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Local, In Rem, and Transitory Actions: General Doctrine and Arkansas Variation

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COMMENT

LOCAL, IN REM, AND TRANSITORY ACTIONS: GENERAL DOCTRINE AND ARKANSAS VARIATION

IN *Reasor-Hill Corp. v. Harrison*,[1] an Arkansas flying service sued a Missouri landowner in Arkansas in accounting for spraying defendant's land with insecticide; the landowner defended on the ground that the flying service misrepresented the insecticides. As to this suit the Arkansas court had jurisdiction. The landowner then filed a cross-complaint against the manufacturer for damage done to his growing crop, and the question arose as to whether the Arkansas court could entertain an action for injuries to land located in another state. Held, the Arkansas court had jurisdiction.

The court recognized that its holding was contrary to the overwhelming weight of authority.[2] The general rule, which finds its basis in the old common law of England, is to the effect that a state cannot entertain suit for injury to land located in another state.[3] The English courts clearly developed a distinction between so-called "local" and "transitory" actions, holding that local

[1] 220 Ark. 521, 249 S. W. 2d 994 (1952), noted, 30 A.L.R. 2d 1213 (1953), and 65 Harv. L. Rev. 1242 (1952).

[2] *Id.* at 995. The court notes "... that with the exception of the Supreme Court of Minnesota every American Court that has passed upon the question (and there have been about twenty) has held that jurisdiction does not exist."

[3] Skinner v. East India Co., 6 How. St. Tr. 710 (1665); Doulson v. Matthew, 4 Tern Rep. 503, 100 Eng. Rep. 1143 (1792); Livingston v. Jefferson, 1 Brock 203, 4 Hughes 606, 15 Fed. Cas. 660, Fed. Cas. No. 8411 (C.C. 4th, 1811); Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 S. Ct. 771 (1895) (rule recognized), 39 L. Ed. 913; British South Africa Co. v. Companhia di Mocambique, A. C. 602 (1893); Rackow v. United Excavating Co., 67 F. Supp. 699 (rule recognized) (D.C.N.J. 1946).

Contra: Minnesota, Little v. Chicago, etc. R. Co., 65 Minn. 48, 67 N. W. 846 (1896); Louisiana, because of Civil Law background, 4 LA. ANN. 63 (1849); Virginia, CODE OF VIRGINIA, § 8-866, p. 559; New York, NEW YORK REAL PROPERTY LAW, § 536; Missouri, Ingram v. Great Lakes Pipe Line Co., 153 S. W. 2d 547 (1941), under Missouri venue statutes actions affecting title are not local unless they directly affect title.

actions must be tried where the cause of action arose.[4] Thus, the English courts refused jurisdiction of suits for injury to foreign lands.[5] As to suits within England itself, the rule presented no problem, for while such suits were required to be tried where the cause of action arose, process could be served anywhere in the country, and thus the plaintiff could always bring the defendant to trial. When the tortfeasor crossed national boundaries, however, application of the rule often resulted in wrongs going without redress.

Brought to the United States, this doctrine was applied among the states as it had been among the several nations.[6] Here, the opportunities for injustice were multiplied by the fact that there exists between the states a greater freedom of intercourse than between nations; hence, there is a greater probability (1) that land will be injured by interstate traffic, and (2) that tortfeasors will evade service of process by reason of the free ingress and egress among the states. This fact, coupled with the restriction prohibiting the process of a state from crossing that state's boundaries, leaves many injured parties without remedy.

In the leading case of *Livingston v. Jefferson*,[7] Justice Marshall, after reocognizing this problem, reluctantly agreed that the general rule was too firmy established to allow departure. While subsequent cases have almost universally accorded with this holding, the commentators have often echoed Marshall's dissatisfaction with the result.[8]

The Arkansas court was divided in the principal case, and the resulting opinions afford an excellent summary and examination

[4] 5 Holdsworth, HISTORY OF ENGL. LAW 117 (1924). A local action is the type action which could occur only at a particular place. A transitory action could occur anywhere. Thus, local actions are those involving injury or dispute as to land, whereas transitory actions pertain to persons and movable property.

[5] *Id.*

[6] Livingston v. Jefferson, 1 Brock 203, 4 Hughes 606, 15 Fed. Cas. 660, Fed. Cas. No. 8411 (4th Cir. 1811).

