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FAILURE OF ACCUSED TO TESTIFY

At common law the accused in a criminal case was not competent to testify. This disqualification has been removed by statute in England and in every state in the United States except Georgia, where the accused is privileged only to make a

"statement."¹ In the majority of the states the statute provides that the accused shall at his own request, but not otherwise, be competent to testify, but that a neglect or refusal so to testify shall create no presumption against him. Most of the statutes also expressly forbid any comment on such failure to take the stand.²

The original qualifying statutes in Maine³ and California⁴ did not forbid the drawing of an adverse inference from the defendant's silence. Those of New Jersey,⁵ South Carolina,⁶ and Georgia⁷ have never forbidden such an inference. The Ohio statute⁸ originally provided that no presumption should arise because of the accused's refusal to testify, but this has been changed by an amendment of the state constitution.⁹

Five of the statutes prohibit either "reference to or comment upon"¹⁰ silence; two others provide that it shall not be alluded to.¹¹ The statutes in Indiana, Nevada, and Washington¹² impose an affirmative duty on the trial court to charge that the jury

¹ See *infra* note 7. Maine abolished the disqualification first, in 1864; England last, in 1898.

² The Massachusetts statute provides that ". . . The defendant in the trial of a . . . criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him." Mass. Gen. Laws (1921) c. 233, § 20. Similar statutes are: Md. Ann. Code (1924) Art. 35, § 4; N. Y. Code Cr. Proc. (1881) § 393; Tenn. Ann. Code (Shannon, 1919) § 5600. The Pennsylvania statute provides that ". . . the neglect or refusal of any defendant, actually on trial in a criminal court, to offer himself as a witness [shall not] be treated as creating any presumption against him, or be adversely referred to by the Court or counsel during the trial." Pa. Digest (1920) § 21864. Other statutes of this type are Ala. Cr. Code (1923) § 5632; Minn. Gen. Stat. (1923) § 9815; Va. Gen. Laws (1923) § 4778.

³ Me. Acts 1864, c. 280.

⁴ Cal. Stat. 1865-1866, c. 644, p. 865.

⁵ N. J. Comp. Stat. (1910) (Cr. Proc.) § 57.

⁶ S. C. Code Cr. Proc. (1922) par. 97.

⁷ Ga. Penal Code (1926) §§ 1036, 1037.

⁸ Ohio Gen. Code (1926) § 13661.

⁹ The Ohio Constitution, Art. I, § 10, was amended in 1912 to read: "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

For expressions of satisfaction with the present rule in Ohio, see Dunmore, *Failure of the Accused to Testify* (1917) 26 YALE LAW JOURNAL 464; Price, Comment (1922) 13 JOUR. CRIM. LAW 292. But *cf. ibid.* 295, *et seq.*

¹⁰ Ill. Rev. Stat. (1927) c. 38, § 758; Mich. Comp. Laws (1915) § 12552; Neb. Comp. Stat. (1922) § 10139; W. Va. Code Ann. (1923) c. 152, § 19; Wyo. Comp. Stat. (1920) § 7507.

¹¹ Minn. Gen. Stat. (1923) § 9815; Texas Code Cr. Proc. (1925) Art. 710.

¹² Ind. Ann. Stat. (Burns, 1926) § 2267; Nev. Rev. Laws (1912) § 7161; Wash. Comp. Stat. (Rem. 1922) § 2148.

must not take the accused's failure to testify as evidence against him. In Iowa it is made a misdemeanor for the prosecutor to comment on such failure, and there, as well as in Oklahoma,¹³ improper comment is expressly made ground for a new trial. In the statutes of North Dakota, Missouri, and Kansas there is a clause to the effect that neither court nor jury shall consider the defendant's silence.

Express comment on a defendant's failure to testify, made by the prosecuting attorney in argument to the jury, is held improper under the statutes which simply provide that such failure shall create no presumption against the accused as well as under those specifically forbidding comment.¹⁴ As to the effect of such a reference occurring in a disclaimer of intention to draw an adverse inference, or in an explanation or withdrawal of other remarks, there is an apparent conflict.¹⁵ Some courts will hold a statement referring to the defendant's privilege to be within the statute where it is overheard by the jury, even though not addressed to them,¹⁶ but it is doubtful whether many courts will go this far.¹⁷ Any adverse comment on the personal appearance

¹³ Iowa Code (1927) c. 646, § 13890; Okla. Comp. Stat. (1921) § 2698.

¹⁴ *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765 (1893); *Bridgman v. State*, 170 Ark. 709, 280 S. W. 982 (1926); *Coleman v. State*, 111 Ind. 563, 13 N. E. 100 (1887) (remark in opening argument that defendant has not been sworn but that jury should watch him if he does go upon the stand is improper); *State v. Tennison*, 42 Kan. 330, 22 Pac. 429 (1889); *State v. Drummins*, 274 Mo. 632, 204 S. W. 271 (1918); *People v. Minkowitz*, 220 N. Y. 399, 115 N. E. 987 (1917); *Staples v. State*, 89 Tenn. 231, 14 S. W. 603 (1890).

¹⁵ Improper reference was cured by disclaimer and an instruction by the court in *Commonwealth v. Richmond*, 207 Mass. 240, 93 N. E. 816 (1911); *People v. Hess*, 85 Mich. 128, 48 N. W. 181 (1891). *Contra*: *Jackson v. State*, 45 Fla. 38, 34 So. 243 (1903) (new trial ordered where the only reference to the accused's silence occurred in the course of disclaiming that a proper remark was intended as a reference). The remark by the prosecutor: "Although I have no right to swear any man accused of crime, I have a right . . . etc." was held no infraction of the statute. *Sawyers v. Commonwealth*, 88 Va. 356, 13 S. E. 708 (1891). *Contra*: *People v. Lay*, 193 Mich. 17, 159 N. W. 299 (1916) (remark: "I have not a word about this respondent . . . testifying here, but . . . " held violative of statute).

¹⁶ A new trial was granted in the following cases: *State v. Holmes*, 65 Minn. 230, 68 N. W. 11 (1896) (reference made in discussion between counsel); *State v. Bennett*, 21 S. D. 396, 113 N. W. 78 (1907) (reference made in argument to court about advisability of holding night session); *State v. Ryan*, 70 Iowa 154, 30 N. W. 397 (1886) (reference made in argument to court). Of these jurisdictions, the statute of Minnesota alone forbids "allusion to" as well as comment upon defendant's silence.

¹⁷ No impropriety was found in the following cases: *State v. Lanyon*, 82 Conn. 449, 76 Atl. 1095 (1910); *State v. Mosley*, 31 Kan. 353 (1884) (reference occurring in argument as to whether evidence, properly rebuttal evidence, should be admitted in chief); *Commonwealth v. Cannon*, 13 Phila. 456 (Pa. 1879) (prosecutor asked court whether accused had been informed

of a defendant who does not testify is regarded as equivalent to express comment upon his silence.¹⁸ It seems that even where counsel for the defense refers in argument to the silence of his client the prosecuting attorney is not thereby privileged to comment upon it.¹⁹ But the prosecuting attorney may refer to the evidence introduced by the state as uncontradicted or unexplained even where the defendant does not testify, and such a reference will not violate the statutes under consideration unless it "calls the attention of the jury so pertinently to this fact (silence of the accused) that the ordinary mind would understand that this was the meaning and direction of the comment."²⁰ Thus a general reference to the evidence of the state as uncontroverted is proper.²¹ Moreover, the state may point out the failure of the accused to establish an alibi,²² to explain specific compromising facts,²³ or to contradict testimony as to a conversa-

of his "right to testify"); *McDonald v. State*, 212 N. W. 635 (Wis. 1927) (request to cross-examine defendant, made to court, held not comment within statute).

¹⁸ *Bestor v. State*, 209 Ala. 693, 96 So. 899 (1923); *State v. Tucker*, 190 N. C. 708, 130 S. E. 720 (1925). But cf. *Bachelor v. State*, 113 So. 67 (Ala. 1927).

¹⁹ *Commonwealth v. Scott*, 123 Mass. 239 (1877); *Austin v. People*, 102 Ill. 261 (1882). *Contra*: *State v. Williams*, 28 Nev. 395, 82 Pac. 353 (1905) (court's action in allowing such answering argument upheld where there was also charge to draw no inference against the defendant on account of his silence).

²⁰ *Wheeler, C. J.*, in *State v. Monahan*, 96 Conn. 289, 291, 114 Atl. 102 (1921). In *People v. Cassidy*, 260 Pac. 313 (Cal. App. 1927), the following remarks were characterized as improper (but cured by instruction): "In whose power, I ask you, within whose mind and power lies the control of the situation to tell you whether it (state's evidence) is true or not true? But they stand on their constitutional rights of the presentation of evidence and the doctrine of reasonable doubt, and no evidence whatever has been presented"

²¹ *Davis v. State*, 298 S. W. 359 (Ark. 1927); *People v. Calvert*, 251 Pac. 244 (Cal. App. 1926); *People v. McNamara*, 65 Cal. App. 521, 224 Pac. 476 (1924) ("not a single piece of testimony has been brought forward . . . against the testimony . . . of the people"); *State v. Kittenbrink*, 197 Iowa 968, 192 N. W. 157 (1924) ("pertinent facts developed by the state tending to prove guilt have not been denied"); *State v. Labore*, 80 Kan. 664, 103 Pac. 106 (1909) (no evidence to contradict sale of liquor).

²² *State v. Murray*, 292 S. W. 434 (Mo. 1926) ("Where is the alibi for defendant except for his wife?"); *Enix v. State*, 299 S. W. 430 (Tex. Cr. App. 1927) ("Where is that testimony that would warrant you to believe that defendant, at time of crime was anywhere than there?"); *Sutton v. Commonwealth*, 85 Va. 128, 7 S. E. 323 (1888) ("defendant has not accounted for his whereabouts").

²³ *Markham v. State*, 149 Ark. 507, 233 S. W. 676 (1921) (remark: "We find five of them going towards the still and only one of them denies having gone there," held proper); *People v. Gleason*, 238 Ill. App. 168 (1925) (remark: ". . . there is no evidence . . . contradicting state's testimony that defendant rented this property and that there were

tion.²⁴ It is generally allowable to comment on the defendant's failure to produce a witness whose testimony, according to the story of the defense, would exculpate the accused or deny or explain inculpatory facts.²⁵ But where such witness is a co-defendant not on trial, there is a conflict as to whether failure to call him affords an inference.²⁶ There is sharp conflict and a fairly even split in the authorities on the question as to whether such a reference is permissible when the testimony of the accused would be the only evidence available to contradict that of the state.²⁷

The privilege of the court to comment is almost equally restricted. The English statute provides that the "failure of any

various forms of gambling there . . ." held proper); *People v. Marcus*, 220 App. Div. 697, 222 N. Y. Supp. 456 (2d Dept. 1927) (defendant's possession of stolen furs may be commented upon as unexplained); *White v. State*, 298 S. W. 896 (Tex. Cr. App. 1927) (reference to compromising attitude of accused when arrested for violation of liquor law held proper).

²⁴ *Drane v. State*, 92 Miss. 180, 45 So. 149 (1907); *Territory v. McGrath*, 5 Utah 525, 17 Pac. 116 (1888).

²⁵ *Wireman v. Commonwealth*, 211 Ky. 495, 277 S. W. 822 (1925); *Commonwealth v. Sacco*, 255 Mass. 369, 151 N. E. 839 (1926); *State v. Boyd*, 199 Iowa 1206, 200 N. W. 205 (1924); *Prater v. State*, 104 Tex. Cr. App. 669, 284 S. W. 965 (1926); *Werner v. State*, 189 Wis. 26, 206 N. W. 893 (1926). Alabama requires that such witness be not "accessible" to both parties. *Jones v. State*, 109 So. 564 (Ala. 1926). In Illinois it is improper to comment on the defendant's failure to call a witness. *People v. Lanzgem*, 307 Ill. 56, 138 N. E. 222 (1923). But otherwise where the defendant attempts to account for his failure so to do. *People v. Swift*, 319 Ill. 359, 150 N. E. 263 (1925).

²⁶ Comment was allowed in the following cases: *McElwain v. Commonwealth*, 146 Ky. 104, 142 S. W. 234 (1912); *State v. Dunn*, 161 La. 532, 109 So. 56 (1926); *Cole v. State*, 16 Okla. Cr. App. 420, 183 Pac. 734 (1919) (co-defendant had been convicted). *Contra*: *Brock v. State*, 123 Ala. 24, 26 So. 329 (1898); *People v. Schultz*, 210 Mich. 297, 178 N. W. 89 (1920).

