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# Power to Decline the Exercise of Federal Jurisdiction

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### NOTE

#### POWER TO DECLINE THE EXERCISE OF FEDERAL JURISDICTION

The dual judicial system existing in the United States inherently causes friction where the federal and state courts meet in the exercise of their concurrent jurisdiction. Congress, empowered by the Constitution<sup>1</sup> with defining the extent of the jurisdiction of the lower federal courts, by the respective expansion and contraction of federal jurisdiction<sup>2</sup> has regulated this friction.<sup>3</sup> In certain fields the federal judiciary, for various purposes, has contracted its jurisdiction in favor of state courts; and pressure is being exerted for further judicial limitation.<sup>4</sup>

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1. U. S. Const. Art. III, § 1.

2. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 506-515 (1928).

3. See, e.g., 28 U. S. C. § 1341 (Supp. 1952) which prohibits interference with state tax orders where a plain, speedy, and efficient remedy exists in the state courts; 28 U. S. C. § 1342 (Supp. 1952), which is similar in that it prohibits interference with state public utility rate orders under certain circumstances.

4. See Judge Clark's disapproval of this trend in *P. Beiersdorf & Co. v. McGohey*, 187 F. 2d 14, 15 (2d Cir. 1951) (dissenting opinion). The most recent recommendation concerning Congressional limitation of diversity

## I. STATE POLICY AND UNSETTLED STATE LAW IN FEDERAL COURTS

A. *Jurisdiction Based on a Federal Question*

Where a substantial federal question exists, federal jurisdiction may be invoked originally<sup>5</sup> or on removal.<sup>6</sup> Where interpretation of unsettled state law is necessary to ascertain the existence of a federal question, federal courts can decide the state question although such will be a final disposition of the case requiring no decision of the federal question.<sup>7</sup> The traditional reluctance to decide constitutional issues if decisions can be predicated on other grounds<sup>8</sup> frequently prompts federal courts to make determinations of state law.<sup>9</sup>

Nevertheless, there have evolved judicially-imposed restrictions on federal question jurisdiction. When federal equity jurisdiction is invoked, the federal court in the exercise of its equitable discretion will withhold injunctive relief pending an authoritative state determination of a doubtful state question in "exceptional circumstances."<sup>10</sup> The circumstances which warrant withholding jurisdiction are generally limited to those exceptional instances where federal intervention would infringe upon the rightful independence of the state by prematurely interfering with domestic affairs,<sup>11</sup>

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jurisdiction urges that the jurisdictional amount be raised from \$3,000 to \$7,500 and that a corporation be deemed a citizen both of the state of its creation and the state in which it has its principal place of business. See Report of the Director of the Administrative Office of the United States Courts, Report of the Judicial Conference of the United States 1, 27 (1951).

5. 28 U. S. C. § 1331 (Supp. 1952). Federal question jurisdiction may be invoked to protect those rights arising under federal law, federal treaties, or the Constitution. *Ibid.*

6. 28 U. S. C. § 1441 (Supp. 1952).

7. *E.g.*, *Siler v. Louisville & Nashville R. R.*, 213 U. S. 175 (1909); see *City of Winchester v. Winchester Water Works Co.*, 251 U. S. 192 (1920).

8. See, *e.g.*, *Alabama Federation of Labor v. McAdory*, 325 U. S. 450, 470-471 (1945); *Ashwander v. TVA*, 297 U. S. 288, 346-348 (1936) (concurring opinion).

9. See, *e.g.*, *Siler v. Louisville & Nashville R. R.*, 213 U. S. 175 (1909); see *Hillsborough v. Cromwell*, 326 U. S. 620, 629 (1946). *But see* *Thompson v. Consolidated Gas Corp.*, 300 U. S. 55, 76 (1937). However, a decision based on federal construction of state law, while disposing of the case, is only tentative and at best a prediction of the state law; the state court's determination of its own law is controlling. See *Sutton v. Leib*, 342 U. S. 402, 413-414 (1952) (concurring opinion); *Thompson v. Consolidated Gas Corp.*, *supra* at 74. And where a federal court had found that a state statute violated the state constitution, the Supreme Court provided for dissolution of that decree if the state court subsequently found the statute valid. See *Glenn v. Field Packing Co.*, 290 U. S. 177 (1933); Note, 43 *Yale L. J.* 669 (1934).

10. *E.g.*, *A. F. of L v. Watson*, 327 U. S. 582 (1946); *Chicago v. Fieldcrest Dairies*, 316 U. S. 168 (1942); *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941).

11. See *Meredith v. Winter Haven*, 320 U. S. 228, 235-236 (1943) (summarizing the "exceptional circumstances").

especially state administrative action.<sup>12</sup>

In diverting questions of state law to state courts the federal action is usually stayed for a reasonable time to allow commencement of an independent state suit to obtain an authoritative decision concerning the applicable state law.<sup>13</sup> If determination of the state question does not completely dispose of the controversy, the federal court vacates the stay order and the action on the federal question proceeds. If an action is already pending in a state court which will determine the unsettled state question, a federal court is more inclined to grant a stay pending outcome of the state action than when no state action has been instituted.<sup>14</sup> Submission of the state questions to the state court is expensive and inconvenient for the litigants, but the doctrine of equitable abstention is motivated by the stronger considerations of harmonious cooperation between federal and state governments.<sup>15</sup>

The rationale of the equitable abstention doctrine as it first appeared was to enable the federal courts to avoid (1) a premature constitutional decision<sup>16</sup> and (2) needless friction with state courts whose decision would supplant a federal ruling on the state question.<sup>17</sup> It was thought that application of the doctrine was limited to cases in which the state decision could dispose of the entire case,<sup>18</sup> making federal adjudication of the constitutional issues unnecessary.<sup>19</sup> This analysis was supported by the refusal to extend the

12. See Davis, *Administrative Law* § 218 (1951).

13. See, e.g., *Shipman v. DuPre*, 339 U. S. 321 (1950); *Spector Motor Service v. McLaughlin*, 323 U. S. 101 (1944); *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941). But see *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943) (complaint dismissed); *Local 333B, United Marine Division v. Battle*, 101 F. Supp. 650 (E.D. Va. 1951) (action dismissed because adequate remedy available through state courts and direct appeal to Supreme Court). The practice of submission of doubtful questions of state law to state courts in any type of case has been criticized from a practical viewpoint. See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Eric v. Tompkins*, 55 *Yale L. J.* 267, 293-294 (1946).

14. See *Chicago v. Feldcrest Dairies*, 316 U. S. 168, 173 (1942).

15. *Id.* at 172-173.

16. See *Spector Motors Service v. McLaughlin*, 323 U. S. 101, 104-105 (1944); *Chicago v. Feldcrest Dairies*, 316 U. S. 168, 173 (1942); *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, 500-501 (1941).