[7] *Id.*

[8] Note, 18 Val. Rev. 691 (1931); 65 Harv. L. Rev. 1242 (1952).

of the reasons which have compelled adherence to the rule. Commenting upon the argument that the courts of one state are without the practical ability to pass upon title to land located in another, the majority opinion cites the nature of an American state Supreme Court Library as an adequate resource from which the court may ascertain the law of any state. The dissent counters that "land actions are tried in lower courts and not in the Supreme Court Library," and to illustrate the point, Justice McFadden comments on the skill necessary to try a Trespass to Try Title suit in Texas.[9]

The majority points out that all state courts will pass upon an out of state title when the issue arises incidentally in a transitory action. Thus a situation may arise in which ". . . two companion suits, one local and one transitory, were presented to the same court together. In these states where the courts disclaim the ability to pass upon questions of title in local actions, it might be necessary for the court to dismiss the local action for that reason and yet decide the identical question in the allied transitory case."[10] This holding, the dissent submits, would eliminate, in effect, the distinction between local and transitory actions and would permit the state to determine ejectment actions involving lands located in other states, "and while we might undertake to do this . . . the full faith and credit clause of the U. S. Constitution would not require the sister state to recognize our judgment."

If the necessary effect of the majority opinion would be to allow a state to decide such actions, then the dissent would seem to be well founded. Furthermore, the broad language of the majority opinion allows that interpretation, and at no point does it specifically negative such possibility. Nevertheless, it is highly improbable that such a result was intended, and it is clearly not a necessary incident of the holding. The principal case merely

[9] This observation would seem to be entirely irrelevant, since adherence to Texas substantive law would not require utilization of the peculiar Texas procedure.

[10] Reasor-Hill Corp. v. Harrison, *supra*, note 1 at 996.

holds that an Arkansas court will entertain a suit for damages to land in another state—that is, that the nature of such a suit as a "local" action is eliminated. Does it necessarily follow that the "local" nature of an ejectment action is also abolished? The distinction between the two types of suits is basic in that the action for damages is in personam, while the suit in ejectment is, by nature, in rem. Query: Does this distinction remove the ejectment proceeding from the scope of the Arkansas holding?

In order to facilitate a discussion of this question, we will consider briefly the distinction between an in rem action and a local action. The shades of meaning between the two terms may be clearly drawn from the cases.[11] A local action is one which could occur only at a particular place. Thus it must *involve* an immovable. An in rem suit includes all actions against particular things, whether real or personal. The term "local" includes actions against persons, (e.g. trespass), but the term "in rem" does not. Though an ejectment suit falls within the meaning of both local and in rem, a trespass action is not "in rem" for it is an action against the person. As to in rem suits involving lands in one state, lack of jurisdiction in another state would seem unquestionable, if only because the sister state would not be required to honor any judgment rendered by the forum state. But to the extent that the term "local" includes actions against persons, at least this reason for want of jurisdiction falls; for there is nothing to prevent a court of one state from enforcing its judgment against an individual, whether he is a citizen of that state or not, so long as the court has jurisdiction over his person. This fundamental difference would seem to justify the conclusion that the Arkansas

[11] In Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021, 1029, Lord Mansfield made the distinction: "There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is, where the proceeding is in rem, and where the effect of the judgment cannot be had, if it is laid in the wrong place. That is the case of all ejectments. . . ." The formal distinction as to the locality of trials was stated to be the venue or place or county in which any suit must be brought in order that process may be issued and a trial had.

court did not intend, nor did it effect the inclusion of in rem proceedings within the scope of its holding.

As a second point, the majority in the principal case stated that because of the free intercourse among the states, the common law rule is not as justified as if applied among nations.[12] The dissent asserts that this reasoning relegates the states to the level of mere administrative units, contrary to their inherent position as sovereign powers.

Third, the majority notes the reluctance of a nation to subject its own citizens to suits by aliens as another reason often submitted in support of the general rule. Recognizing this to be a natural incident of the inherent jealousies among the nations, the court finds no logical foundation for this concept when applied against a sister state. Arkansas is ". . . not . . . compelled to provide a sanctuary . . . for those who have willfully and wrongfully . . . inflicted . . . injuries upon innocent landowners in [other] states."[13] The majority cites its State Bill of Rights as providing that every wrong shall have a remedy and submits that the adoption of the general rule would preclude this possibility. "Under the majority rule, we should have to tell the plaintiff that he would have been much better off had the petitioner had stolen his cotton outright instead of merely damaging it . . . We

[12] The court points out that nations, through control over passports and ports of entry, can retain tortfeasors within the reach of their process. Since the states do not have comparable powers, the court argues that the general rule is less justifiable when applied among the states. As pointed out earlier in the text, the greater freedom of movement among the several states does increase the possibility that wrongs will go without redress under the general rule. Nevertheless, the argument utilized by the majority at this point seems to be ill-founded since in many cases, including the principal case, the fact that a nation has the power to detain persons within its borders affords no real relief from the harm which frequently results under the general rule. In the principal case, for example, the action was against the insecticide manufacturer who was never in Missouri; furthermore, had the action been against the flying company, the opportunity for service, whether by a state or a nation, would seem slim, since (1) the plane did not land in Missouri and (2) the damage to the plaintiff's land probably could not have been discovered until defendant had had ample time to leave the state, even though he might be required to go through customs, acquire a passport, etc. The first of these factors, it is true, is peculiar to the unusual facts of this case; the second however, would seem to have general application.