²⁷ In the following cases the prosecution was allowed to refer to the witness's testimony as uncontradicted: *Clinton v. State*, 56 Fla. 57, 47 So. 389 (1908); *People v. Paisley*, 299 Ill. 576, 132 N. E. 822 (1921) (testimony as to alleged offer of bribe); *State v. Solomon*, 210 N. W. 448 (Iowa, 1926); *State v. Clarke*, 48 Nev. 134, 228 Pac. 582 (1924); *State v. Kincaid*, 140 S. E. 338 (W. Va. 1927) (statutory rape). *Contra*: *Barnes v. United States*, 8 F. (2d) 832 (C. C. A. 8th, 1925), noted in (1926) 24 MICH. L. REV. 615; *People v. Payne*, 131 Mich. 474, 91 N. W. 739 (1902) (seduction); *State v. Snyder*, 182 Mo. 462, 82 S. W. 12 (1904); *Commonwealth v. Foley*, 24 Pa. Super. 414 (1904); *Boles v. State*, 288 S. W. 198 (Tex. Cr. App. 1926).

In Massachusetts, a charge that the jury consider the defendant's "failure . . . to produce evidence in his power to produce, to meet evidence of commonwealth" was held prejudicial unless limited to evidence other than the defendant's testimony. *Commonwealth v. Harlow*, 110 Mass. 411 (1872). But *cf.* *Commonwealth v. Richmond*, *supra* note 15 (where the argument of the prosecuting attorney that every person, so far as known, except the defendant, who had an opportunity to do the killing had testified and, if believed, was innocent, leaving only the defendant unaccounted for, was held proper even though defendant's silence was thus inferentially referred to).

person charged with an offense . . . to give evidence shall not be made the subject of any comment by the prosecution."²⁸ This has been construed as allowing the judge to urge an inference of guilt from the failure of the accused to testify.²⁹ But the American statutes cited above³⁰ which forbid such an inference preclude the court as well as the prosecuting attorney from suggesting it.³¹ An instruction that the jury shall not consider the defendant's silence as evidence against him is quite generally held proper,³² even where unrequested. There is a dictum in a Minnesota case, however, to the effect that such a charge would violate the statute in that state even though requested by the defense.³³ Where there is no specific statutory provision to the contrary, it does not, as a rule, constitute error for the court to omit any instruction on this point unless there has been an improper reference by the prosecuting attorney or unless the court has been asked so to instruct.³⁴ In this event, according to the general rule, the court must cover the point in its charge to the jury.³⁵ According to some of the cases this is sufficiently accomplished by the general statement that the presumption of the defendant's innocence remains with him throughout the trial unless and until overcome by positive evidence.³⁶ This is insufficient

²⁸ (1898) 61 & 62 Vict. c. 36, § 1.

²⁹ *Regina v. Rhodes* [1899] 1 Q. B. 77. And *cf. Ex parte Kops* [1894] A. C. 650. The Privy Council here gave a similar construction to a statute rendering the accused "competent but not compellable" to testify. (1892) 55 Vict. No. 5.

³⁰ This reference is only to those cited *supra* note 2.

³¹ *State v. Banks*, 78 Me. 490, 7 Atl. 269 (1886).

³² *State v. Goff*, 62 Kan. 104, 61 Pac. 683 (1900) (request); *State v. Landry*, 85 Me. 95, 26 Atl. 998 (1892) (request); *State v. DeWitt*, 186 Mo. 61, 84 S. W. 956 (1905) (no request); *State v. Carlisle*, 28 S. D. 169, 132 N. W. 686 (1911).

³³ *State v. Pearce*, 56 Minn. 226, 235, 57 N. W. 652, 655 (1894). The case holds that it is no error to refuse such a request, but it is said that the charge would be an "allusion to" the defendant's silence within the statutory prohibition. Similar phraseology in the statutes of Michigan, Nebraska, and West Virginia does not seem to have received this construction. *Ferguson v. State*, 52 Neb. 432, 72 N. W. 590 (1897). And see cases *infra* note 35. Query as to the construction of the similar Wyoming provision. See *infra* note 36.

³⁴ *State v. Williams*, 90 Conn. 126, 96 Atl. 370 (1916); *State v. Younger*, 70 Kan. 226, 78 Pac. 429 (1904); *Metz v. State*, 46 Neb. 547, 65 N. W. 190 (1895); *State v. Magers*, 36 Or. 38, 58 Pac. 892 (1899). Indiana, Nevada and Washington impose an affirmative statutory duty to charge. See statutes, *supra* note 12.

³⁵ *State v. Goff*, *supra* note 32; *State v. Landry*, *supra* note 32; *People v. Prevost*, 144 Mich. 17, 107 N. W. 716 (1906); *State v. Wimpsett*, 189 N. W. 983 (S. D. 1922); *State v. Walker*, 94 W. Va. 691, 120 S. E. 171 (1923), noted in (1924) 22 MICH. L. REV. 841. *Contra*: *State v. Taylor*, 261 Mo. 210, 168 S. W. 1191 (1914).

³⁶ *Roberts v. State*, 72 Fla. 132, 72 So. 649 (1916); *Leslie v. State*, 10

in most jurisdictions, where a charge more or less in the terms of the statute is required.³⁷

Where the defendant has taken the stand, it is generally held that the prosecuting attorney may comment on any failure by the accused to testify to or explain any facts or circumstances tending to criminate him; and an inference of guilt may be urged from such an omission.³⁸ The Missouri court formerly dissented from this proposition,³⁹ but the older decisions have been overruled and such comment is now allowed there.⁴⁰ Moreover, where the defendant takes the stand and testifies, the weight of authority allows him to be questioned in cross-examination, to impeach his credibility, as to whether he had not availed himself of his privilege on a former hearing of the case.⁴¹ There seems to be more hesitation, however, in allowing the prosecuting attorney to comment on such former silence.⁴²

The statutes of Iowa and Oklahoma make a new trial imperative where a reference to the defendant's silence has occurred.⁴³ A substantial number of other courts have ruled that improper comment requires a new trial even where, on objection by the defendant, the court has stopped such argument and instructed the jury to disregard it,⁴⁴ and the right to a new trial has not

Wyo. 10, 65 Pac. 849 (1901) (no intimation that such a charge would be erroneous).

³⁷ See cases *supra* note 35.

³⁸ *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192 (1917); *State v. Feinberg*, 105 Conn. 115, 134 Atl. 228 (1926); *Brashears v. State*, 58 Md. 563 (1882); *People v. Trybus*, 219 N. Y. 18, 113 N. E. 538 (1916).

³⁹ *State v. Graves*, 95 Mo. 510, 8 S. W. 739 (1888).

⁴⁰ *State v. Larkin*, 250 Mo. 218, 157 S. W. 600 (1913); *State v. Drew*, 213 S. W. 106 (Mo. 1919).

⁴¹ *Raffel v. United States*, 271 U. S. 494, 46 Sup. Ct. 566 (1926), noted (1927) 12 CORN. L. Q. 216, (1927) 21 ILL. L. REV. 641; *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189 (1895); *People v. Prevost*, 219 Mich. 233, 189 N. W. 92 (1922); *Sanders v. State*, 52 Tex. Cr. App. 156, 105 S. W. 803 (1907). *Contra*: *Parrott v. State*, 125 Tenn. 1, 139 S. W. 1056 (1911). See Mass. Gen. Laws (1920) c. 278, § 23 (forbidding inference from or reference to such former refusal to testify).

⁴² Michigan allows it. *People v. Prevost*, *supra* note 41. *Contra*: *Newman v. Commonwealth*, 28 Ky. L. R. 81, 88 S. W. 1089 (1905); *Wilson v. State*, 54 Tex. Cr. App. 505, 113 S. W. 529 (1908).

⁴³ *Supra* note 13. *State v. Ryan*, *supra* note 16 (new trial irrespective of whether defendant is prejudiced); *Nowlin v. State*, 7 Okla. Cr. App. 27, 121 Pac. 791 (1912). But *cf.* *Davis v. State*, 16 Okla. Cr. App. 377, 182 Pac. 909 (1919) (no new trial ordered on appeal where improper remarks do not appear of record and were not objected to). Query whether this provision has not been nullified by the "harmless error" statute. Okla. Comp. Stat. (1921) § 2822; *Williams v. State*, 249 Pac. 433 (Okla. Cr. App. 1926) (violation of statute by improper question to jury on their voir dire held not to require new trial).

⁴⁴ *Rowe v. State*, 87 Fla. 17, 98 So. 613 (1924); *Angelo v. People*, 96 Ill. 209 (1880); *State v. Tennison*, 42 Kan. 330, 22 Pac. 429 (1889); *State*

been held to be waived in these jurisdictions by the defendant's allowing the case to proceed without moving to withdraw it from the jury. In the view of these courts, fatal and irreparable harm is done the defendant by the fact that the jury's attention has once been called to his not offering himself as a witness.⁴⁵ The more general holding seems to be, however, that the impropriety is not reversible error where it has not been prejudicial to the defendant,⁴⁶ and a proper and timely instruction by the court is deemed to cure any prejudicial effect.⁴⁷ Withdrawal of the objectionable remark by the prosecuting attorney and a rebuke of that officer by the court has been held to accomplish the same result.⁴⁸ It is not clear, even under the more liberal majority rule, whether or not the accused is entitled to a new trial if he moves to have the case withdrawn from the jury as soon as the impropriety occurs.⁴⁹ But it is a waiver of whatever such right the defendant may have to allow the trial to proceed after an objection has been sustained to the remark,⁵⁰ unless the appellate court feels that the defendant was substantially prejudiced. If, after objection by the defendant, the court allows counsel for the state

v. Robinson, 112 La. 939, 36 So. 811 (1904); Gurley v. State, 101 Miss. 190, 57 So. 565 (1911); State v. Garrington, 11 S. D. 178, 76 N. W. 326 (1898); Haley v. State, 84 Tex. Cr. App. 629, 209 S. W. 675 (1919).

⁴⁵ See Angelo v. People, *supra* note 44, at 213.

⁴⁶ State v. Buxton, 79 Conn. 477, 65 Atl. 957 (1907); State v. Ahern, 54 Minn. 195, 55 N. W. 959 (1893); Hardesty v. State, 95 Neb. 839, 146 N. W. 1007 (1914); Price v. Commonwealth, 77 Va. 393 (1883). And see State v. Monahan, 96 Conn. 289, 291, 114 Atl. 102, 103 (1921).

In Minnesota the court will not assume the error to have been harmless unless the evidence is practically conclusive. State v. Richman, 143 Minn. 314, 173 N. W. 718 (1919) (reversal although evidence is "amply sufficient").

⁴⁷ Brooks v. United States, 8 F. (2d) 593 (C. C. A. 9th, 1925); Commonwealth v. Festo, 251 Mass. 275, 146 N. E. 700 (1925); People v. Shader, 326 Ill. 145, 157 N. E. 225 (1927) (apparently contra to earlier Illinois cases, *supra* note 44). Petite v. People, 8 Colo. 518, 9 Pac. 622 (1885); State v. Buxton, *supra* note 46; Blume v. State, 154 Ind. 343, 56 N. E. 771 (1900); People v. Hess, *supra* note 15; State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (1895); State v. Anderson, 10 Or. 448 (1882); State v. Hull, 18 R. I. 207, 26 Atl. 191 (1893); State v. Chisnell, 36 W. Va. 659; 15 S. E. 412 (1892); Dunn v. State, 118 Wis. 82, 94 N. W. 646 (1903). For a statement as to adequacy and timeliness of charge, see State v. Monahan, *supra* note 46, at 295, 114 Atl. at 104.

⁴⁸ People v. Kromphold, 172 Cal. 512, 157 Pac. 599 (1916); State v. Taylor, 134 Mo. 109, 35 S. W. 92 (1896); State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925).

⁴⁹ Davis v. State, 197 Ind. 448, 151 N. E. 329 (1926) (prompt motion to withdraw case from jury held erroneously denied. It does not appear from this case that an instruction would have sufficed after such a motion). *Contra*: Commonwealth v. Worcester, 141 Mass. 58, 6 N. E. 700 (1886) (proper remedy said to be by objection and instruction).