17. See *Railroad Comm'n v. Pullman Co.*, *supra* note 16, at 499-500; see *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 211 (1929) *semble*—where the adequacy of the state remedy was mentioned and the complexity of the contracts and statutes was stressed.

18. See Wendell, *Relations Between the Federal and State Courts* 59 (1949).

19. See Note, 48 *Col. L. Rev.* 575, 582 (1948). Supreme Court dicta also supported the same proposition. See *Public Utilities Comm'n v. United Gas Corp.*, 317 U. S. 456, 463 (1943); *cf. Propper v. Clark*, 337 U. S. 472, 490 (1949).

abstention doctrine to cases involving nonconstitutional federal questions<sup>20</sup> with the possible exception of federal bankruptcy proceedings.<sup>21</sup>

A recent application of the abstention doctrine in *Alabama Public Service Commission v. Southern Ry.*<sup>22</sup> indicates its extension, since the Supreme Court, while carefully distinguishing the cases in which jurisdiction has been withheld to avoid premature constitutional decision, stated that a federal district court in the exercise of equitable discretion should not interfere with the regulatory order of a state agency—although applicable state law was sufficiently definite to avoid objection to a federal decision as an unnecessary constitutional adjudication. The only stated limitation to this broad policy of non-intervention occurs when it is shown that state courts do not offer adequate protection of a federal right.<sup>23</sup> While concurring in the result, Justice Frankfurter, an advocate of the original abstention doctrine,<sup>24</sup> attacked the decision as a virtual abdication of the congressional grant of federal question jurisdiction—at least in the area of state regulatory proceedings—since the extraordinary circumstances justifying application of the abstention doctrine were absent in this case.<sup>25</sup>

#### B. *Jurisdiction Based on Diversity of Citizenship*

Diversity of citizenship jurisdiction, like federal question jurisdiction, may be invoked originally<sup>26</sup> or on removal.<sup>27</sup> Where diversity alone is the basis of jurisdiction, normally no constitutional issue would be present and therefore none would be avoided by submitting unsettled state questions for state court determination. It is then compatible in the typical diversity case, where no constitutional issue exists, that the federal courts regard the congressional grant of diversity jurisdiction to require adjudication of the

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20. See *Propper v. Clark*, *supra* note 19, at 489-490 (Trading with the Enemy Act); *Estate of Spiegel v. CIR*, 335 U. S. 701, 707-708 (1948), 33 Minn. L. Rev. 547 (1949) (includibility of trust corpus for federal estate tax).

21. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940).

22. 341 U. S. 341 (1951).

23. *Alabama Pub. Serv. Comm'n v. Southern Ry.*, *supra* note 22, at 349.

24. See Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1928*, 43 Harv. L. Rev. 33, 61-62 (1929). Frankfurter wrote the majority opinions in the cases which announced the doctrine. See *Railroad Comm'n v. Pullman*, 312 U. S. 496 (1941); *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U. S. 573, *amended*, 311 U. S. 614 (1940).

25. *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U. S. 341, 351 (1951) (concurring opinion).

26. 28 U.S.C. § 1332 (Supp. 1952).

27. 28 U.S.C. § 1441 (Supp. 1952).

rights of the parties although state law may be novel or unsettled.<sup>28</sup> While federal construction of state law does not control state courts,<sup>29</sup> the decision of *Erie R.R. v. Tompkins*<sup>30</sup> is interpreted as imposing greater responsibility on federal courts in their application of state law.<sup>31</sup>

Nevertheless,<sup>32</sup> the exercise of diversity jurisdiction is not completely unrestricted. Among the first limitations is the doctrine that a federal district court has discretion to decline equitable jurisdiction where the suit concerns the administration of the internal affairs of a foreign corporation;<sup>32</sup> but this "internal affairs rule" is limited to situations in which the courts of the corporation's domiciliary state can grant a more just and effective remedy.<sup>33</sup> While reference is still made<sup>34</sup> to the uniformly criticized<sup>35</sup> internal affairs rule, it rarely has been used as a method of declining to hear the merits of a controversy.<sup>36</sup>

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28. *E.g.*, *Sutton v. Leib*, 342 U. S. 402 (1952); *Meredith v. Winter Haven*, 320 U. S. 228 (1943); see *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 148 (1933) (dissenting opinion). But even where the exercise of federal jurisdiction would not interfere with state domestic policy, Justice Frankfurter, in order to avoid a tentative determination, would remand all unsettled questions of state law for authoritative decision by the state courts. See *Sutton v. Leib*, *supra* at 412-414 (concurring opinion). See also *Harlow v. Ryland*, 172 F. 2d 784, 786-787 (8th Cir. 1949), 50 Col. L. Rev. 710 (1950), where the court, although sitting in diversity in an action at law, refused to declare a state statute invalid under the state constitution because the state supreme court would have the final word anyway.

29. See note 9 *supra*.

30. 304 U.S. 64 (1938), 22 Minn. L. Rev. 885.

31. See *Meredith v. Winter Haven*, 320 U. S. 228, 237 (1943).

32. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933); cf. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U. S. 518 (1947); *Williams v. Green Bay & W. R. R.*, 326 U. S. 549 (1946).

33. See *Koster v. (American) Lumbermens Mut. Cas. Co.*, *supra* note 32, *passim* (application of forum non conveniens); *Williams v. Green Bay & W. R. R.*, *supra* note 32, at 554-556; *Rogers v. Guaranty Trust Co.*, *supra* note 32, at 131.

34. See, *e.g.*, *Mayflower Hotel Stockholders v. Mayflower Hotel Corp.*, 193 F. 2d 666, 668 (D.C. Cir. 1951).

35. See Notes, 18 Minn. L. Rev. 192 (1934); 33 Col. L. Rev. 492 (1933); 31 Mich. L. Rev. 682 (1933).

36. See *e.g.*, *Mayflower Hotel Stockholders v. Mayflower Hotel Corp.*, 193 F. 2d 666 (D.C. Cir. 1951); Note, 46 Col. L. Rev. 413, 420-421 (1946). But see *Healy v. R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207 (M.D. N.C. 1942) (dismissal without prejudice where identical action already pending in a state court of the corporation's domicile). Much of the internal affairs rule apparently has been superseded by the doctrine of forum non conveniens, with dismissal of any action when, all considerations weighed, the availability of a more appropriate forum is indicated; the doctrine's statutory counterpart provides for change of venue under virtually the same circumstance. 28 U. S. C. § 1404(a) (Supp. 1952). While the internal affairs rule in the *Rogers* case used substantially the same test as that of forum non conveniens, consideration was limited to the adequacy of the remedy afforded by the courts of the corporation's domiciliary state and not to availability of an adequate remedy in the courts of any other place. See *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 131 (1933).

