.[31] It is, however, a legitimate deduction from the *Little* and *Reasor-Hill* cases that the rule does so extend, for if it did not, it would have been easy to say so, both cases being for negligence.

If the common-law rule is conceived as extending beyond the first proposition, it is apparent that the rule can produce at worst a total denial of justice and at best some glaring anomalies. Such a rule finds no support in any other of the world's legal systems and has been expressly repudiated in such civil law jurisdictions as Louisiana[32] and Quebec.[33] In addition to Mansfield and Marshall, such distinguished commentators as Story,[34] Cardozo,[35] Scott,[36] Beale,[37] Rabel,[38] Goodrich[39] and Stumberg[40] all condemn the rule as archaic and unjust.

There are four possible methods of shedding the incubus of the common-law doctrine of localization.

(a) The first is express statutory abolition. Thus far few states have been willing to follow New York in taking this step.

(b) The second is by an act of judicial casuistry State statutes abolishing local venue for trespass actions could be construed as working an implied repudiation of the common-law rule as to jurisdiction. Only the Missouri court has adopted this course, and its logical weakness is apparent quite apart from the practical difficulty that more than half the states have retained local venue rules for trespass actions.

(c) The third method is by open judicial legislation on the model of the *Little* case, thus holding all trespass actions transitory So far only the Arkansas court has been willing to follow the precedent of the *Little* case, on its own initiative breaking with the overwhelming weight of authority.

31. Brereton v. Canadian Pacific Railway Co., [1894] 29 O. R. 57; Albert v. Fraser Companies, [1937] 1 D. L. R. 39.
32. Holmes v. Barclay, 4 La. Ann. 63 (1849).
33. Glasgow Ins. Co. v. Canadian Pac. Ry., 34 Lower Canada Jurist 1 (1888).
34. Conflict of Laws §§ 544, 545 (8th ed. 1883).
35. Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837, 840 (1916).
36. Fundamentals of Procedure in Actions at Law 32 (1922)
37 3 Conflict of Laws 1657 (1935), *The Jurisdiction of Courts over Foreigners*, 26 Harv. L. Rev. 283, 291 (1913).
38. 2 Conflict of Laws 246, 247 (1947).
39. Conflict of Laws 271 (3d ed. 1949).
40. Conflict of Laws 174, 175 (2d ed. 1951).

(d) This break would be made easier in the future, however, if the courts imposed a forum non conveniens qualification when adopting the *Little* doctrine.

It is, of course, to be hoped that the legislatures of our states will follow the New York example and remove the dead hand of the past at one stroke. The possibility of remedial legislation, however, should not be ground for adhering to the common-law rule.[41] In the considerable number of states where the question is still open, it is to be hoped that the courts will be prevailed upon to follow the example of the Minnesota court in the *Little* case rather than the numerical weight of authority.

41. "We cannot deny to the judicial process capacity for improvement, adaptation, and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes." Mr. Justice Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944).