⁵⁰ State v. Buxton, *supra* note 46; Stone v. State, 105 Ala. 60, 17 So. 114 (1894); Coleman v. State, 111 Ind. 563, 13 N. E. 100 (1887).

to continue to comment upon the failure of the accused to testify, or fails to take suitable measures, a new trial will be granted.⁵¹

In Maine and California the original statutes qualifying the accused in a criminal case to testify if he so elected did not forbid an inference from his neglect or refusal to testify.⁵² The courts in the former state consistently held that the failure of the accused to testify did raise a presumption in favor of his guilt which the court in its charge to the jury properly might urge them to consider.⁵³ There is no case on the privilege of the prosecuting attorney to urge this presumption in his argument but it seems to have been understood that this also was proper.⁵⁴ By the California court, on the other hand, such reference in argument was deemed to be an infraction of that part of the statute which reenacted the constitutional guaranty against self incrimination.⁵⁵ In Georgia it is improper for either the court⁵⁶ or the state's attorney⁵⁷ to suggest that a presumption of the defendant's guilt is raised by his silence. And it is reversible error for the trial court to deny a motion for a mistrial on the occurrence of such an argument.⁵⁸ But the defendant cannot take advantage of it where, in the absence of such a motion, the court gives a proper instruction.⁵⁹ The rule in South Carolina seems to be similar.⁶⁰

In New Jersey the statute qualifying the accused to testify did not preclude the propriety of drawing an adverse inference from a neglect or refusal to avail himself of the privilege.⁶¹ The rule in that state, established by a long line of decisions, is that where the state's evidence "tends to establish facts which if true would be conclusive of his (the defendant's) guilt of the crime

⁵¹ *Spears v. State*, 114 So. 477 (Ala. 1927) (court allowed prosecuting attorney to continue to comment); *People v. Minkowitz*, 220 N. Y. 399, 115 N. E. 987 (1917) (court neither struck out reference nor gave instruction); *State v. Humphrey*, 186 N. C. 533, 120 S. E. 85 (1923); *Commonwealth v. Green*, 233 Pa. 291, 82 Atl. 250 (1912) (not clear that court was asked to take action); *State v. Cameron*, 40 Vt. 555 (1868) (reversal where court refused to check comment, but gave instruction).

⁵² See *supra* notes 3 and 4.

⁵³ *State v. Bartlett*, 55 Me. 200 (1867); *State v. Lawrence*, 57 Me. 574 (1870); *State v. Cleaves*, 59 Me. 298 (1871).

⁵⁴ See *State v. Banks*, *supra* note 31, at 491, 7 Atl. at 270.

⁵⁵ *People v. Tyler*, 36 Cal. 522 (1869).

⁵⁶ *Bird v. State*, 50 Ga. 585 (1874).

⁵⁷ *Robinson v. State*, 82 Ga. 535, 9 S. E. 528 (1889).

⁵⁸ *Minor v. State*, 120 Ga. 490, 48 S. E. 193 (1904).

⁵⁹ *Robinson v. State*, *supra* note 57; *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577 (1904).

⁶⁰ *State v. Pendarvis*, 88 S. C. 548, 71 S. E. 45 (1911) (comment by state's attorney improper but not ground for new trial unless verdict was thereby influenced).

⁶¹ N. J. Laws (1871) c. 40, p. 12. This provision is now N. J. Comp. Stat. (1910) (Cr. Proc.) § 57.

charged against him, and where he can disprove them by his own oath as a witness, if the facts be not true, then his silence would justify a strong inference that he could not deny the charges."⁶² And the court may, by comment on this failure to testify, urge the suggested inference to the jury.⁶³ The fact that the evidence against the prisoner is all circumstantial does not seem to take away the judge's privilege to comment,⁶⁴ although it does not justify language as emphatic as in other cases.⁶⁵ There seems to be no case upholding, or denouncing, the action of a prosecuting attorney in this respect.

In passing upon the New Jersey practice, just discussed, the United States Supreme Court held that, even if it were a violation of the privilege against self-crimination to allow an inference to be drawn from the defendant's silence, there was no federal question presented, as the National Constitution did not guarantee that privilege to those on trial in the state courts.⁶⁶ The privilege is provided for, however, by the constitutions of all but two of the states, and in one of these it is guaranteed by statute, in the other by judicial decision.⁶⁷

The direct holdings on the question of state constitutionality are, of course, few, since comment was forbidden by statute in most of the states. The court of Maine decided directly that the constitutional privilege could be reconciled with allowing an inference to be urged and drawn from failure to testify.⁶⁸ The cases in New Jersey and England⁶⁹ hold that such an inference is not subversive of the privilege against self-crimination. On the other hand the decisions in Georgia, South Carolina⁷⁰ and

⁶² Magie, C. J., in *Parker v. State*, 61 N. J. L. 308, 313, 39 Atl. 651, 653 (1898).

⁶³ *Parker v. State*, *supra* note 62; *State v. Banusik*, 84 N. J. L. 640, 64 Atl. 994 (1906) (comment in case where defendant rested after close of state's case, for purpose of getting directed verdict); *State v. Rubenstein*, 136 Atl. 597 (N. J. 1927).

⁶⁴ *State v. Conners*, 87 N. J. L. 419, 94 Atl. 812 (1915).

⁶⁵ *State v. Wines*, 65 N. J. L. 31, 46 Atl. 702 (1900) (words "natural and irresistible inference," quoted from opinion of Magie, C. J., in *Parker v. State*, *supra* note 62, held too strong in such a case); *cf.* *State v. Kisik*, 99 N. J. L. 385, 125 Atl. 239 (1923) (charge that jury could place such importance "as they saw fit" held improper).

⁶⁶ *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908) (Harlan, J., *dissenting*). The authority of this case does not seem to have been questioned.

⁶⁷ New Jersey and Iowa. The privilege is guaranteed by statute in New Jersey and by judicial decision in Iowa. N. J. Comp. Stat. (1910) (Evidence) § 8; *State v. Height*, 117 Iowa 650, 91 N. W. 935 (1902) (privilege read by implication into "due process" clause).

⁶⁸ *State v. Bartlett*, *supra* note 53; *State v. Cleaves*, *supra* note 53.

⁶⁹ *Parker v. State*, *supra* note 62; *Regina v. Rhodes*, *supra* note 29.

⁷⁰ For Georgia and South Carolina cases, see *supra* notes 56-60.

California (under the original provision) ⁷¹ take exactly the opposite view. Dicta in other cases characterize the statutory prohibition of the inference of guilt as a mere carrying out of the constitutional guaranty.⁷² Where this question has been discussed by writers on the subject, the view generally expressed by them seems to be that the permission of comment is incompatible with the privilege, on the ground that such permission virtually compels a defendant to testify, even though it criminales him.⁷³ It is also significant, perhaps, that when the statutory rule was changed in Ohio, the change was effected by a constitutional amendment.⁷⁴ This was sought to be done in Massachusetts also, but met with no success.⁷⁵ In Wisconsin, however, those favoring an alteration of the same rule apparently thought an act of the legislature sufficient.⁷⁶

Recent recommendations by crime surveys and committees charged with the investigation of criminal conditions and procedure have frequently suggested that the prosecutor be allowed to comment on the failure of the accused to testify.⁷⁷ The rule forbidding such comment, it is said, is a relic of the time when the accused was incompetent to testify.⁷⁸ The retention of it is the result of that unfortunate attitude which regards a criminal trial as a contest of skill, rather than as a judicial proceeding to ascertain the truth, about which no one, presumably, knows more than the defendant.⁷⁹ It is urged that the jury will draw an adverse inference from the prisoner's silence whether there is comment on this fact or not.⁸⁰ The statutory rule is some-

⁷¹ *People v. Tyler*, *supra* note 55.

⁷² See *Commonwealth v. Scott*, *supra* note 19, at 240; *Commonwealth v. Harlow*, 110 Mass. 411 (1872); *State v. Cameron*, 40 Vt. 555, 565 (1868); *Ruloff v. People*, 45 N. Y. 213, 222 (1871).

⁷³ COOLEY, *CONSTITUTIONAL LIMITATIONS* (7th ed. 1903) 447, *et seq.*; WIGMORE, *EVIDENCE* (2d ed. 1923) § 2272; Note (1917) 15 MICH. L. REV. 423.

⁷⁴ See *supra* note 9.

⁷⁵ DEBATES IN THE CONSTITUTIONAL CONVENTION (1917-18) 374.

⁷⁶ (1912) 2 JOUR. CRIM. LAW 870.

⁷⁷ Deck, *Proposed Reforms in Illinois Criminal Law and Procedure* (1922) 12 JOUR. CRIM. LAW 381, 385; (1912) 2 JOUR. CRIM. LAW 870 (recommendations of committee on trial procedure, Wisconsin branch); *Report of Special Committee on Law Enforcement* (1922) 47 REP. AM. BAR ASS'N 424, 431; Reynolds, *Proposed Reforms of American Criminal Law* (1923) 32 YALE LAW JOURNAL 368, 371; THE MISSOURI CRIME SURVEY (1926) 361.

⁷⁸ THE MISSOURI CRIME SURVEY, *supra* note 77; Hadley, *Criminal Justice in America* (1925) 11 AM. BAR ASS'N JOUR. 674.

⁷⁹ Storey, *Practical Suggestions as to the Reform of Criminal Procedure* (1913) 4 JOUR. CRIM. LAW 495, 500, *et seq.*

⁸⁰ Appleton, C. J., in *State v. Cleaves*, 59 Me. 298, 300 (1871); Stone, J., in *Raffel v. United States*, 271 U. S. 494, 499, 46 Sup. Ct. 566, 568 (1926):

times classed among those technicalities which, it is said, are such a bulwark to the accused that the police are tempted to resort to illegal means in order that prisoners may be compelled to confess.⁸¹ Many critics also assail the privilege against self incrimination.⁸²

On the other hand, it is pointed out that the hope of getting confessions in court and the ability to draw inferences from a prisoner's silence will lead prosecutors to bring people to trial without preparing careful cases against them.⁸³ The fact that a defendant's guilt may not be the only reason for his failure to testify is often stressed.⁸⁴ That the inference is not illogical, however, is indicated by the fact that it is permitted in civil cases where a party or his witness avails himself of the privilege.⁸⁵

VALIDITY OF JUDGMENTS REFUSING RECOGNITION TO CHATTEL MORTGAGES RECORDED IN ANOTHER STATE

The restatement of the conflict of laws by The American Law Institute contains the following statement:

"If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage and is then taken into another state without the consent of the mortgagee, the interest of the mortgagee is not thereby divested, nor is it divested as a result of any dealings with the chattel in the second state until the mortgagee has had a reasonable opportunity to remove the chattel from the second state or until the period of prescription in that state has run."¹

Note (1917) 15 MICH. L. REV. 423; WIGMORE, *loc. cit. supra* note 73 (excellent discussion of the subject).

⁸¹ Knox, *Self Incrimination* (1925) 74 U. PA. L. REV. 139.

⁸² Burdick, *Criminal Justice in America* (1925) 11 AM. BAR ASS'N JOUR. 510, 513; (1920) 13 REP. ST. BAR ASS'N OF WIS. 225. But see, in behalf of the privilege: Millar, *Modernization of Criminal Procedure* (1920) 11 JOUR. CRIM. LAW 344 (recommending, however, that prosecutor be allowed to comment); Note (1925) 16 JOUR. CRIM. LAW 165.

⁸³ Cruikshank, *Letter* (1915) 5 JOUR. CRIM. LAW 923 (1915). To the effect that this has not resulted in Ohio see Dunmore, *Comment on Failure of Accused to Testify* (1917) 26 YALE LAW JOURNAL 464. This article points out that on an actual ballot all the public prosecutors in the state expressed themselves satisfied with the Constitutional amendment, although a majority favored a retention of the privilege.

⁸⁴ WIGMORE, *loc. cit. supra* note 73; HINTON, *CASES ON EVIDENCE* (1919) 239, n. 13.

⁸⁵ *Hudson v. Jordan*, 108 N. C. 10, 13 S. E. 1029 (1891); *United States v. Mammoth Oil Co.*, 14 F. (2d) 705 (C. C. A. 8th, 1926) (suit to cancel an oil lease in the Fall-Doheny affair. It is interesting to note that the silence of these same men as to the same general fact situation was unavailable as an inference against them on their criminal prosecution).