Independently of the internal affairs rule and for somewhat different reasons, another limitation on diversity jurisdiction evolved, providing that if all creditor and stockholder interests are adequately protected, federal receivership actions being equitable in nature should be declined in deference to expert state agencies.<sup>37</sup> The reluctance to frustrate the function of a state agency which is able to administer the receivership efficiently and more economically than an inexperienced federal court underlies the surrender of jurisdiction.<sup>38</sup> But a sharp distinction must be drawn between declining jurisdiction in favor of state administrative agencies as differentiated from state courts, since jurisdiction is more freely surrendered to a state agency.<sup>39</sup>

It has been intimated that even in a diversity case a federal court of equity would stay its proceedings in favor of a state forum under the same exceptional circumstances which call for the application of the abstention doctrine in federal question cases.<sup>40</sup> Thus in *Burford v. Sun Oil Co.*,<sup>41</sup> where equity jurisdiction rested both on diversity of citizenship and presence of a federal question, the Supreme Court declined to enjoin enforcement of an order of the Texas Railroad Commission on the ground that the subject matter was a complicated specialty for a particular state court which, acting as an adjunct of the state administrative agency, reviewed the Commission's orders. A vigorous dissenting opinion of Justice Frankfurter in which three justices concurred<sup>42</sup> criticized the majority's decision as an arbitrary judicial limitation of diversity jurisdiction in contravention of Congress's deliberate refusal to impose such restrictions.<sup>43</sup> The dissent does recognize, however, that equity jurisdiction need not always be exercised where state law is doubtful.<sup>44</sup>

But again in *Alabama Public Service Commission v. Southern Ry.*,<sup>45</sup> where, as in the *Burford* case, jurisdiction was predicated on the dual bases, the Court, in declining to exercise its jurisdiction,

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37. *Pennsylvania v. Williams*, 294 U. S. 176 (1935).

38. See *Gordon v. Washington*, 295 U. S. 30, 39 (1935); *Pennsylvania v. Williams*, *supra* note 37, at 182-183.

39. See *id.* at 183-184; *Burford v. Sun Oil Co.* 319 U. S. 315, 346 (1943) (dissenting opinion).

40. See *Meredith v. Winter Haven*, 320 U. S. 228, 234 (1943).

41. 319 U. S. 315 (1943).

42. Chief Justice Stone and Justices Roberts and Reed joined Justice Frankfurter in dissenting.

43. *Burford v. Sun Oil Co.*, 319 U. S. 315, 336 (1943) (dissenting opinion).

44. *Id.* at 345.

45. 341 U. S. 341 (1951).

indicated that the result would not vary with the basis of jurisdiction. Avoidance of friction with domestic policies was stressed and reliance was placed neither on the reluctance to decide constitutional issues nor on the presence of doubtful state law. Justices Frankfurter and Jackson, while concurring in the result, ignored the diversity aspect of jurisdiction and limited their attack on the decision as a judicial abdication of federal question jurisdiction to state courts.<sup>46</sup>

## II. FEDERAL DECLARATORY ACTION WHEN RELATED STATE ACTION PENDING

Although it is not controverted that a federal court has the power to hear and decide an in personam action although an identical action is pending in a state court,<sup>47</sup> whether a federal court *must* exercise its jurisdiction in such a case is not entirely certain.<sup>48</sup> Where, however, federal declaratory relief is sought in an in personam action, the federal court unquestionably has discretion to refuse to exercise its jurisdiction.<sup>49</sup> The different approach results from the nature of the declaratory judgment, which requires as a *sine qua non* that a useful purpose be served by the granting of a declaratory judgment.<sup>50</sup> So when a state action is already pending at the time the federal declaratory action is commenced, the federal court is required to ascertain the usefulness of the requested declaratory relief.<sup>51</sup> If the state action is at least as comprehensive

46. Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U. S. 341 (1951) (concurring opinion).

47. *E.g.*, Kline v. Burke Construction Co., 260 U. S. 226 (1922); *see* Mandeville v. Canterbury, 318 U. S. 47, 49 (1943); Princess Lida v. Thompson, 305 U. S. 456, 466 (1939).

48. *See* P. Beiersdorf & Co. v. McGohey, 187 F. 2d 14 (2d Cir. 1951) (Judge Clark dissenting); Mottolese v. Kaufman, 176 F. 2d 301 (2d Cir. 1949) (Judge Frank dissenting).

49. Brillhart v. Excess Ins. Co., 316 U. S. 491 (1942); *see* 51 Yale L. J. 511 (1942).

50. *See* Yellow Cab Co. v. Chicago, 186 F. 2d 946, 950 (7th Cir. 1951); Panhandle Pipe Line Co. v. Michigan Gas Co., 177 F. 2d 942, 944 (6th Cir. 1949); *see* Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677, 678 (1942); *cf.* Carbide & Carbon Corp. v. United States Chemicals, 140 F. 2d 47, 49 (4th Cir. 1944) (concurrent federal actions). An action for declaratory relief is analogous to an extraordinary equitable remedy because of its discretionary granting, but a characterization as equitable fails since a declaratory judgment may be granted although an adequate legal remedy exists. When a declaratory action is refused to be heard because of the pendency of a related state action, it is refused because it would serve no useful purpose and not because of the adequacy of the legal remedy. *See* Mutual Life Ins. Co. v. Krejci, 123 F. 2d 594, 597 (7th Cir. 1941); Columbian Nat. Life Ins. Co. v. Foulke, 89 F. 2d 261, 263 (8th Cir. 1937).

51. *See* Brillhart v. Excess Ins. Co., 316 U. S. 491, 495 (1942); Guardian Life Ins. Co. v. Kortz, 151 F. 2d 582, 586 (10th Cir. 1945). Where,



as the federal action, the declaratory judgment generally would serve no useful purpose, and the lower federal courts, mindful of the Supreme Court's admonition to avoid "gratuitous interference"<sup>52</sup> with state courts, usually refuse declaratory relief.<sup>53</sup>

The exercise of jurisdiction may also be refused where the declaratory action is being used as a circumvention of or a substitute for the removal statute when the right to remove has been lost by the failure to conform to the statutory requirements,<sup>54</sup> when the rights of the parties depend upon unsettled questions of state law,<sup>55</sup> when it is used as an instrument of harassment,<sup>56</sup> or when the declaratory judgment would prematurely interfere with state administrative and fiscal policies.<sup>57</sup> In concurrent actions, the first decision is *res judicata* to the common issues between the common parties in the other action,<sup>58</sup> and declining jurisdiction not only eliminates the race for *res judicata*, but also avoids expensive and wasteful duplication of litigation and needless friction with state courts.