[13] Reasor-Hill Corp. v. Harrison, *supra* note 1, at 996.

prefer to afford this litigant his day in court."[14] The dissent contends that the result reached by the majority is judicial legislation that "[t]his is an argument that should be made—if at all—in the legislative branch of government, rather than in a judicial opinion."[15]

Though contrary to the general common law rule, the Arkansas decision has been found commendable,[16] for the general rule has been criticized when applied.[17]

Having examined the general rule and the Arkansas variation thereof, it seems not amiss to consider briefly the several problems which arise in these jurisdictions following the general rule with reference to its application, and further to give some attention to the federal rules concerning the several facets of this problem.

The general rule is usually held inapplicable where extrastate timber, stones, or sand, etc., are converted, because upon severance the property becomes personalty and the subject of a transitory

[14] *Ibid.*

[15] *Id.* at 998.

[16] Note, 65 Harv. L. Rev. 1242 (1952).

[17] Livingston v. Jefferson, *supra* note 3.
For a more recent criticism of the rule, see Note, 18 Va. L. Rev. 691 (1931).
Because the common law rule was based upon the distinction between local and transitory actions, Holdsworth, HISTORY OF ENGLISH LAW, Ed. 3, vol. 5, p. 140 (1924); Hancock, TORTS IN THE CONFLICT OF LAWS, pp. 1-5 (1942); Leplar, A TREATISE ON THE ARKANSAS LAW OF CONFLICT OF LAW, § 4, p. 55 (1938); Kuhn, LOCAL AND TRANSITORY ACTIONS IN PRIVATE INTERNATIONAL LAW, 66 U. Penn. L. Rev. 301 (1918), courts have considered statutes significant which define and limit venue of local actions, 42 A.L.R. 196, at 213. (It was believed that the general rule rested not on lack of jurisdiction, but upon inability to lay venue in the forum when the injured land was located out of state; but when the venue statutes were abrogated in England, the House of Lords found a lack of jurisdiction, Brit. S. Africa v. Mocambique, A. C. 619 (1893). This holding seems to be in accord with the American view. Thus, the effect of venue statutes has been less meaningful). An Arkansas statute, ARK. STAT. 1947 ANN., § 27-601, required that actions for injury to realty be brought in the county in which the land is located. But an earlier Supreme Court decision had construed a similar venue statute inapplicable upon extrastate causes of action, K.C.S. Ry. Co. v. Ingram, 80 Ark. 269, 97 S.W. 55 (1906), and in light of this prior decision, Leflar, an authority on Arkansas Conflict of Laws, anticipated a free determination by the Court as to whether extrastate torts to realty are local or transitory. Leflar, A TREATISE ON THE ARKANSAS LAW OF CONFLICT OF LAW, § 4, p. 57 (1938).

action.[18] And in many states the general rule is also held inapplicable where the tort is committed in one state causing injury to realty in another. In such a case jurisdiction will lie either in the state where the wrong was committed or in the state where the land lies.[19] It has been suggested that this exception applies in the Arkansas case as the manufacturer's acts occurred solely in Arkansas;[20] however, it is noteworthy that the interstate exception has been applied to cases which fall within the English decision of strict liability based upon direct trespass.[21] Until recent years, the defendant manufacturer would not have been liable to the plaintiff in the Arkansas case, for liability of an original seller for damages caused by defects in his product was formerly

[18] Ariz. Commercial Min. Co. v. Iron Cap Copper Co., 19 Me. 213, 110 A. 429 (1920); Montesano Lumber Co. v. Portland Iron Works, 78 Ore. 53, 152 P. 244 (1915) (rule recognized); Montesano Lumber & Mfg. Co. v. Portland Iron Works, 94 Ore. 677, 186 P. 428 (1920); Horne v. Howe Ybr. Co., 209 Ark. 202, 190 S. W. 2d 7 (1945); Copper State Min. Co. v. Kelvin Lumber & Supply Co., 227 S. W. 938 (1921) (later app. in 1921, 232 S. W. 858); Stone v. U. S.,167 U. S. 178, 17 S Ct. 778, 42 L. Ed. 127, 26 L.R.A. (N.S.) 927 (1897); Rackow v. United Excavating Co., 67 F. Supp. 699 (D.C.N.J. 1946), noted, 14 U. Chi. L. Rev. 666 (1947).