¹ AMERICAN LAW INSTITUTE, *CONFLICT OF LAWS RESTATEMENT* No. 3, § 288. In a subsequent section (§ 295), the rule for conditionally sold chattels is laid down in similar terms. Both of these sections are merely par-

It may be conceded at the outset that by far the greater number of courts have held that the interests of mortgagees under these circumstances will be protected in the state of the forum, even though there has been no attempt to comply with the local recording acts. It is the group of cases which for one reason or another refuses recognition to the "foreign mortgage" that raises doubts as to the validity of the rule in the Restatement. While these cases are, perhaps, relatively few in number, none of them have been taken to the Supreme Court on appeal.²

Let us select a typical case from one of the minority holdings and consider the issues which it raises.³ An automobile, validly mortgaged in Texas, was, without the knowledge or consent of the mortgagee, taken to Wisconsin and there immediately sold to the defendant, a purchaser for value and without notice. In an action brought in Wisconsin by the mortgagee against this purchaser it was held that the recognition of the Texas mortgage was solely a matter of comity and that, since Texas did not recognize foreign mortgages, Wisconsin would not recognize the Texas mortgage. It is not intended to debate the question of the desirability of such a decision, but rather to consider its validity as distinguished from its expediency. Having exercised jurisdiction what is the effect of the judgment? Section 52 of the Restatement,⁴ read in connection with section 43,⁵ would appear to tell us that it would be of no force in any other state, and

ticularizations of the broad generalization to be found in § 52 that:

"If a chattel belonging to a person who is not a citizen of or domiciled in the state, is brought into the state without his consent, the state has no jurisdiction over his title to the chattel until he has had a reasonable opportunity to remove it or until the period of prescription has run."

² *Union Securities Co. v. Adams*, 33 Wyo. 45, 236 Pac. 513 (1925); *Turnbull v. Cole*, 70 Colo. 364, 201 Pac. 887 (1921); *Bank v. Carr*, 15 Pa. Super. 346 (1900); *Boydson v. Goodrich*, 49 Mich. 65, 12 N. W. 913 (1882); *Delop & Co. v. Windsor*, 26 La. Ann. 185 (1874); *Consolidated Garage Co. v. Chambers*, 111 Tex. 293, 231 S. W. 1072 (1921); *Farmer v. Evans*, 111 Texas 283, 233 S. W. 101 (1921); *Crosby v. Huston*, 1 Tex. 203 (1846).

There are also a number of cases decreeing the forfeiture of automobiles used for carrying liquor, though they were validly mortgaged in some state other than the forum and were taken out of that state and used in liquor traffic against the express provisions of the mortgage. *State v. Morris*, 257 Pac. 731 (Kan. 1927); *State v. Stephens*, 109 Kan. 254, 198 Pac. 1087 (1921); *Robinson Cadillac Motor Co. v. Ratekin*, 104 Neb. 369, 177 N. W. 337 (1920); *Pennington v. Commonwealth*, 127 Va. 803, 102 S. E. 758 (1920) (Virginia by Amended Acts (1922) c. 345, § 1, now protects the interest of the owner, lienor, mortgagee, etc.).

³ *Union Securities Co. v. Adams*, *supra* note 2.

⁴ *Supra* note 1.

⁵ Section 43 reads "As used in this Subject, the word jurisdiction means the power of a state to create rights which under the principles of the common law will be recognized as valid in other states."

section 288⁶ is susceptible of the construction that it would be inoperative even in Wisconsin. Unfortunately, there is no direct authority on either of these questions.⁷

Is the judgment of no validity in Wisconsin? If this be so it must be either because of some "fundamental, immutable principle" of jurisdiction in the conflict of laws flowing from the "nature of law and legal rights,"⁸ or it must be because of the Federal Constitution.⁹

The assumption that there is always some one and only "law" which has jurisdiction or power to attach legal consequences to a given situation in the conflict of laws and that when the "appropriate law" has created rights their validity cannot be impeached has been subjected to severe attack.¹⁰ In its place attention has been directed to what the courts have actually done. No doubt, as Professor Cook so clearly points out,¹¹ the existing rules of positive law often do not authorize a court to deal with a particular situation, and in this sense the court has

⁶ *Supra* note 1.

⁷ The case of *Edgerly v. Bush*, 81 N. Y. 199 (1880) has been cited as authority in favor of the Restatement. Beale, *Jurisdiction over Title of Absent Owner in a Chattel* (1927) 40 HARV. L. REV. 805. In that case horses validly mortgaged to plaintiff in New York were taken to Canada and sold to defendant. Under Canadian *market overt* principles the defendant got good title, but when he brought the horses back to New York the plaintiff was allowed to recover them. The peculiar facts should be noted, however. If the New York court had recognized the Canadian *market overt* they would have defeated their own chattel mortgage act. The case cannot be considered as direct authority, nor is the question of a judgment of a sister state, entitled to full faith and credit under the Constitution, before the court. Cf. *Fuller v. Webster*, 5 Boyce (Del.) 538, 95 Atl. 335 (1915), *aff'd* 99 Atl. 1069, where an automobile, conditionally sold by plaintiff in Massachusetts was taken to Pennsylvania and sold to defendant. In an action of replevin brought in Delaware it was held that, even though Delaware follows Massachusetts and protects the conditional vendor against a bona fide purchaser, the purchase should be governed by Pennsylvania law which did not recognize a conditional sale valid where made. The case is weakened as authority by the fact that it does not appear whether or not the conditional vendor had forbidden the removal of the car from Massachusetts.

⁸ Those who adopt the "territorial" theory of law contend that from the essential nature of law flow fundamental principles which dictate the choice of "law" and this appropriate law is the only one with "jurisdiction" to attach legal consequences to a given situation. Beale, *Summary of The Conflicts of Laws*, in 3 CASES ON THE CONFLICT OF LAWS (1902) 501, 517.

⁹ E. M. Dodd, *The Power of The Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 531.

¹⁰ Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL 457; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE LAW JOURNAL 736; Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE LAW JOURNAL 468, 474 *et seq.*

¹¹ Cook, *op. cit. supra* note 10, at 462.

"no jurisdiction." This is, however, quite a different thing from erecting the rules of positive law into a principle limiting the power of a *state* to authorize its courts to apply its own rules to the problem. A consideration of cases will show that courts have actually operated in opposition to supposed principles of conflicts without successful objection.¹² It is clear that the Wisconsin court in the case above conceived itself to be governed in the selection of the rule it chose solely by its own positive law and not by the essential nature of the jurisdictional principles of the conflict of laws.

Granting, therefore, that the assumption of jurisdiction and the application of its rules by Wisconsin are not rendered void by any "immutable principle," are they in violation of either the "full faith and credit" or the "due process" clauses of the Federal Constitution? It has been insisted that such a course could violate both sections. It would be said that, in refusing recognition to the Texas mortgage Wisconsin did not give full faith and credit to the Texas statute which by the principles of the conflict of laws alone was applicable to the situation, and that the plaintiff, having acquired a "vested right" would be denied due process when recognition was refused.¹³

Under the assumption that there are no principles of conflicts that demand that Texas "law" and only Texas law can attach legal consequences to this situation, there is no necessity that full faith be accorded the Texas recording acts. What has been termed the "local law" theory would remove any question of denial of full faith by pointing out that there is in reality no "Texas right" involved, but instead, the remedy and therefore the right must be created by the forum, and, since the Texas recording act is only a domestic rule, its validity is not denied if it is considered by the forum as merely a fact worthy of consideration as one of the factors leading to the selection of a desirable rule.¹⁴

The proposition that due process is denied by the refusal to apply Texas law must be supported in the light of the long established rule that judicial error is not a deprivation of due process.¹⁵ It has been said that a different rule should be applied in conflicts cases because under the "vested rights" theory a judicial error in conflicts decisions involves not only local law

¹² *Commonwealth v. Macloon*, 101 Mass. 1 (1869); *cf.* *State v. Carter*, 3 Dutcher (N. J. 1859) 499; *Cook, op. cit. supra* note 10, at 463 and cases cited; *Lorenzen, op. cit. supra* note 10, at 741 and cases cited.

¹³ *E. M. Dodd, op. cit. supra* note 9.

¹⁴ See *Yntema, op. cit. supra* note 10, at 478.

¹⁵ *Milwaukee Elec. Light Co. v. Wisconsin*, 252 U. S. 100, 40 Sup. Ct. 306 (1920); *Paterson v. Colorado*, 205 U. S. 454, 27 Sup. Ct. 556 (1907); *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80 (1895).

but "foreign rights."¹⁶ Under the more tenable local law theory there can be no basis for such discrimination against conflicts cases since there is in reality no foreign right enforced or denied by the forum. The position that there is no deprivation of due process or denial of full faith in refusing to recognize the foreign statute or, if there be one, the foreign right, seems to be supported by the decisions of the Supreme Court, although they have often been confusing in language.¹⁷ State courts appear to be as free from constitutional restrictions as in deciding any other question of local law, unless the case presents an instance of a state act of specific direction¹⁸ which must be accorded full faith, but they are no freer than in deciding questions of local law and will not be permitted to do things otherwise unconstitutional¹⁹ or manifestly unfair.²⁰

¹⁶ It has been suggested that, whereas the refusal to recognize the Texas statute might constitute a denial of due process, the application of Wisconsin law would really do so because a vested right is denied. If it be borne in mind that no "foreign right" is involved, this tenuous distinction may be discarded since neither constitutes a denial of due process. *Cf. infra* note 17.

¹⁷ *Kryger v. Wilson*, 242 U. S. 171, 37 Sup. Ct. 34 (1916), has never been overruled. The court dismissed that case saying: "The most that the plaintiff in error can say is that the state court made a mistaken application of the doctrine of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned." It has been said that the Supreme Court has, however, receded somewhat from this position and has to some extent made itself "a tribunal for bringing about uniformity in the field of the conflict of laws." E. M. Dodd, *op. cit. supra* note 8, at 560. It is submitted that the cases relied upon to establish this new attitude fall into two well-defined groups: (1) those involving the rights and obligations of members or stockholders in a corporate body, (2) those involving attempts by states to take unfair advantage of foreign corporations which, because such corporations are not engaged in interstate commerce, they had the power to exclude from doing business within their borders. "In these situations, strong economic and governmental motives are in operation behind the formulae, so that from the practical point of view it would at the present time be unsafe and unsound to generalize the dicta in these decisions into a theory of unlimited federal competence in the field of the conflicts of laws." Yntema, *op. cit. supra* note 10, at 482. *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955 (1914), would appear to be outside the above categories. It should be noted, however, that the Supreme Court pointed out that the action of the South Carolina court there amounted to an attempt to regulate interstate commerce. That, coupled with the fact that the decision was not conceived to stand in the way of *Kryger v. Wilson*, *supra*, two years later, would appear to make it undesirable to take this case at its face value. *Cf. Comment* (1917): 26 YALE LAW JOURNAL 405.

¹⁸ Such acts might be judgments or decrees of courts, corporate charters, etc.

¹⁹ See the discussion of interference with the interstate commerce in *Western Union Telegraph Co. v. Brown*, *supra* note 17.

The belief, then, that there are no pre-existing principles demanding the application of a certain "law," and the further proposition that the forum does not violate constitutional provisions, since it creates the remedy and right rather than enforces or denies foreign rights, explains in the simplest way the actual results achieved by the cases. One should not completely accept a theory which does not reconcile with its major premise the fact that these cases are on the books and that courts have exercised jurisdiction, slaughtering "foreign rights" without protest.

Since these judgments are not impeachable for either of the reasons considered above, it is submitted that they are themselves entitled to full faith and credit in the other states of the Union.²¹

Were the question one of the desirability of protecting the mortgagee, perhaps few would quarrel with the Restatement. When, however, "jurisdiction" is denied to those courts which do not do so, it appears that a positive rule which most courts have *elected* to follow has been transformed into a permanent and everlasting "principle" which all *must* follow.

THE DOCTRINE OF PAIN V. PACKARD

After a guaranteed note becomes due, the creditor who does not wish immediately to force payment has many difficulties. It is often necessary to grant a moratorium to a debtor who is temporarily embarrassed, or else to run the chance of forcing him into bankruptcy. And yet the creditor who does not wish to force immediate payment must act cautiously if he is to avoid any action which will discharge his surety. For example, he will lose the surety if without the latter's consent he makes a "binding" contract for an extension of time, or other important changes in the contract. If he only decides not to push collection of the debt for a time, a nervous surety may in many states, by the doctrine of *Pain v. Packard*, force him to choose between suing the principal immediately, thus jeopardizing future business relations with him, and the alternative of losing his security. Viewed on the whole, it often seems that the surety's function in law is to be discharged.

Concisely stated, the doctrine of *Pain v. Packard* is, that after the debt is due the surety may notify the creditor to sue the prin-

²⁰ As, for example, in *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 45 Sup. Ct. 129 (1924).