The pendency of a prior state action, however, does not of itself necessarily indicate that a federal court should refuse to grant a declaratory judgment. A declaratory judgment could serve a useful purpose and should be granted despite the prior state action where the question to be determined in the federal court is not present in the state action,<sup>59</sup> where the rights of more parties can

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however, the federal declaratory action precedes a related state action, the federal courts do not relinquish jurisdiction, *Aetna Life Ins. Co. v. Martin*, 108 F. 2d 824 (8th Cir. 1940); since the state proceedings cannot be enjoined the two actions proceed independently. *Washington Loan & Trust Co. v. Lyon*, 98 F. Supp. 320 (D. D.C. 1951). But it has been indicated that where there are related concurrent federal declaratory actions the question of priority of commencement is not determinative, and the suit which will more expeditiously adjudicate the rights of all the parties will be allowed to continue while the other action is stayed. See *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952).

52. See *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 495 (1942).

53. See, e.g., *Connecticut Indemnity Co. v. Oliver*, 172 F. 2d 68 (8th Cir. 1949); see *Yellow Cab Transit Co. v. Overcash*, 133 F. 2d 228, 232 (8th Cir. 1942); *Greer v. Searce*, 53 F. Supp. 807, 813 (W.D. Mo. 1944).

54. *H. J. Heinz Co. v. Owens*, 189 F. 2d 505 (9th Cir. 1951), *cert. denied*, 342 U. S. 905 (1952); see *Kaufman & Ruderman v. Cohn & Rosenberger*, 177 F. 2d 849, 850 (2d Cir. 1949).

55. See *Yellow Cab Co. v. Chicago*, 186 F. 2d 946, 951 (7th Cir. 1951).

56. See *Indemnity Ins. Co. v. Schriever*, 142 F. 2d 851, 853 (4th Cir. 1944) (by implication); *Maryland Cas. Co. v. Boyle Construction Co.*, 123 F. 2d 558, 565-566 (4th Cir. 1941).

57. *Great Lakes Co. v. Huffman*, 319 U. S. 293 (1943).

58. *Restatement, Judgments* § 43 (1942).

59. *Maryland Cas. Co. v. United Corp.*, 111 F. 2d 443 (1st Cir. 1940) (alternative holding); *Maryland Cas. Co. v. Consumers Finance Serv.*, 101 F. 2d 514 (3d Cir. 1938).

be determined in the federal suit,<sup>60</sup> or possibly where the federal action is likely to reach a faster determination than the state proceeding.<sup>61</sup>

The statutory<sup>62</sup> grant of power to issue declaratory judgments does introduce the element of discretion in the assumption of jurisdiction; but it cannot accurately be said that the refusal to exercise jurisdiction where such relief would serve no useful purpose is a judicially created limitation of federal jurisdiction,<sup>63</sup> since the power to decree a declaratory judgment under such circumstances theoretically does not exist. Moreover, the discretion is not uncontrolled and improper refusal to exercise jurisdiction may be corrected on appeal.<sup>64</sup>

### III. FEDERAL NON-DECLARATORY ACTION WHEN RELATED STATE ACTION PENDING

#### A. *Where State In Rem or Quasi In Rem Action Pending*

A long established judge-made limitation on federal jurisdiction applies to the situations where the nature of the relief sought in parallel state and federal actions requires that each court take possession or control of the same property—the res<sup>65</sup>—either initially<sup>66</sup> or during the progress of the litigation.<sup>67</sup> The court which first secures possession or control of the res takes jurisdiction to the

60. See *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 495 (1942). The liberal federal rules of joinder may allow more parties and issues to be joined in a single action, thus avoiding piecemeal litigation condemned in *American Automobile Ins. Co v. Freundt*, 103 F. 2d 613, 619 (7th Cir. 1939) and in *Aetna Cas. & Surety Co. v. Quarles*, 92 F. 2d 321, 325 (4th Cir. 1937). See, generally, Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580 (1952).

61. Fed. R. Civ. P. 57 provides that an action for a declaratory judgment may be advanced on the calendar.

62. 48 Stat. 955 (1934), now 28 U. S. C. §§ 2201, 2202 (Supp. 1952).

63. Judge Clark lists as one of the inroads on federal jurisdiction the refusal to grant declaratory relief when a pending state jury action seeks affirmative relief against the federal suitor. See *P. Beiersdorf v. McGohey*, 187 F. 2d 14, 16 (2d Cir. 1951) (dissenting opinion).

64. See Borchart, *Declaratory Judgments* 299, 313 (2d ed. 1941).

65. The res rule was first clearly announced in *Freeman v. Howe*, 24 How. 450 (U.S. 1860). Prior thereto the federal judges expressed regret at being unable to avoid the unseemly conflict occasioned by simultaneous proceedings but regarded the conflict as inherent within the dual judicial system. See *Wadleigh v. Veazie*, 28 Fed. Cas. 1319, No. 17,031 (C.C. Me. 1838).

66. Where the property has been reduced to the possession or control of one court, the action, *for purposes of this doctrine*, is said to be a proceeding in rem. See *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F. 2d 772, 778 (10th Cir.), *cert. denied*, 287 U. S. 620 (1932).

67. Where possession or control of the property has not been attained but must necessarily be gained in order to give effect to the court's judgment, the action is then said to be a proceeding quasi in rem. Actions quasi in rem include suits to foreclose mortgages, to enforce specific liens, to marshal assets, to administer trusts, and to liquidate estates. *Ibid.*

exclusion of the other court. Constructive possession of the res is deemed to be acquired by the court in which the action is first commenced<sup>68</sup> provided the actions involve substantially the same parties and have the same purpose.<sup>69</sup>

Where, however, the simultaneous actions do not involve substantially the same parties or purposes, but do require that possession or control of a specific res be taken by the court, existence of jurisdiction to dispose of the res turns on priority in attaining actual possession or control of the property instead of on priority in the institution of proceedings.<sup>70</sup> Until the res is reduced to the actual possession or control of one court, neither action can be enjoined<sup>71</sup> and both proceed concurrently.<sup>72</sup>

The res rule is used to avoid actual physical conflict between the federal and state judicial systems.<sup>73</sup> As a corollary, both actions may proceed simultaneously when one action would not interfere with the other court's possession of the property, as in proceedings

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68. This assumes that process issues properly. *See* *Palmer v. Texas*, 212 U. S. 118, 129 (1909); *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R.*, 177 U. S. 51, 61 (1900).

69. *See* *Harkin v. Brundage*, 276 U. S. 36, 43 (1928). However, the courts have encountered no little difficulty in determining what constitutes sufficient similarity of issues and parties. Early cases required virtual identity of issues, but some relaxation of the rigorous rule has been indicated. *Compare* *Ingram v. Jones*, 47 F. 2d 135 (10th Cir. 1931), *with* *Maxwell Co. v. Central Hanover Bank & Trust Co.*, 48 F. Supp. 408 (S.D. N.Y. 1943).

70. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463 (1936); *see* *Harkin v. Brundage*, 276 U. S. 36, 43 (1928); *Leggett v. Green*, 188 F. 2d 817, 819 (8th Cir. 1951).