[19] REST. OF CONFLICT OF LAWS (1934), § 615; Vermont Valley R. Co. v. Conn. River Power Co., 99 Vt. 397, 133 A. 367 (1926); Thayer v. Brooks, 17 Ohio 489 (1848); Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12139 (aff. 1852); Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4908 (1853); Armendiaz v. Stillman, 54 Tex. 623 (1881); Smith v. Southern Ry. Co., 136 Ky. 162, 123 S. W. 678, 26 L.R.A., N.S. 927 (1909). But contrary: Howard v. Ingersoll, 17 Ala. 780 (1850); Eachus v. Trustees of Ill. & Mich. Canal, 17 Ill. 534 (1856); Boslund v. Abbotsford Lumber, etc. Co., 34 Brit. Col. 485 (1925) (semble); Albert v. Fraser Cos. (N.B.) 11 M.P.R. 209, 1 D.L.R. 39 (1937.)

Note: The problem of service is not considered here.

[20] Note, 65 Harv. L. Rev. 1242 (1952).

[21] Prosser, HANDBOOK OF THE LAW OF TORTS (1941), § 13, p. 77; Newsom v. Anderson, 2 Ired. 42, 24 N.C. 42, 37 Am. Dec. 404 (1841); Lawson v. Price, 45 Md. 123 (1876); Harp v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 (1849); Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627 (1907), 12 L.R.A. (N.S.) 389; Ashville Constr. Co. v. So. R. Co., 19 F. 2d 32 (4th Cir. 1927).

The exception has been applied to damages to land in one state caused by obstruction in a stream in another, Armendiaz v. Stillman, 54 Tex. 623 (1881); to damages in one state caused by building a canal in another, Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12139 (1849) (aff. in 1852), 14 How. (U.S.) 80, 14 L. Ed. 385; to damages to a mill in one state caused by diversion of a stream in another, Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4908 (1853); Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261 (1884); to damages to a building in one state caused by an explosion in another; Smith v. So. R.B., 136 Ky. 162, 123 S.W. 678, 26 L.R.A. 927 (1909).

limited to his immediate buyer.[22] Today, a manufacturer's liability to third persons is firmly established and is based upon negligence or breach of warranty.[23] Logically, it would seem that the interstate exception should be extended to include such wrongs and that they should be actionable either where the wrong occurs or where the injury results, without regard to whether the injury occurs to land or to persons. Thus, on its facts the *Reasor-Hill* case might plausibly have been construed to fall within this exception to the general rule.[24] Had the court so found, its rejection of the general rule would have been unecessary. But the court's language was couched in terms which indicated that they mistakenly assumed that the cross-complaint was against the flying service, and, thus, that both the wrong and the injury occurred in Missouri.[25]

Even though many states allow interstate torts to realty to be maintained either in the state of origin or in the state of the injury,[26] some refuse jurisdiction;[27] among the latter is Oregon.[28] In

[22] Prosser, HANDBOOK OF THE LAW OF TORTS (1941) § 83, p. 674; Hasbreck v. Armour & Co., 139 Wisc. 357, 121 N.W. 157, 23 L.R.A. (N.S.) 876 (1909); Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (1912); Ligget & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009, L.R.A. 1916A, 940, Ann. Cas. 1917A, 179, (1915); Huset v. J. I. Case Threshing Machine Co., 120 F. 865, 61 L.R.A. 303 (8th Cir. 1903).

[23] Note; *Tort Liability of Manufacturers and Contractors; some recent developments,* 40 Harv. L. Rev. 886 (1927); Russell, *Manufacturer's Liability to Ultimate Consumer,* 21 Ky. L. J. 338 (1933); Israel, *Liability of Manufacturer for Negligence,* 8 So. Cal. L. Rev. 315 (1935); for other articles, see, Prosser, HANDBOOK OF THE LAW OF TORTS (1941), § 83, p. 674, footnote 45.

[24] In Chapman Chemical Co. v. Taylor, 222 S.W. 2d 820 (Ark. 1949), strict liability was imposed on the manufacturer who was also the sprayer. In this light perhaps the Reasor-Hill case would fall within the exception of the interstate trespasses without the extension thereof.