²¹ Clearly if no "principles" of the conflict of laws nor the Federal Constitution prevent it, when the mortgagee pursues the property into the forum and there institutes suit, the forum has jurisdiction and any judgment rendered must be given full faith and credit in sister states. *Mills v. Duryee*, 7 Cranch. (U. S.) 481 (1813). The forfeiture cases, *supra* note 2, are proceedings *in rem* and must also be given full faith. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308 (1870).

principal immediately, the penalty for noncompliance being the discharge of the surety, either absolutely or to the extent to which such noncompliance prejudiced him.¹ This doctrine has been criticized by many courts and as a result has been in some respects limited in scope. It is the law in many states, and it has been much favored by laymen, probably because it is not generally known that the surety can always, if he wishes, pay the debt and sue the principal himself,² or exercise his right of exoneration in equity. Contrary to the general impression, the doctrine was first formulated by a Virginia statute in 1794.³ Tennessee passed a similar statute in 1801.⁴ In the same year the doctrine was considered but not applied in Pennsylvania, although there was no court of equity, and hence the surety could not avail himself of exoneration.⁵ Fifteen years later the New York Supreme Court independently stated the doctrine and

¹ In most states the surety is discharged absolutely by the creditor's failure to sue, but he is discharged only to the extent to which he is prejudiced, by the statutes of California, Montana, Oklahoma, North Dakota, and South Dakota. In Missouri, if suit is not brought after notice, the surety is discharged in full to the creditor whom he notified. See statutes *infra* notes 9 and 11.

² Alabama has thought this not sufficient protection to the surety. "To say that a security should always pay the debt and resort to the principal for his indemnity would often without sufficient reason lay on him a burden too hard to be borne." *Bruce v. Edwards*, 1 Stew. 11, 12 (Ala. 1827). It really depends on who one thinks should bear the cost of the debtor's failing to keep his promise.

³ Va. Rev. Code (1803) 323: "That when any person or persons shall hereafter become bound as security or securities . . . for the payment of money or tobacco, and shall apprehend that his or their principal debtor or debtors is or are likely to become insolvent . . . it shall and may be lawful for such security . . . to require by notice in writing of his or their creditor or creditors, forthwith to put the bond, bill, or note . . . in suit; and unless the creditor or creditors . . . shall in a reasonable time commence an action . . . the creditor or creditors . . . shall thereby forfeit the right . . . to demand and receive . . . the amount of the money or tobacco which may be due by such bond, bill or note."

⁴ Tenn. Laws (Scott, 1821) 705. Later cases indicate that a similar practice existed in equity irrespective of a statute. *Hancock v. Bryant*, 2 Yerg. 476 (Tenn. 1830).

⁵ "To delay bringing a suit against the principal, when required thereto by the surety, or his representative, who might have more correct channels of information than the creditor, would be highly unjust." *Dehuff v. Turbett*, 3 Yeates 157, 159 (Pa. 1801). But at page 162 the court said: "Upon the whole, sitting as a court of law, we cannot say that a creditor neglecting to sue his principal debtor, on the requisition of his surety thereby discharges his surety in general; and we think it will require great consideration before such a rule is adopted." The court was not required to pass on the point, because the principal was at the time of notice a Congressman and not subject to suit. For an explanation of Pennsylvania's special position, see *Cope v. Smith*, 8 S. & R. 110, 115 (Pa. 1822).

gave it its name.⁶ Chancellor Kent soon attempted to revive the common law rule,⁷ but he was overruled on appeal, the deciding vote being that of a layman.⁸ Thereafter many states adopted the doctrine by statutes, but courts were loathe to adopt it by judicial decision. At the present time eighteen states have the rule by statute;⁹ three states have it by judicial decision;¹⁰ five states have a special type of statute under which the surety may require the creditor to pursue any remedy which he has against the principal debtor which is not accorded the surety directly, but some of the courts have practically construed this into the common law rule;¹¹ the situation is doubtful in one state;¹² sixteen states have refused to adopt the rule;¹³ while in five states the point has seemingly not arisen.¹⁴

⁶ *Pain v. Packard*, 13 Johns. 174 (N. Y. 1816).

⁷ *King v. Baldwin and Fowler*, 2 Johns. Ch. 554 (N. Y. 1817).

⁸ *King v. Baldwin*, 17 Johns. 384 (N. Y. 1819).

⁹ Ala. Civ. Code (1923) §§ 9555-9557; Ariz. Civ. Code (1913) §§ 4356, 4357; Ark. Dig. Stat. (Crawford, 1921) §§ 8287-8289; Ga. Ann. Code (1926) § 3546; Ill. Rev. Stat. (Cahill, 1927) c. 132, §§ 1, 2; Ind. Ann. Stat. (Burns, 1926) §§ 1288, 1289; Iowa Code (1927) §§ 9457, 9458; Ky. Stat. (Carroll, 1922) § 4668; Miss. Ann. Code (Hemingway, 1927) § 3109; Mo. Rev. Stat. (1919) §§ 12687-12692; N. C. Cons. Stat. (1919) §§ 3967-3969; Ohio Gen. Code (Page, 1926) §§ 12191-12193; Tenn. Ann. Code (Shannon, 1918) §§ 3517-3520; Tex. Ann. Civ. Stat. (Vernon, 1914) Art. 6329; Va. Gen. Laws Ann. (1923) § 5774, 5775; Wash. Comp. Stat. (Remington, 1922) c. 9, §§ 974, 975; W. Va. Code Ann. (Barnes, 1923) c. 101, §§ 1, 2; Wyo. Comp. Stat. Ann. (1920) §§ 6293-6295.

¹⁰ *Pain v. Packard*, *supra* note 6; *Lichenthaler v. Thompson*, 13 S. & R. 157 (Pa. 1825); *Martin v. Skehan*, 2 Colo. 614 (1875); see *Cope v. Smith*, *supra* note 5, at 116.

¹¹ Cal. Civ. Code (Deering, 1928) §§ 2840, 2845; Mont. Rev. Code (Choate, 1921) §§ 8201, 8203; N. D. Comp. Laws Ann. (1913) §§ 6681, 6683; Okla. Rev. Laws (1921) §§ 5153, 5155; S. D. Rev. Code (1919) §§ 1504, 1506, 1507; *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214 (1882) (surety held; *Pain v. Packard* criticized). But *cf.* *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58 (1896). In Oklahoma the court inferred that since the surety could pay the creditor and himself sue the principal, he was not ordering the creditor to do something which he could not do himself within the terms of the statute. *Cf.* *Palmer v. Noe*, 48 Okla. 450, 150 Pac. 462 (1915). *Cf.* also, *National Bank v. Lowrey*, 57 Okla. 304, 157 Pac. 103 (1916) (action by surety to recover what bank had subtracted from his account; held for creditor as only oral notice given); *Miller v. State*, 52 Okla. 76, 152 Pac. 409 (1915) (same); *Gregg v. Okla. State Bank*, 72 Okla. 193, 179 Pac. 613 (1919) (same); *Union Mutual Ins. Co. v. Page*, 65 Okla. 101, 164 Pac. 116 (1917).

¹² The rule has never been applied in Kansas, but two cases where notice had been given have come up, and the court then said that the surety would be discharged if the creditor, when asked, refused either to sue the principal himself or to allow the surety to do so in his name. See *Turner v. Hale*, 8 Kan. 38 (1871) (notice given, but no proof that creditor did not comply); *Ingals v. Sutliff*, 36 Kan. 444, 13 Pac. 328 (1887) (oral notice).

¹³ *Bull v. Allen*, 19 Conn. 101 (1848); *Wilds v. Attix*, 4 Del. Ch. 253 (1871); *Boutte v. Martin*, 16 La. 133 (1840); *Eaton v. Waite*, 66 Me. 221

The courts which have once adopted the rule have often tended to limit it. The Oklahoma statute as mentioned above has seemingly been entirely construed away by its court. Other jurisdictions have limited the kind of contract to which the doctrine applies. The statutes in Missouri and other states except official bonds;¹⁵ New York and Ohio require the suretyship agreement to be part of the principal contract.¹⁶ The terms of the contract

(1877); *Frye v. Barker*, 21 Mass. 382 (1826); *Inkster v. First National Bank*, 30 Mich. 143 (1874); *Huey v. Pinney*, 5 Minn. 310 (1861); *Davis v. Huggins*, 3 N. H. 231 (1825); *Kemp Lumber Co. v. Stanley*, 22 N. M. 198, 160 Pac. 351 (1916); *Findley v. Hill*, 8 Or. 247 (1880); *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338 (1893); *Caston v. Dunlap*, Rich Eq. Cas. 77 (S. C. 1831); *Hubbard v. Davis*, 1 Aik. 296 (Vt. 1826); *Harris v. Newell*, 42 Wis. 687 (1877); see *Bank of Maywood v. Estate of McAllister*, 56 Neb. 188, 189, 76 N. W. 552, 553 (1898); cf. *Walmer v. First Acceptance Co.* 192 Wis. 300, 212 N. W. 638 (1927) (indorser); *Lennox v. Prout*, 3 Wheat. 520 (U. S. 1818) (applying Dist. of Col. law). There is an early New Jersey case applying the doctrine, but this has since been overruled. *Manning v. Shotwell*, 5 N. J. L. 584 (1819) (notice; suit discontinued on part payment; surety discharged); *Pintard v. Davis*, 21 N. J. 692 (1846) (notice; *Pain v. Packard* expressly repudiated; surety held).

¹⁴ Florida, Idaho, Maryland, Nevada, and Utah. See *Dorman v. Richard*, 1 Fla. 281, 295 (1847): "As to this objection [creditor's lack of diligence], we deem it sufficient to remark that notice to the payee is necessary in order to release the surety, and that nothing appears on the record to that effect." But it is very doubtful whether a Florida court would follow this dictum if such a case came up today.

¹⁵ *Jasper County v. Shanks*, 61 Mo. 332 (1875) (official bond for safe-keeping public funds); *Johnson County v. Gilkeson*, 70 Mo. 645 (1879) (bond for performance of officer's duties). *Contra*: *Row v. Pulver*, 1 Cow. 246 (N. Y. 1823) (bail bond); *Montecello v. Cohn*, 48 Ark. 254 (1886) (bond to pay license fee); *Hobbs v. Taylor*, 11 Ga. App. 579 (1912) (forthcoming bond); cf. *Weiler v. Hoch*, 25 Pa. 525 (1855) (judgment bond); see *Hickernell's Appeal*, 90 Pa. 328, 331 (1879) (same).

The Illinois, Missouri, North Carolina, Ohio, Tennessee, and Wyoming statutes expressly except bonds of public officers or those required by law, while Missouri, Ohio, Tennessee, and Wyoming specifically except bonds of guardians, executors, and administrators, and Missouri also adds a curator, or other person whose bond secures the performance of the duties of an office. See statutes cited *supra* note 9.

¹⁶ *Morrison v. Equitable Nat. Bank*, 6 N. P. 7 (Ohio, 1898); *Wells v. Mann*, 45 N. Y. 327 (1871) (surety signs on face of note after its execution); *Newcomb v. Hale*, 90 N. Y. 326 (1882) (mortgagee, when selling mortgage, guarantees payment).

Other contracts held not within the statute: *Croughton v. Duval*, 7 Va. 60 (1801) (contract made before the statute passed); *Fensler v. Prather*, 43 Ind. 119 (1873) (partnership note; after paying his half partner asked other be sued for second half; first partner still responsible); *Wilson v. Tebbetts*, 29 Ark. 579 (1874) (principal gave deed of trust to sureties on property worth more than the debt; sureties had no power of notification, as they were sufficiently protected without it); *Hall v. Equitable Surety Co.*, 126 Ark. 535, 191 S. W. 32 (1917) (obligor on an indemnity bond to a surety company could not give notice to the latter to sue an employee, principal of the surety company's bond); *Fish v. Glover*, 154 Ill. 86, 39

—probably without the intent of any of the parties at the time it was made—have been allowed to neutralize the statute.¹⁷ The status of the parties has a great influence on whether or not the doctrine may be invoked. Although there is conflict, some states have held that an indorser may not give notice,¹⁸ and the same has been intimated as to “guarantors.”¹⁹ But the executor of a surety,²⁰ a surety who signs a note as a joint maker, even though the creditor thinks he is a principal,²¹ or a retired partner, where another partner carrying on the business has agreed to pay the old debts,²² have been allowed to invoke the doctrine. A

N. E. 1081 (1894) (after a mortgagor had himself sold the mortgaged land, notice to the mortgagee to proceed against the vendee who had assumed the mortgage debt held ineffective).