71. The court which first acquires actual or constructive control or possession of the res may enjoin other proceedings which would interfere with its custody. *See, e.g.,* *Princess Lida v. Thompson*, 305 U. S. 456 (state injunction of federal proceedings); *see* *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R.*, 177 U. S. 51, 61-62 (1900) (state court unable to enjoin federal court plaintiff from proceeding where federal court had possession first); *cf.* *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 134-136 (1941), 26 Minn. L. Rev. 558 (1942). The *Toucey* decision revitalized the federal statute that prohibited federal courts from enjoining state proceedings. Exceptions had developed to the statute, among them being the res cases. *See* Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1177 (1933). *Toucey* denied the validity of all these exceptions save the res cases. Its effect has been offset by enactment of 28 U. S. C. § 2283 (Supp. 1952) which is believed to revive the exceptions that had existed prior to the *Toucey* case. *See* Moore, *Commentary on the U. S. Judicial Code 395-396* (1949).

72. *E.g.,* *Moran v. Sturges*, 154 U. S. 256 (1894); *United States v. Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9 (3d Cir. 1948); *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F. 2d 772 (10th Cir.), *cert. denied*, 287 U. S. 620 (1932); *see* *Penn Cas. Co. v. Pennsylvania*, 294 U. S. 189, 196 (1935).

73. *See* *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 135 (1941); *Kline v. Burke Construction Co.*, 260 U. S. 226, 235 (1922).

to determine rights in the property held by the other court<sup>74</sup> or rights against persons with respect to the property.<sup>75</sup>

Unlike most judge-made inroads on federal jurisdiction, refusal to pass on the merits in the rem and quasi in rem cases is based on lack of jurisdiction over the subject matter rather than a discretionary disinclination to exercise existing jurisdiction.<sup>76</sup> Further, since state courts have the power to enjoin federal proceedings which would interfere with the state court's prior acquisition of the res,<sup>77</sup> it is essential that refusal to adjudicate the claims be predicated on a non-discretionary basis.

### B. *Where State in Personam Action Pending*

In both the state<sup>78</sup> and federal courts<sup>79</sup> the rule is well established that the pendency of a prior in personam action between the same parties on the same claim in another jurisdiction is not grounds for dismissal of an action subsequently commenced.<sup>80</sup>

74. *Markham v. Allen*, 326 U. S. 490 (1946) (federal action to determine right of Alien Property Custodian to share in a decedent's estate being probated in a state court); *United States v. Klein*, 303 U. S. 276 (1938) (state action to declare escheat of moneys deposited in a federal court registry); *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613 (1936) (federal action by receiver to determine his rights to funds administered by a successor trustee appointed by a state court).

75. *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33 (1909) (federal action to determine parties' respective rights in an estate being administered in a state probate court); see *McClellan v. Carland*, 217 U. S. 268 (1910) (federal action by an heir against an administrator when state court action was to be commenced to determine an escheat of the estate); see *Rosenberg v. Baum*, 153 F. 2d 10, 13 (10th Cir. 1946) (federal action to impose constructive trusts upon real estate being probated in a state court). The judgment of the court which does not have possession of the res may be given effect by being set up in the court which has control of the property.

76. See *Princess Lida v. Thompson*, 305 U. S. 456, 467-468 (1939). *But cf.* *Metropolitan Finance Corp. v. Wood*, 175 F. 2d 209 (9th Cir. 1949). Seizure of property in the possession or control of another court is a nullity. *Taylor v. Carryl*, 20 How. 583 (U.S. 1857).

77. See *Princess Lida v. Thompson*, 305 U. S. 456 (1939); Note, 90 U. of Pa. L. Rev. 714, 721 (1942).

78. *E.g.*, *Greenberg v. Greenberg*, 11 N. J. Super. 582, 78 A. 2d 723 (1951) (alternative holding); *Perkins v. DeWitt*, 197 Misc. 369, 94 N. Y. S. 2d 177 (Sup. Ct. 1950), *rev'd on other grounds*, 111 N. Y. S. 2d 752 (App. Div. 1st Dep't 1952); *Mills v. Howard*, 228 S. W. 2d 906 (Tex. Civ. App. 1950).

79. *Mandeville v. Canterbury*, 318 U. S. 47 (1943); see *Kline v. Burke Construction Co.*, 260 U. S. 226, 230 (1922); *Skelly Oil Co. v. Phillips Petroleum Co.*, 174 F. 2d 89, 100 (10th Cir. 1949), *rev'd on other grounds*, 339 U. S. 667 (1950).

80. Although the pendency of a prior suit may become involved in many types of situations, the following 3 appear to be the most common:

- (1) Where the same plaintiff sues the same defendant on the same claim in a different jurisdiction.
- (2) Where the defendant in the prior action sues the prior plaintiff on a claim arising out of the same occurrence.

State courts generally exercise their discretion to avoid the duplication of litigation by staying their proceedings pending termination of prior state<sup>81</sup> or federal litigation.<sup>82</sup> Similarly, federal courts have discretion to stay their proceedings when an action which will decide the principal issue of the subsequent action is pending in another *federal* court, even though the parties to the actions are not the same.<sup>83</sup>

Even at an early date, however, considerable uncertainty prevailed concerning the power of a federal court to grant a stay in deference to a prior substantially similar in personam action in a *state* court.<sup>84</sup> In the federal courts the pendency of an action in a state court customarily was raised by a plea in abatement which results in dismissal without prejudice as a matter of right if the plea is successful;<sup>85</sup> such pendency was but infrequently raised by a motion to stay<sup>86</sup> which is directed to the court's discretion.<sup>87</sup> The decisions

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(3) Where the plaintiff seeks to abate the defendant's counter-claim on the ground that it is the basis of a prior action by the defendant.

See generally, Comment, 39 Yale L. J. 1196 (1930).

81. *E.g.*, *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P. 2d 844 (2d Dist. 1950); *Greenberg v. Greenberg*, 11 N. J. Super. 582, 78 A. 2d 723 (1951).

82. *E.g.*, *Lanova Corp. v. Atlas Engine Co.*, 44 Del. 593, 64 A. 2d 419 (Super. Ct. 1949); *cf. Mennonna v. Pennsylvania R. R.*, 5 N. J. Misc. 233, 136 Atl. 185 (Sup. Ct. 1927); *In re Phelan*, 225 Wis. 314, 274 N. W. 411 (1937) (subsequent state action *must* be stayed unless only the state proceedings can protect a substantial right).

83. *Landis v. North American Co.*, 299 U. S. 248 (1936).

84. See *Loring v. Marsh*, 15 Fed. Cas. 898, No. 8,514 (C.C. Mass. 1864), *aff'd*, 6 Wall. 337 (U.S. 1867) (concluding that a stay could not be granted). But see *Brooks v. Mills County*, 4 Fed. Cas. 290, No. 1,955 (C.C. Iowa 1876) (concluding that a plea in abatement is good if the state and federal courts have the same geographical jurisdiction).