[25] *E.g.,* the court said (1) by defendant flying over, plaintiff had no opportunity to serve defendant, and (2) that the plaintiff would have been better off had defendant stolen his crop rather than merely damaging it. The defendant to the cross-complaint was the manufacturer, not the flying service.

[26] See note 21 *supra.*

[27] See note 21 *supra.*

[28] Montesano Lumber Co. v. Portland Iron Works, 78 Ore. 53, 152 Pac. 244 (1915) (rule recognized); Montesano Lumber & Mfg. Co. v. Portland Iron Works, 94 Ore. 677, 186 Pac. 428 (1920); Dippold v. Cathlamet Timber Co., 98 Ore. 183, 193 Pac. 909 (1920).

a recent federal case, *Arvidson v. Reynolds Metals Co.*,[29] fumes from an Oregon plant injured Washington realty. The Washington landowner sued for damages in a Washington federal district court. The defendant sought transfer to the Oregon federal district court under 28 U.S.C. 1404(a).[30] The Washington district court held that inherent in sec. 1404(a) was the mandate that the transferee forum be one where suit "might be brought," and that here the landowner could not have brought suit in Oregon because Oregon has no power to entertain actions for trespasses in foreign jurisdictions and thus lacks the required jurisdiction of the subject matter. The court maintained the doctrine of lack of jurisdiction was binding because of the inherent character of the rule as purely substantive law and because of the holdings in *Erie Railroad v. Tompkins*,[31] that federal courts apply local substantive law.

The *Arvidson* decision raises the problem as to which rule a federal court sitting in Arkansas should apply to the fact situation presented in the *Reasor-Hill* case. Since the *Erie* case, the federal court must apply the substantive law of the state in which it is sitting. Thus, if a suit is against a trespasser to foreign land, a federal court sitting in Arkansas should apply the Arkansas law.

However, *Erie v. Tompkins* and other cases[32] were situations in which the "closed door policy" of the state was held to "close the door" of the federal court. The question remains whether the federal court is required to "open its door" in cases in which the "door" of the state court is open. *Guaranty Trust Co. of New York v. York*,[33] a leading case on this point states the following rules:

[29] 107 F. Supp. 51 (1952).

[30] The § reads:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[31] 304 U.S. 64 (1938).

[32] 326 U.S. 99 (1945); Angel v. Bullington, 330 U. S. 183 (1947); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Arvidson v. Reynolds Mfg., 107 F. Supp. 51 (D.C.W.D. Wash. 1952); Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

[33] Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945).

(1) Where federal jurisdiction is based upon a federal question, the federal courts are required to follow the "open door policy" of the state in actions at law; but as to suits in equity, no such requirement exists as to either an open or closed door policy (i.e., the federal court need not follow the state rule at all).[34] (2) Where federal jurisdiction attaches solely because of diversity, whether the case be an action at law or a suit in equity, the outcome in the federal court should not lead to a substantially different result from that reached in the state court.[35] It is conceivable that equitable remedies could be sought in cases involving injury to out-of-state lands, and in such situations resort would have to be had to the distinctions drawn in *Guaranty Trust, supra,* to determine the applicable federal rule. However, since a *Reasor-Hill* fact situation will ordinarily lead to an action at law, a federal court sitting in Arkansas—whether it hears the case by reason of diversity or because a federal question is involved—would be required to follow the open door policy of that state as enunicated in the principal case.

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[34] Where there is Congressional legislation such as the NORRIS-LAGUARDIA ACT, (47 STAT. 70, 1932, 29 U.S.C.A., sec. 101 (1947), barring an injunction in the federal courts which would be available in the state courts, the problem seems to be answered, but the question is not clear as to whether federal courts may refuse an equitable remedy available in a state court without legislation. Though under the view of Justice Brandies in the *Erie* case ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts") there is a possibility that the Norris Act is unconstitutional as an attempt to restrict or expand remedies which affect substantive law rather than to restrict or expand merely jurisdiction (as it was proposed to do), unless the expansion or restriction comes within an express or implied power of the Congress. See Comment, *The Norris-LaGuardia Act & Erie R.R. v. Tompkins,* 20 U. of Chi. L. Rev. 304 (1953).

[35] The *Erie* rule is applied when jurisdiction is based solely upon diversity and does not apply in suits (1) by the United States, (2) where a federal statute is involved or (3) where federal questions are raised. See Note, *Exceptions to Erie v. Tompkins; The Survival of Federal Common Law,* 59 Harv. L. Rev. 966 (1946); Gorrell and Weed, *Erie Railroad: Ten Years After,* 9 Ohio S. L. J. 276 (1948); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 55 Yale L. J. 267 (1946).