Situations within the doctrine: *Lichtenthaler v. Thompson*, *supra* note 10 (lease; notice to go after rent); *Prescott Nat. Bank v. Head*, 11 Ariz. 213, 90 Pac. 328 (1907) (building contractor's bond); see *Dallas Homestead & Loan Ass'n. v. Thomas*, 36 Tex. Civ. App. 268, 270, 81 S. W. 1041, 1043 (1904) (same).

¹⁷ *Owensboro Sav. Bank v. Haynes*, 143 Ky. 534, 136 S. W. 1004 (1911) (“The parties, including makers and indorsers . . . waive . . . diligence in bringing suit against any party hereto”); *Continental & Comm. Nat. Bank v. Cobb*, 200 Fed. 511 (C. C. A. 1st, 1912) (decided under Illinois law; contract said creditor “may, on such terms as it sees fit, extend time and alter manner of payment, without notice to” surety). But *cf.* *Cent. Bank & Trust Co. v. Hill*, 160 S. W. 1099 (Tex. Civ. App. 1913) (surety's waiver of notice and presentation for payment did not waive statute); *Martinsburg Bank v. Bunch*, 212 Mo. App. 249, 251 S. W. 742 (1923) (note by terms permitted time extension; held not to have contemplated indefinite delay).

¹⁸ *Trimble v. Thorne*, 16 Johns. 152 (N. Y. 1819); *Bank of Conway v. Stary*, 51 N. D. 399, 200 N. W. 505 (1924) (accommodation endorser). But *cf.* *Brooks v. Stevens*, 178 S. W. 30 (Tex. Civ. App. 1915) (accommodation endorsement before delivery of note; held a “surety,” not a “technical endorser”); *Williams v. Ogg & Keith Lumber Co.*, 42 Tex. Civ. App. 558, 94 S. W. 420 (1906); *Cent. Bank & Trust Co. v. Hill*, *supra* note 17 (accommodation endorser). Mississippi by statute permits this technique to “accommodation endorsers.” Georgia, North Carolina, Virginia, and West Virginia by statute permit “endorsers” to give notice. *Supra* note 9.

¹⁹ See *Sample v. Martin*, 46 Ind. 226, 227 (1874). *Contra*: By statute expressly in Georgia, Virginia and West Virginia. *Supra* note 9.

²⁰ *Clark v. Osborn*, 41 Ohio St. 28 (1884). The Ohio and Wyoming statutes specifically apply the doctrine to the surety's executor or administrator, while Virginia, West Virginia, and Missouri apply it to his “personal representative.” *Supra* note 9. Missouri also provides that if a surety dies a co-surety may give notice for him.

²¹ *McCoy v. Lockwood*, 71 Ind. 319 (1880) (till notice creditor did not know defendant was a surety); *Piper v. Newcomer & Campbell*, 25 Iowa 221 (1868); *Sullivan v. Dwyer*, 42 S. W. 355 (Tex. Civ. App. 1897); *Sisk v. Rosenberger*, 82 Mo. 46 (1884); *Meriden Silver Plate Co. v. Flory*, 44 Ohio St. 430 (1886). The Kentucky statute, *supra* note 9, includes a co-obligor.

²² *Colgrove v. Tallman*, 67 N. Y. 95 (1876). But *cf.* *Fensler v. Prather*, *supra* note 16.

co-surety has the same power, but failure to sue after notice does not by the majority rule discharge his co-surety who had nothing to do with giving it.²³ The surety who is discharged is under no duty to contribute to his co-sureties who had to pay and who did not collect from the principal.²⁴ The surety will not be discharged if the principal debtor was a non-resident of the state at the time of notice,²⁵ or if he was a member of Congress then attending a session in the state, and so exempt from suit.²⁶ The same situation occurs if the principal dies before the notice is given, at least until the appointment of an administrator has given the creditor the chance to file a claim or to sue.²⁷ Texas

²³ *Martin v. Orr*, 96 Ind. 491 (1884); *Ramey v. Purvis*, 38 Miss. 499 (1860); *Routon v. Sacy*, 17 Mo. 399 (1853) (two sureties, one giving notice discharged, other held for one half of debt); *Klingensmith v. Klingensmith*, 31 Pa. 460 (1858) (same); N. C. Cons. Stat. (1919) § 3969; see *Wilson v. Tebbetts*, *supra* note 16, at 587; *Trustees of Schools v. Southard*, 31 Ill. App. 359, 362 (1889); *Bank v. Homesley*, 99 N. C. 531, 534 (1888). *Contra*: *Towns v. Riddle*, 2 Ala. 694 (1841); *Wright v. Stockton*, 5 Leigh. 153 (Va. 1834); Georgia and West Virginia statutes, *supra* note 9. The Alabama, Arizona, and Mississippi statutes say the "surety giving such notice shall be discharged."

²⁴ *Letcher v. Yantis*, 3 Dana 160 (Ky. 1835). But if one surety gives notice and his co-sureties pay the debt in order to prevent a principal from being sued, the first surety is responsible to them for contribution. *Reiter v. Cumback*, 1 Ind. App. 41, 27 N. E. 443 (1890).

²⁵ *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934 (1897); *Thompson v. Freller*, 82 Ark. 247, 101 S. W. 174 (1907) (debtor absconded from state); Georgia statute *supra* note 9 ("if the principal is within the jurisdiction of this state"); *Davie v. Hatcher*, Fed. Cas. No. 7,041 (1871); *Conklin v. Conklin*, 54 Ind. 289 (1876); *Franklin v. Franklin*, 71 Ind. 573 (1880) (not pleaded that principal was in the state at time of notice); Mississippi statute, *supra* note 9 ("the principal if resident within this state"); *Phillips v. Riley*, 27 Mo. 386 (1858); *Bostwick v. First Nat. Bank of Norwalk*, 6 Ohio Cir. Dec. 682 (1895); *Seattle Crockery Co. v. Haley & Schram*, 6 Wash. 302 (1893); see *Warner v. Beardsley*, 8 Wend. 194, 199 (N. Y. 1831); *cf. Sims v. Parks*, 32 Ind. 363 (1869) (notice to attach non-resident's property). *Contra*: *Hayward v. Fullerton*, 75 Iowa 371 (1888); *Cox v. Jeffries*, 73 Mo. App. 412 (1898) (creditor must make some attempt to find debtor who is out of state); *cf. Hancock v. Bryant*, *supra* note 4 (property left in state). In Iowa and Illinois the statute implies that notice may be given only if there is danger of the debtor's insolvency or leaving the state.

The statute applies even though the creditor is a non-resident. *Meriden Silver Plate Co. v. Flory*, *supra* note 21. In Kentucky a joint judgment debtor may give notice to the attorney of the non-resident judgment creditor to levy execution but an ordinary surety must serve notice in person "within the state."

²⁶ *Dehuff v. Turbett*, *supra* note 5.

²⁷ The creditor need not sue if the debtor is dead at the time of notice, or dies within the period for bringing suit. *Hickan v. Hollingsworth*, 17 Mo. 475 (1853); *Davis v. Gillilan*, 71 Mo. App. 498 (1897) (letters of administration granted before notice given); *Nat. Bank of Commerce v. Gilvin*, 152 S. W. 652 (Tex. Civ. App. 1912). Indiana holds that notice

holds that the creditor cannot in any case be forced to pursue the principal or his representative into the probate court, but the Missouri statute is contrary.²⁸ Iowa allows notice to be given where the surety merely fears that the principal may become insolvent.²⁹ Some jurisdictions, however, require that the surety show that the principal was solvent at the time of notice, and has since become insolvent;³⁰ thus the surety has no power to force proceedings against the debtor where the latter was insolvent at the time that he borrowed the money, and has continued so ever since.³¹

The courts are inclined to be strict as to the form, source and destination of the notice. Nearly all jurisdictions adopting the rule of *Pain v. Packard* by statute expressly require written notice; and even in the absence of an express statutory provision, such states would seem to require that the notice be in writing.³² Where the doctrine was adopted by judicial decision,

may be given if an administrator has been appointed, but not otherwise. *Franklin v. Franklin*, *supra* note 25 (not shown that plaintiff could have sued the principal before he died, or that an administrator had been appointed in the state); *Whittlesey v. Heberer*, 48 Ind. 260 (1874) (no proof by surety that an administrator had been appointed for the principal); *Daily v. Robinson*, 86 Ind. 382 (1882) (creditor, administrator of principal, failed to get a judgment against himself and the surety; surety discharged). But the creditor does not himself have to get letters of administration issued. *Brown v. Flanders Bros.*, 80 Ga. 209 (1887).

²⁸ *Nat. Bank of Commerce v. Gilvin*, *supra* note 27; *Mo. Rev. Stat.*, *supra* note 9.

²⁹ *First Nat. Bank of Newton v. Smith*, 25 Iowa 210 (1868). Iowa and North Carolina statutes mention this as a possible reason for giving the notice allowed by the statute. North Carolina also includes danger of the principal's misconduct.

³⁰ *Howle v. Edwards*, 97 Ala. 649 (1892); *Graham v. Rush*, 73 Iowa 451 (1887); *Marsh v. Dunkel*, 25 Hun 167 (N. Y. 1881); *Hopkins v. Spurlock*, 49 Tenn. 152 (1870) (solvency at time of notice not pleaded); *Bumpus v. Lovejoy*, 196 S. W. 631 (Tex. Civ. App. 1917); see *Jackson v. Huey*, 78 Tenn. 184, 192 (1882); *Cent. Bank & Trust Co. v. Hill*, *supra* note 17, at 1102 (creditor need not sue if principal notoriously insolvent). *Contra: Reid v. Cox*, 5 Blackf. 312 (Ind. 1840).

³¹ *Warner v. Beardsley*, *supra* note 25.

³² Statutes of the following states, *supra* note 9, speak of written notice: Alabama, Arizona, Arkansas, Georgia, Illinois, Indiana, Kentucky, Mississippi (forbids a notice not in writing), Missouri, North Carolina, Ohio, Tennessee, Texas, Virginia, West Virginia, Washington and Wyoming. The following cases have held that notice must be written: *Sims v. Everett*, 113 Ark. 198, 168 S. W. 559 (1914); *Brown v. Flanders Bros.*, *supra* note 27; *Ward v. Stout*, 32 Ill. 399 (1863) (not pleaded that notice was written); *Miller v. Arnold*, 65 Ind. 488 (1879); *Nichols v. McDowell*, 53 Ky. 5 (1853) (same); *Hibler v. Shipp*, 78 Ky. 64 (1879); *Langdon v. Markle*, 48 Mo. 357 (1871); *Bank v. Homesley*, *supra* note 23; *Gregg v. Okla. State Bank*, *supra* note 11; *Brooks v. Stevens*, *supra* note 18; *Leazar v. Menefee*, 61 S. W. 438 (Tex. Civ. App. 1901); *Bumpus v. Lovejoy*, *supra* note 30; *Harmon v. Hale*, 1 Wash. Terr. 422 (1874); see *Clark v. Osborn*,

however, verbal notice has been permitted,³³ though in Pennsylvania there is now a statute forbidding it.³⁴ Intimations have been made that the creditor may waive written notice,³⁵ but reluctance has been shown to construe any action of his into a waiver—as where a creditor promises to sue,³⁶ or authorizes the surety to engage an attorney.³⁷ Kentucky provides by statute that the waiver must be in writing.³⁸ Notice is inoperative before the debt becomes due,³⁹ or after judgment is recovered in a suit against the surety alone,⁴⁰ and of course the surety may render the notice inoperative by withdrawing it or agreeing to an extension of time before the statutory period has run.⁴¹ The attitude of the courts is particularly noticeable in the strictness

supra note 20, at 35. *Contra*: Bolton v. Lundy, 6 Mo. 46 (1839) (statute did not then speak of written notice).

³³ Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16 (1904); Pain v. Packard, *supra* note 6; Strickler v. Burkholder, 47 Pa. 476 (1864).

Where the principal debtor was solvent at the time notice was given and has since become insolvent, Alabama recognizes an exception to the statute requiring written notice, on the ground that in such a situation oral notice was always effective at common law. Bruce v. Edwards, *supra* note 2; Howle v. Edwards, *supra* note 30. Tennessee recognizes an exception on the same ground in equity. Thompson v. Watson, 10 Yerg. 362 (Tenn. 1837); Jackson v. Huey, *supra* note 30. Otherwise, oral notice is ineffective. Miller v. Childress, 21 Tenn. 320 (1841); Kyle v. Fennell, 3 Stew. 9 (Ala. 1830).