85. See *Shipman*, *Common-Law Pleading* 388 *et seq.* (3d ed., Ballantine, 1923).

86. See Comment, 39 Yale L. J. 1196, 1198 (1930).

87. A discretionary stay of proceedings in an action at law is, however, markedly distinct from an equity court's discretionary power to decline to exercise jurisdiction. Although Rule 2 of the Federal Rules of Civil Procedure abolishes the procedural distinctions between actions at law and suits in equity, the power of a federal court to exercise discretion in the dispensation of equitable relief remains inviolate. *See, e.g.*, *A. F. of L. v. Watson*, 327 U. S. 582, 593, 599 (1946). Substantive equity principles remain unchanged. *See Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 382 n. 26 (1949). Prior to the fusion of law and equity, federal equity courts occasionally declined to hear a case when a related action was already pending in a state court. The reasons were two: (1) that since the matter could be adjudicated satisfactorily in a state court, there was no showing of irreparable damage warranting extraordinary equitable relief, *Atlas Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563 (1939); (2) that the action could have been removed to a federal court and therefore an adequate legal remedy existed in the federal court. *Cable v. United States Ins. Co.*, 191 U. S. 288 (1903). The adequacy of the available legal remedy is the remedy afforded by the federal courts and not the state courts. *See Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U. S. 64, 69 (1935).

of the Supreme Court are authority only for the proposition that a pending state action is not grounds for *dismissal* of a federal action.<sup>88</sup> And apparently no Supreme Court decision unequivocally holds that a federal court is without the discretionary power to stay its proceedings because a *prior* in personam action is pending in a state court involving substantially the same parties and issues. But at the court of appeals level, strong Supreme Court dicta which is addressed to the inability to "abdicate jurisdiction" to state courts by sustaining a plea in abatement has been used as authority for refusing to grant a discretionary stay of federal proceedings.<sup>89</sup> The lower federal courts, then, have developed the doctrine that an absolute right to a federal forum exists. Notwithstanding the widespread prevalence of the "absolute right" theory, the possible existence of discretion in granting a stay of federal proceedings has been alluded to.<sup>90</sup>

Although some federal district courts had disregarded the arbitrary "no stay" rule in actions at law,<sup>91</sup> not until two recent decisions from the Second Circuit has it been seriously considered that the mere pendency of a prior state in personam action may be sufficient reason to stay a federal suit involving substantially the same parties and issues. In the earlier decision, *Mottolese v. Kaufman*,<sup>92</sup> the court, while noting the inroads already carved out of federal jurisdiction<sup>93</sup> and the presence of a multiplicity of suits,<sup>94</sup> relied principally on the considerations of fairness and convenience

88. Nevertheless, these cases are generally relied upon in refusing to grant a stay of the federal action: *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922); *McClellan v. Carland*, 217 U. S. 268 (1910); *Chicot County v. Sherwood*, 148 U. S. 529 (1893); *Gordon v. Gilfoil*, 99 U. S. 168 (1878); *Stanton v. Embrey*, 93 U. S. 548 (1876); *Hyde v. Stone*, 20 How. 170 (U.S. 1857).

89. See, e.g., *Great North Woods Club v. Raymond*, 54 F. 2d 1017 (6th Cir. 1931); *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882 (7th Cir.), *cert. denied*, 198 U. S. 585 (1905). The doctrine was applied also in the district courts. See, e.g., *Pure Oil Co. v. Standard Oil Co.*, 2 F. 2d 260 (W.D. La. 1924); *Woren v. Witherbee, Sherman & Co.*, 240 Fed. 1013 (N.D. N.Y. 1917).

90. See, e.g., *Schwartz v. Randolph*, 72 F. 2d 892, 894 (4th Cir. 1934); *Boston Mines Corp. v. Salina Coal Co.*, 3 F. 2d 729, 735 (8th Cir. 1925); *Ironton v. Harrison Construction Co.*, 212 Fed. 353, 355 (6th Cir. 1914); *Hinsdale Paper Co. v. Norfolk Paper Co.*, 101 F. Supp. 19, 20 (D. Mass. 1951).

91. E.g., *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 89 F. Supp. 167 (S.D. N.Y. 1950); *Prudential Ins. Co. v. Zimmerer*, 66 F. Supp. 492 (D. Neb. 1946); *Auditorium Conditioning Corp. v. Carrier Corp.*, 54 F. Supp. 99 (S.D. N.Y. 1943); cf. *Vanderwater v. City Nat. Bank*, 28 F. Supp. 89 (E.D. Ill. 1939) (although an action in equity, stay was predicated on the comity owed the state).

92. *Mottolese v. Kaufman*, 176 F. 2d 301 (2d Cir. 1949).

93. *Id.* at 302-303. The court mentioned the practice of staying a federal action awaiting state construction of its statutes or constitution, the internal

underlying forum non conveniens to uphold the discretionary power to grant a stay of the federal action.<sup>95</sup> No abuse of discretion was found since the record did not indicate that the federal action would be tried earlier than the state action;<sup>96</sup> and by conditioning the stay on the defendant's submission to discovery under the federal rules, plaintiff's chief procedural advantage obtained by bringing a federal suit was protected. The latter condition may be objectionable because, by implementing with federal practices the discovery methods available for state litigation, it usurps the power of the state to fix its own court procedure. And it may encourage institution of dual actions in order to gain advantage of the federal discovery devices.<sup>97</sup> The established federal practice of granting stays in deference to a related prior federal action<sup>98</sup> illustrates, however, the flexibility of the conditional stay as a tool to impel sensible and economical litigation.<sup>99</sup>

The obvious effects of the *Mottolese* case in eliminating parallel proceedings are the conservation of judicial time and energy, the protection of defendants from procedural harassment, and the

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affairs rule, declining receivership actions in deference to state administrative agencies, and the declaratory judgment situation.

94. *Id.* at 303. The multiplicity of suits doctrine is not strictly applicable since equity jurisdiction is *assumed*—not *declined*—to prevent multiplicity. See 1 Pomeroy, Equity Jurisprudence § 243 (5th ed., Symons, 1941).

95. See *Mottolese v. Kaufman*, 176 F. 2d 301, 303 (2d Cir. 1949): “. . . for we can see no difference in kind between the inconveniences which may arise from compelling a defendant to stand trial at a distance from the place where the transactions have occurred, and compelling him to defend another action on the same claim.” Since the *Mottolese* case was a shareholders' derivative action which is equitable in nature, see *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U. S. 518, 522 (1947), the court seemingly could have invoked its equitable discretion to decline to exercise jurisdiction. But this aspect of the case was ignored, and in *P. Beiersdorf & Co. v. McGohey*, 187 F. 2d 14 (2d Cir. 1951), where only a legal remedy was sought, the *Mottolese* case was regarded as controlling.

96. The court took judicial notice of the fact that the federal non-jury docket was 11 months behind, but the comparative congestion of the state court was not mentioned.

97. Formerly, if a duplicate federal action was instituted only to obtain advantage of federal discovery practice, no utilization of the discovery devices was allowed. See *De Seversky v. Republic Aviation Corp.*, 2 F. R. D. 183, 185 (E.D. N.Y. 1941); *Empire Liquor Corp. v. Gibson Distilling Co.*, 2 F. R. D. 247, 248 (S.D. N.Y. 1941).

98. See text to note 83 *supra*.

99. See, *e.g.*, *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 89 F. Supp. 167 (S.D. N.Y. 1950) (stayed unless plaintiff agreed to cease the state proceedings); *Apex Hosiery Co. v. Knitting Machines Corp.*, 90 F. Supp. 763 (D. Del. 1950) (second of two federal actions stayed on condition that defendant waive any claim for damages accruing during the duration of the stay); *Schwartz v. Kaufman*, 46 F. Supp. 318 (E.D. N.Y. 1940) (stayed with leave to vacate stay order if another federal action which was more comprehensive was unreasonably delayed).

elimination of wasteful duplication of effort. Viewed in the light of these advantages, the result of the *Mottolese* case is, of course, compelling. A plaintiff in the state court should not be allowed to refute his original choice of forum and bring to bear the additional costs of preparation of identical law suits, which could force the defendant into an unjust settlement. Similarly, a state court defendant who has had an equal opportunity to sue in a forum of his own choice or a claim arising out of the same occurrence should not be able to hamper the plaintiff's litigation in his chosen forum.<sup>100</sup> Nor should the courts of either system be burdened with superfluous hearings.<sup>101</sup>

A subsequent federal action properly may be brought, however, with the intention of gaining certain advantages available in a federal court—such as more liberal rules of evidence,<sup>102</sup> broader discovery procedure, and possibly a more understanding judge, a better jury, and a speedier trial.<sup>103</sup> The *Mottolese* decision implicitly recognizes that these advantages may be sufficient to justify simultaneous proceedings but asserts that the federal suitor must show that the advantages outweigh the reasons for granting a stay. Judge Frank in his dissenting opinion indicates that he, on the other hand, would place the burden on the defendant to show why the stay should be granted.<sup>104</sup> He has support from two analogous situations: on a motion to dismiss on the ground of forum non conveniens the movant has the burden of showing that there is a more appropriate forum;<sup>105</sup> and where a *similar* action is pending in another federal court which may decide the principle issue, the party requesting the stay has the burden of showing its utility.<sup>106</sup> Despite this there may be validity in placing the burden on the

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100. If defendant has lost his right to remove, allowing defendant's subsequent federal action to proceed would condone circumvention of the removal statute. See note 54 *supra*.

101. Since the first action to reach judgment might be res judicata to the pending action, see *Kline v. Burke Construction Co.*, 260 U. S. 226, 230 (1922), the proceedings which have transpired before entry of the plea of res judicata are wasted.

102. Fed. R. Civ. P. 43(a) provides that, of three available rules, the federal courts use that one which most favors admissibility.

103. For example, the calendar of the Minneapolis federal district court is current (communication from the Clerk of the United States District Court for the District of Minnesota, on file, University of Minnesota Law Library), while the corresponding (Hennepin County) calendar of the state district court is 15 months in arrears (communication from the clerk of Minnesota District Court, Fourth Judicial District, on file, University of Minnesota Law Library).

104. *Mottolese v. Kaufman*, 176 F. 2d 301, 305 (2d Cir. 1949).

105. See *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947).

106. See *Landis v. North American Co.*, 299 U. S. 248, 255-256 (1936).



plaintiff since had *identical* actions been brought in courts of the same jurisdiction, the second action would be regarded as vexatious and would be abated summarily.<sup>107</sup>

Inasmuch as the cases which intoned the "absolute right" theory relied only on questionable precedent and did not meet the practical objections to simultaneous actions, consideration should be given the objections to discretionarily granting stays which are raised by Judge Clark in his dissent to *P. Beiersdorf & Co. v. McGohey*,<sup>108</sup> the decision relying on the *Mottolese* case. The procedure used in the *Mottolese* case requires that at the hearing on the motion to stay the federal action it be ascertained whether the advantages made available by institution of the federal action outweigh the disadvantages<sup>109</sup> of dual state and federal proceedings. If the stay is granted, the order granting it is reviewable on petition for mandamus to the court of appeals,<sup>110</sup> however, an order denying the stay is not appealable<sup>111</sup> and probably is not reviewable on petition for mandamus.<sup>112</sup>

It is to this procedure that Judge Clark raises four objections. The first is that the hearing on the motion to stay is a waste of time for the court and counsel. But it seems at least as wasteful to proceed with a full-scale trial irrespective of its utility or necessity—only to have the issues mooted by entry of judgment in the state action.<sup>113</sup>

107. *See, e.g.*, *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 592-593 (1878); *Seeger v. Young*, 127 Minn. 416, 419-420, 149 N. W. 735, 736 (1914).

108. 187 F. 2d 14 (2d Cir. 1951).

109. Consideration should be given such factors as the scope of the issues of the respective actions, similarity of parties, comparative congestion of the courts' calendars, and the adequacy of the relief available in each court. In denying a motion to stay, a recent decision relied in part upon the fact that the attorneys in the state and federal actions were not the same. *See Montro Corp. v. Prindle*, 105 F. Supp. 460, 465, 466 (S.D. N.Y. 1952).

110. Under 28 U. S. C. § 1651(a) (Supp. 1952) a court of appeals may issue writs in the nature of mandamus in aid of its potential jurisdiction. *See Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943). Failure to adjudicate the merits of matters properly presented to the district court justifies issuance of the writ. *McClellan v. Carland*, 217 U. S. 268 (1910); *P. Beiersdorf & Co. v. McGohey*, 187 F. 2d 14 (2d Cir. 1951); *Mottolese v. Kaufman*, 176 F. 2d 301 (1949). *Contra: Jewell v. Davies*, 192 F. 2d 670 (6th Cir. 1951), *crt. denied*, 343 U. S. 904 (1952).

111. It is not a "final decision" within the meaning of 28 U. S. C. § 1291 (Supp. 1952). *Cf. Catlin v. United States*, 324 U. S. 229 (1945); *In re Kilpatrick*, 167 F. 2d 471 (5th Cir. 1948). These cases state that an order denying a motion to dismiss is not appealable.

112. That mandamus will not lie to review an order denying motion to dismiss, *see Sound Inv. & Realty Co. v. Harper*, 178 F. 2d 274 (8th Cir. 1949); *cf. Federal Sav. & Loan Ins. Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945). *But cf. Whittel v. Roche*, 88 F. 2d 366 (9th Cir. 1937) (mandamus will lie to review order denying motion to dismiss).