³⁴ Pa. Stat. (West, 1920) § 20362; Fidler v. Hershey, 90 Pa. 363 (1879); First Nat. Bank v. Delone, 254 Pa. 409, 98 Atl. 1042 (1916).

³⁵ Hamblin v. McCallister, 67 Ky. 418 (1868) (written notice waived); Clark v. Osborn, *supra* note 20 (orally agreed that written notice on one note would apply to another with same parties; held waiver of written notice).

³⁶ Chrisman v. Tuttle, 59 Ind. 155 (1877); Miller v. Arnold, *supra* note 32; Hibler v. Shipp, *supra* note 32; Kittridge v. Stegmier, 11 Wash. 3 (1895). *Contra*: Taylor v. Davis, 38 Miss. 493 (1860).

³⁷ Leazar v. Menefee, *supra* note 32.

³⁸ *Supra* note 9. Mississippi provides that no act of the creditor shall be a waiver of written notice. *Supra* note 9.

³⁹ Prescott Nat. Bank v. Head, *supra* note 16; Armour Fertilizer Works v. Bond, 139 Ga. 246, 77 S. E. 22 (1913) (after note fell due, but during an extension, surety having agreed for consideration at time of execution that creditor "may grant any extension that he deems proper"); Imming v. Fiedler, 8 Ill. App. 256 (1881); Scales v. Cox, 106 Ind. 261, 6 N. E. 622 (1886); Conrad v. Foy, 68 Pa. 381 (1871); Fidler v. Hershey, *supra* note 34. *Contra*: Lichtenthaler v. Thompson, *supra* note 10 (default on rent after extension of lease; notice to distrain for rent; surety discharged).

⁴⁰ Irwin v. Helgenberg, 21 Ind. 106 (1863). But notice would be effective after suit is merely *begun* against the surety. Barnett Bros. v. Alexander, 150 Ark. 473, 234 S. W. 978 (1921); Hammond v. McHargue, 170 Mo. App. 497, 156 S. W. 725 (1913) (claim filed in the probate court).

⁴¹ Bailey v. New, 29 Ga. 214 (1859); Simpson v. Blunt, 42 Mo. 542 (1868); Weiler v. Hoch, *supra* note 15; Rotting v. Cleman, 20 Wash. 116, 54 Pac. 935 (1898); Gillilan v. Ludington, 6 W. Va. 128 (1873).

with which they interpret the language employed, differentiating between an order and a mere request, and insisting that notice to be effective must consist of a clear, definite order.⁴²

⁴² Most statutes say that the surety must tell the creditor to "sue forthwith." Arizona, Arkansas, Illinois, Indiana, Missouri, Ohio, Tennessee, Texas, Washington, West Virginia, and Wyoming, all *supra* note 9. New York and Colorado say he must give notice to "enforce collection of the note by due process of law." *Bowling v. Chambers*, *supra* note 33; *Singer v. Troutman*, 49 Barb. 182 (N. Y. 1867). In Pennsylvania and the Tennessee equity courts he may say that "he will consider himself discharged" unless suit is begun. *First Nat. Bank of Hanover v. Delone*, *supra* note 34; *Jackson v. Huey*, *supra* note 30.

In the following cases the language was held not to constitute notice. *Savage v. Carleton*, 33 Ala. 443 (1859) (wish); *Baker v. Kellogg*, 29 Ohio St. 663 (1876) (wish); *Glenn v. Union Bank v. Trust Co.*, 150 Ark. 33, 233 S. W. 798 (1921) (advice); *Singer v. Troutman*, *supra* (request to "keep pushing him"); *Lockridge v. Upton*, 24 Mo. 184 (1857) ("I won't stand good any longer"); *Williams v. Ogg Lumber Co.*, *supra* note 18 ("We don't intend to pay until forced"); *Bank v. Perdue*, 3 Ala. 409 (1842) (notice to foreclose mortgage given by principal); *Thompson v. Robinson*, 34 Ark. 44 (1879) (notice to attach property of creditor likely to leave the state; not proved an attachment could then have been made according to the statute); *Kennedy v. Falde*, 4 Dak. 319 (1886) ("you had better collect the sum"); *Bethune v. Dozier*, 10 Ga. 235 (1851) (a request rather than a demand); *McMillin v. Deardorff*, 18 Ind. App. 423, 48 N. E. 233 (1897) ("sue the note or I will not continue to be responsible as surety"; should say "forthwith"); *Frye v. Eisenbiess*, 56 Ind. App. 123, 104 N. E. 995 (1914) ("These notes fall due on demand and I want you to enforce collection or consider my endorsement cancelled"); *Kaufman v. Wilson*, 29 Ind. 504 (1868) ("express note to Esquire Bennett for collection today. Don't fail"); *Davis Sewing Machine Co. v. McGinnis*, 45 Iowa 538 (1877) (request for copy of bond plus authority to sue); *Lawson v. Buckley*, 49 Hun 329 (N. Y. 1889) ("you must make Daniel come to line this fall"); *Hunt v. Purdy*, 84 N. Y. 480 (1880) (collect that mortgage in the spring; do not let it run over the time it is due"); *Maier v. Canavan*, 57 How. Pr. 504 (N. Y. Com. Pleas, 1879); *Porter v. First Nat. Bank*, 54 Ohio St. 155, 43 N. E. 165 (1896) ("Unless you hear from us to the contrary by 10 A. M. tomorrow, we require you to take judgment on the D. J. McConnell note"); *Benge v. Eversole*, 156 Ky. 131, 160 S. W. 911 (1913) (letter suggesting creditor send notes to a certain attorney, and creditor will see that attorney does everything necessary for the collection); *Wilson v. Glover*, 3 Pa. 404 (1846) (surety notified creditor that he would no longer stand security, that principal had sufficient property to meet the bond); *Edmonson v. Potts*, 111 Va. 79, 68 S. E. 254 (1910) (surety's administrator wrote letters urging creditor to take such action as was necessary to get deceased's name off the note); see *Fensler v. Frather*, *supra* note 16, at 125 ("now if you think P in any way liable, you will take notice to proceed accordingly and legally").

In the following cases the language was operative as notice: *Franklin v. Franklin*, *supra* note 25 ("Proceed at once"); *Miller v. Gray*, 31 Ill. App. 453 (1889) ("Make your money"); *Sullivan v. Dyer*, *supra* note 21 ("Use every effort"); *Coykendall v. Constable*, 48 Hun 360 (N. Y. 1888); *Christy v. Horne*, 24 Mo. 242 (1857) (notice requiring creditor forthwith to commence suit against W. H. and A. H.; not necessary to state which is principal and which is surety); *Clark v. Osborn*, *supra* note 20 ("you are

The courts generally incline toward liberal rules concerning the agency by which the notice is given and received. It may be given by the surety's personal representative⁴³ or his agent,⁴⁴ but Pennsylvania has held that his widow,⁴⁵ the guardian of his heir,⁴⁶ or the husband of a legatee of the creditor⁴⁷ may not. It may be given to the creditor's wife⁴⁸ or his agent,⁴⁹ but two courts have held the creditor's husband to be an improper recipient,⁵⁰ while another court refused to give effect to notice served on the treasurer of a school board which was the creditor.⁵¹ Where there are two payees of a note, notice must be given to both,⁵² and where a payee has transferred the note to another, it must go to the latter.⁵³ The manner of delivery varies from merely requiring that the notice be left at the creditor's "usual place of abode,"⁵⁴ and the surety not keeping a copy,⁵⁵ to pro-

hereby requested to commence an action forthwith against _____"); *Routon v. Lacy*, 17 Mo. 399 (1853) (surety would no longer stand security unless creditor proceeded against debtor); *Hancock v. Bryant*, *supra* note 4 ("I shall expect you to proceed to collect it").

⁴³ *Hammond v. McHargue*, *supra* note 40 (administrator); *O'Howell v. Kirk*, 41 Mo. App. 523 (1890); also statutes and case cited *supra* note 20.

⁴⁴ *Wetzel v. Sponsler*, 18 Pa. 460 (1852) (surety's son); *Klingensmith v. Klingensmith*, *supra* note 23 (same). The surety's husband may also give notice. *Medley v. Tandy*, 85 Ky. 566, 4 S. W. 308 (1887).

⁴⁵ *Gardener v. Ferree*, 15 S. & R. 28 (Pa. 1826).

⁴⁶ *Conrad v. Foy*, *supra* note 39.

⁴⁷ *Geddis v. Hawk*, 10 S. & R. 33 (Pa. 1823).

⁴⁸ *McCoy v. Lockwood*, *supra* note 21.

⁴⁹ *Bartlett v. Cunningham*, 85 Ill. 22 (1877); *Wetzel v. Sponsler*, *supra* note 44; Georgia statute, *supra* note 9. There is conflict on whether notice may be served on the creditor's attorney. *Thomas v. Mann*, 28 Pa. 520 (1857) (notice to attorney sufficient). But *cf. Davis v. Snead*, 74 Va. 705 (1880) (court receiver is not a "creditor" within the statute; intimation that creditors whom receiver represents may be notified to proceed). *Contra: Cummins & Feno v. Garretson*, 15 Ark. 132 (1854) (notice to attorney who has the note for collection). *Cf. Kentucky statute, supra* note 9.

⁵⁰ *Moormann v. Voss*, 77 Ohio St. 270, 83 N. E. 76 (1907); *Shimer v. Jones*, 47 Pa. 268 (1864).

⁵¹ *Trustees of Schools v. Southard*, *supra* note 23.

⁵² *Kelly v. Matthews*, 5 Ark. 223 (1845). But see *Baker v. Kellogg*, 29 Ohio St. 663, 665 (1876): "We see no good reason for requiring notice to more than one of the administrators [of the creditor] in such a case, than there is for requiring notice to more than one of several joint contractors. In both cases, we think, notice to one is notice to all."

⁵³ *England v. McKamey*, 36 Tenn. 75 (1856). The same where a payee is debtor to another who holds the note as security. *McCrary v. King & Dimond*, 27 Ga. 26 (1859).

⁵⁴ Missouri Statute, *supra* note 9. The notice may either be delivered personally or left at the creditor's house "with some person of the family over the age of fifteen years." It may not be mailed. *Conway v. Campbell*, 38 Mo. App. 473 (1889).

⁵⁵ *Lewis v. Warden*, 163 Mo. App. 256, 148 S. W. 165 (1912).

visions that the sheriff must serve it and return the paper to the surety.⁵⁶ In most states it is expected that the notice will be delivered personally.⁵⁷ Tennessee requires proof of such notice to be made in court by two witnesses.⁵⁸

It is usually provided by statutes how soon suit must be started after proper notice has been given. Three states say it must be during the next term of court,⁵⁹ six within a "reasonable time,"⁶⁰ while nine give limits varying from ten days to three months.⁶¹ Delays of five weeks or more have been held to be unreasonable.⁶² Indiana has construed the statute to mean getting to trial as soon as possible, so that a suit in the wrong county, or in the common pleas court rather than in the circuit court has been held unreasonable delay where a suit brought in another possible court would have resulted in a trial two months or more earlier.⁶³ In the same manner, it was held during the Civil War that the fact that the nearest court was closed because of disturbances was no excuse where suit could have been brought in another county.⁶⁴ As to the non-statutory states, Pennsylvania has held a delay of two months excessive,⁶⁵ and one of five days reasonable.⁶⁶

⁵⁶ North Carolina statute, *supra* note 9.

⁵⁷ Statutes of Kentucky and Missouri, *supra* note 9. Although only one case has been found considering the sufficiency of mailing the notice where the point is not covered by statute, a mailed notice has occasionally been upheld without that fact being discussed. *Hancock v. Bryant*, *supra* note 4; *cf. Graham v. Pepple*, 132 Miss. 612, 97 So. 130 (1923). Mailing a notice has been upheld where the creditor lived a long distance outside the state. *Meriden Silver Plate Co. v. Flory*, *supra* note 21.

⁵⁸ Statute, *supra* note 9; *Miller v. Childress*, *supra* note 33. But the provision has been nullified by refusing to apply it in equity. *Hancock v. Bryant*, *supra* note 4 (injunction against enforcing a law judgment).

⁵⁹ Statutes of Alabama, Kentucky, and Mississippi (the next term, provided it gives the creditor at least thirty days after notice in which to bring suit), *supra* note 9.

⁶⁰ Statutes of Illinois, Indiana, Missouri, Ohio, Washington, and Wyoming, *supra* note 9.