113. It is true, however, that if the federal suit had not come up for

The second objection is the difficulty of determining whether the state action will afford as complete relief. But an analysis of the respective pleadings would usually determine the general nature of the relief sought, and the fact that the federal remedy is more adequate is a factor which favors allowing the federal action to proceed. Furthermore, if the state suit does not settle all issues, the stay order may be vacated and trial proceed on the issues not rendered *res judicata* by the state adjudication.

Judge Clark's third objection is to the appropriateness of penalizing diligence in commencing the federal action. But if the plaintiff in state court subsequently commences a similar federal action, staying his federal suit does not unduly penalize *his* diligence since it was utilized initially to institute the state action. Where a state court defendant with equal opportunity to institute action is the federal suitor, allowing the federal action to proceed would in effect penalize the state court plaintiff's diligence in commencing action, especially where the expenses of the additional litigation would force the state plaintiff to abandon his state action.

Fourthly, Judge Clark finds it difficult to imagine that objective bases can be found on which to premise refusal to exercise jurisdiction. This is probably his most telling criticism, since if no criteria exist to test the exercise of discretion, the district judge has power to arbitrarily choose the cases which he will hear if a related state action is pending. The *Mottolese* and *Beiersdorf* cases have produced few guides to aid in determining what facts are to be considered in ruling on the stay. *Mottolese* mentioned only the broader discovery devices of the federal court and the delay concomitant with a federal trial, but failed to compare the relative delay in the state court. Limiting analysis to only these aspects is not an accurate appraisal of the advantages of the federal action and necessarily vests the district judge with almost uncontrolled discretion.

#### IV. CONCLUSION

The working area of federal jurisdiction has undergone recurring diminution for varied and independent reasons. Reluctance to make tentative constitutional decisions<sup>114</sup> and the desire to avoid interference with domestic policy until it has had an opportunity to

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trial before the state judgment was entered, no federal judicial effort would have been expended; under the *Mottolese* procedure the motion on the stay may have been heard before entry of the state judgment and the time spent hearing the motion wasted.

114. See note 16 *supra*.

be reviewed in the state courts<sup>115</sup> underlies the surrender of jurisdiction in some cases. The inability to afford as convenient and effective relief as a state agency<sup>116</sup> or another court<sup>117</sup> also contributes to the contraction of federal jurisdiction. Another limitation is based on the necessity of avoiding physical conflict between the two judicial systems over control of specific property.<sup>118</sup> All these limitations have been considered by the Supreme Court and now are firmly established—though sometimes over the criticism that self-imposed restrictions upon jurisdiction are judicial legislation.<sup>119</sup> Nevertheless, in at least two situations the limitations announced by the Court have been sanctioned subsequently by Congress and enacted into law.<sup>120</sup>

Originally the refusal to entertain a controversy was limited to cases in which equitable relief was requested; however, the introduction of federal forum non conveniens extended the right to refuse jurisdiction in cases which sought only a legal remedy. It was, then, the establishment of forum non conveniens which paved the way for a general discretionary power to refuse to hear a case—regardless of the relief sought. And as indicated by Judge Frank, since the limitation of jurisdiction promulgated in the *Mottolese* case fits into none of the established exceptions, allowing a federal court sitting in diversity to decline to exercise jurisdiction under the circumstances existing therein destroys by judicial decision a substantial area of diversity jurisdiction.<sup>121</sup>

Yet diversity jurisdiction has been undermined not only by express judicial and congressional limitations but also by development of the doctrine of *Erie R.R. v. Tompkins*,<sup>122</sup> and the futility

115. See text to notes 22-25 *supra*.

116. See text to notes 37-39 *supra*.

117. See text to notes 32-33 *supra*.

118. See text to note 67 *supra*.

119. See, *e.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U. S. 341, 357-362 (1951) (concurring opinion); Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 515, 517 (1947) (dissenting opinion); Burford v. Sun Oil Co., 319 U. S. 315, 344-345 (1943) (dissenting opinion).

120. Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947), by enactment of 28 U. S. C. § 1404(a) (Supp. 1952) (which predicates change of venue upon essentially the same considerations upon which dismissal is based in forum non conveniens); Matthews v. Rodgers, 284 U. S. 521 (1932), by enactment of 28 U. S. C. § 1341 (Supp. 1952) (proscription against interference with state tax orders).

121. See *Mottolese v. Kaufman*, 176 F. 2d 301, 305 (2d Cir. 1949) (dissenting opinion).

122. 304 U. S. 64 (1938), 22 Minn. L. Rev. 885. Since a federal court whose jurisdiction is based on diversity is "in effect, only another court of the State," see *Guaranty Trust Co. v. York*, 326 U. S. 99, 108 (1945), 30 Minn. L. Rev. 643 (1946), the possibility is recognized that the federal court must stay its proceedings in deference to a prior state action if the state court would

and undesirability of diversity jurisdiction is repeatedly urged.<sup>123</sup> Nevertheless, Congress, although the probable historical bases for diversity jurisdiction have largely disappeared,<sup>124</sup> steadfastly has declined to abolish it. Hence, the *Mottolese* and *Beiersdorf* cases are peculiarly vulnerable to the criticism that they are judicial legislation. As a practical matter, however, the approach adopted appears desirable. But to guard against arbitrary "abdication of jurisdiction," criteria similar to those used to test the utility of a declaratory action should be developed to guide the exercise of discretion in staying a federal suit.<sup>125</sup>

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do likewise in a similar situation. See *Indemnity Ins. Co. v. Kellas*, 80 F. Supp. 497, 501 (D. Mass. 1948), *aff'd*, 173 F. 2d 120 (1st Cir. 1949). But a federal court is foreclosed from hearing a case, under the *Erie* doctrine, only if a court of the state in which it is sitting is *without jurisdiction* to hear a similar case. Cf. *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949); *Angel v. Bullington*, 330 U. S. 183 (1947). And since granting stays rests in the court's discretion and is not premised on want of jurisdiction, it would appear that a federal court is not bound to follow the state rule on granting stays under the doctrine of *Angel v. Bullington*. See 32 Minn. L. Rev. 633 (1948) (concluding that *forum non conveniens* should be procedural rather than substantive for purposes of the *Erie* doctrine).

123. See Wendell, *Relations Between the Federal and State Courts*, 248 *et seq.* (1949); Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A. B. A. J. 499 (1933); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 520-530 (1928); Weschler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 234 (1948); Comment, 31 Mich. L. Rev. 59 (1932) (reviewing proposed legislation designed to limit diversity jurisdiction). But see Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A. B. A. J. 499 (1932); Newlin, *Proposed Limitations upon Our Federal Courts*, 15 A. B. A. J. 401, 403 (1929); Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A. B. A. J. 433 (1932). See also Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. of Pa. L. Rev. 869 (1931).

124. See Frank, *Historical Bases of the Federal Judicial System*, 23 Ind. L. J. 236, 262-270 (1948).

125. See *supra* pp. 52-54.