⁶¹ Arizona (60 days), Arkansas (30 days), Georgia (3 months), Iowa (10 days), Missouri (30 days), North Carolina (same), Tennessee (same), Virginia (15 days). Where the notice is to issue execution after a judgment has been recovered, Kentucky allows 10 days. Statutes, *supra* note 9.

⁶² *Miller v. Gray*, 31 Ill. App. 453 (1888) (one month and one week); *Martin v. Orr*, *supra* note 23 (52 days in taking execution); *Meriden Silver Plate Co. v. Flory*, *supra* note 21 (3 months and 6 days).

⁶³ *Hamrick v. Barnett*, 1 Ind. App. 1, 27 N. E. 106 (1891); *Craft v. Dodd*, 15 Ind. 380 (1860). Other courts have refused to discharge the surety where the delay from this cause was very slight. *Collum v. Luck-singer*, 83 Mo. App. 110 (1900) (one week); *Robertson v. Angle*, 76 S. W. 317 (Tex. Civ. App. 1903) (two weeks).

⁶⁴ *Cockrill v. Dye*, 33 Mo. 365 (1863).

⁶⁵ *Wetzel v. Sponsler*, *supra* note 44.

New York says that for the surety to be discharged the creditor must,

When the creditor does sue, he must sue all the principals.⁶⁷ It is permissible for him to sue the principal and the surety together, but the creditor is not protected by suing the surety alone;⁶⁸ the principal must be included. Where the principal has made an assignment for the benefit of creditors, Missouri says that the creditor must still bring a regular suit, the filing of a claim against the assignee not being sufficient.⁶⁹ In Texas the surety cannot force the creditor to attach the principal's property at the time of bringing suit.⁷⁰ Two courts have lightened the creditor's burden by saying that if he offers to let the surety sue, the latter will not be discharged.⁷¹ The creditor, having brought suit, must proceed with due diligence and carry it through to execution.⁷² The surety will also be discharged *pro tanto* if the creditor surrenders any of the principal's assets after he has received notice.⁷³

It is thus quite apparent that the adoption of the doctrine of *Pain v. Packard* has not served to afford the surety additional protection of a clear and simple character. The result has been, rather, that where a surety attempts to avail himself of the doctrine, he finds himself confronted by a mass of rules, regulations, and technicalities by which it is far easier to become hopelessly involved than efficaciously aided. If we assume that sureties are favored creatures of the courts, the alleged virtue of the doc-

without any reasonable excuse, neglect to proceed until the principal has become insolvent. See *Warner v. Beardsley*, *supra* note 21, at 199.

⁶⁶ *Weiler v. Hoch*, *supra* note 15.

⁶⁷ *Shenandoah Nat. Bank v. Ayres*, 87 Iowa 526 (1893) (service against one of two principals not made till statutory limit up; surety discharged).

⁶⁸ *Sisk v. Rosenberger*, *supra* note 21; *Hardy v. Worthen*, 53 Mo. App. 580 (1893); *Starling v. Buttles*, 2 Ohio 303 (1826). *Contra*: *Scott v. Bradford*, 5 Port. 443 (Ala. 1837) (statute then said creditor upon notice was "to put such bond in suit"; it now says surety may give "notice to bring suit against the principal", and that suit is to be brought "pursuant to such notice").

⁶⁹ *Hammond v. McHargue*, *supra* note 40.

⁷⁰ *Robertson v. Angle*, *supra* note 63.

⁷¹ Iowa statute, *supra* note 9; *Citizens Bank of Pleasantville v. Hickman*, 179 Iowa 1178, 162 N. W. 606 (1917); *Gardener v. Ferree*, *supra* note 45.

⁷² Statutes of the following states say the creditor must prosecute to "judgment and execution"; Arizona, Arkansas, Illinois, Indiana, Missouri, Ohio, Tennessee, Virginia, Washington, West Virginia, Wyoming. The following cases have discharged the surety because the creditor failed to press suit: *Overturf v. Martin*, 2 Ind. 507 (1851) (complaint demurred to; suit dropped but another begun in 6 months); *Peters v. Linenschmidt*, 58 Mo. 464 (1874) (failure to take out writ *alias* when principal not found); *Manning v. Shotwell*, *supra* note 13 (suit discontinued after part payment). But where a court refuses to issue execution, the lack of it does not discharge the surety. *Harrison v. Price*, 66 Va. 553 (1874).

⁷³ *Franklin Savings and Trust Co. v. Clark*, 283 Pa. 212, 129 Atl. 56 (1925) (principal has account with creditor bank, and is allowed, the day after notice, to check out its money on deposit).

trine in furthering that policy is little realized; if we concede that the function of the surety is to provide security, the doctrine is anomalous.

DISCRETIONARY EXERCISE OF JURISDICTION OF SUITS BETWEEN
NON-RESIDENT PARTIES IN NEW YORK

Courts have frequently overlooked the distinction between the existence of jurisdiction and the exercise thereof.¹ While it is generally recognized that a court, having the parties before it, has the power to take cognizance of a transitory cause of action, regardless of the residence of the parties, or of the place where the cause of action arose, to exercise jurisdiction where the parties are non-residents, and the cause of action foreign to the forum, may often be deemed inexpedient. Yet there is much doubt as to whether courts have the power to decline jurisdiction for this reason.² In New York, however, it is well established that, under such circumstances, jurisdiction may be declined in the discretion of the court. The application of the New York rule is here considered³ in the light of (1) the general tendency of common law courts to entertain jurisdiction; (2) the "privileges and immunities" clause of the Federal Constitution.⁴

Suits between non-resident aliens. While the "privileges and immunities" clause is not applicable to alien litigants, courts have, nevertheless, accorded to them much the same privileges of suit as are extended to citizens.⁵ But, in controversies arising outside the forum, jurisdiction is often declined for reasons of policy or convenience. Courts have been particularly loathe to settle disputes between foreign seamen, to avoid possible interference with commerce.⁶ Jurisdiction has also been declined in an action for damages for a tort committed in a neighboring country where both parties resided, nothing having been shown

¹ The following cases are typical: *Molony v. Dows*, 8 Abb. Pr. 316 (N. Y. 1859); *Roberts v. Knights*, 7 Allen 449 (Mass. 1863); *Lee v. Baird*, 139 Ala. 526, 36 So. 720 (1903); *Reeves v. Southern Ry.*, 121 Ga. 561, 49 S. E. 674 (1905); *Smith v. Mining Co.*, 127 Fed. 462 (E. D. Wash. 1904).

² Admiralty courts have long been held to have such power. 1 BENEDICT, ADMIRALTY (5th ed. 1925) § 84. The question raised here has reference to common law courts only.

³ Unless otherwise noted it is assumed that there is no question as to the existence of jurisdiction, but rather, to what extent has jurisdiction been refused to non-resident litigants where the suit is based upon a foreign transitory cause of action.

⁴ "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Art. IV, § 2.

⁵ *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 658, 106 N. W. 821, 822 (1903). Also (1873) 7 AM. L. REV. 417.

⁶ *Gardner v. Thomas*, 14 Johns. 134 (N. Y. 1817); *Olzen v. Schierenberg*, 3 Daly 100 (N. Y. C. P. 1869); *Peterson v. Brockelman*, 1 N. Y. City Ct. Rep. 193 (1874). *Contra*: *Roberts v. Knights*, *supra* note 1.

to justify suit in this country.⁷ But jurisdiction has been exercised where it appeared that the failure of the court to determine the case would work undue hardships upon the plaintiff.⁸ And it has been held⁹ that, in actions arising out of commercial transactions, there is no policy in refusing jurisdiction to alien litigants, even though the cause of action cannot technically be said to have arisen within the forum.

Suits between non-resident citizens. There is a considerable difference of opinion as to whether the courts of one state can refuse jurisdiction of transitory causes of action arising outside the forum between citizens of another state.¹⁰ In denying the existence of this power, it is argued that under the "privileges and immunities" clause of the Federal Constitution, courts cannot discriminate between citizens of the different states, but must accord to each citizen the same privileges of suit as are extended to citizens of the forum.¹¹ But in New York it is generally recognized that the refusal of jurisdiction to non-resident litigants, in the discretion of the court, under circumstances in which an action by a resident would be entertained, does not con-

⁷ *DeWitt v. Buchanan*, 54 Barb. 31 (N. Y. 1868). "It is most clearly against the interests of those living on the border of our courts to encourage or entertain jurisdiction of such actions. To do so would establish a practice which might often be attended with serious disadvantages to persons crossing the border." *Ibid.* 33. See, in accord, *Great Western Ry. v. Miller*, 19 Mich. 305, 315 (1869).

⁸ *Johnston v. Dalton*, 1 Cow. 543 (N. Y. 1823); *State of Yucatan v. Arguinedo*, 92 Misc. 547, 157 N. Y. Supp. 219 (Sup. Ct. 1915).

⁹ *Wertheim v. Clergue*, 53 App. Div. 122, 65 N. Y. Supp. 750 (1st. Dept. 1900) (defendant was a resident of this country, and the contract sued on was to be performed partly in New York). It is doubted that jurisdiction would ordinarily be entertained where both parties were residents of a foreign country and the contract sued on had no connection with the forum. See *Dewitt v. Buchanan*, *supra* note 7, at 33.

¹⁰ The problem is very fully discussed in 32 A. L. R. 6, 33-43 (1924) annotation. See also (1928) 41 HARV. L. REV. 387; (1928) 28 COL. L. REV. 347, 351; (1926) 5 NEB. L. BULL. 222.

¹¹ The Supreme Court has on several occasions indicated that, under the "privileges and immunities" clause, a citizen of one state has the privilege of bringing suit in the courts of another state. See *Ward v. Maryland*, 12 Wall. 418, 430 (U. S. 1870); *Cole v. Cunningham*, 133 U. S. 107, 113-114, 10 Sup. Ct. 269, 271 (1889); *Chambers v. Baltimore & O. R. R.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 35 (1907); *Missouri Pac. R. R. v. Clarendon*, 257 U. S. 533, 535, 42 Sup. Ct. 210, 211 (1922). These dicta have been used by many state courts as a basis for holding that a court has no discretionary power to dismiss an action because the parties are non-residents and the cause of action arose in another state. *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664 (1896); *Steed v. Harvey*, 18 Utah 367, 54 Pac. 1011 (1898); *Bossung v. Dist. Ct.*, 140 Minn. 494, 168 N. W. 589 (1918); *Morgan v. Pennsylvania R. R.*, 138 S. E. 566 (Va. 1927). *Contra*: *Foss v. Richards*, 139 Atl. 313 (Me. 1927); *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94 (1923); *Stewart v. Litchenberg*, 148 La. 195, 86 So. 734 (1920).

travene the Federal Constitution.¹² In justification of this result it is urged that the courts, already congested with cases having no other available forum, should not be required to determine suits between non-residents upon a foreign cause which can more conveniently be brought elsewhere.¹³ Furthermore, there would seem to be much force to the contention that the privilege of citizens of one state to sue in the courts of another state upon a cause of action foreign to the latter state is not such a privilege as is contemplated by the Constitution, but rather a privilege resting on interstate comity.¹⁴ But, in any event, discrimination against non-resident citizens is not necessarily unconstitutional, unless it is unreasonable.¹⁵ The New York courts have not arbitrarily refused to exercise jurisdiction in the situation. Jurisdiction is ordinarily entertained in contract actions.¹⁶ And in tort cases, jurisdiction has only been denied where there was apparently no justification for bringing suit in New York, such as an action for personal injuries suffered in another state where both parties resided, the defendant being served with process while temporarily in New York.¹⁷ The frequent practice of bringing suit in New York, solely for the purpose of obtaining a larger recovery than is usually allowed in the state where the

¹² *Hatfield v. Sisson*, 28 Misc. 255, 59 N. Y. Supp. 73 (Sup. Ct. 1899); *Collard v. Beach*, 93 App. Div. 339, 87 N. Y. Supp. 884 (1st Dept. 1904).

¹³ Cases cited *supra* note 12.

¹⁴ See dissenting opinion of Cassoday, J., in *Eingartner v. Illinois Steel Co.*, *supra* note 11, at 84. Also (1903) 17 HARV. L. REV. 54; 32 A. L. R. 6, 23 (1924), suggesting that the right of a citizen to sue in the courts of a particular state is an incident of local, not of general citizenship, as are the right of suffrage, the right to the use of state-maintained schools, the right to take fish from inland waters, and other privileges to which the constitutional guaranty is held not to apply.

¹⁵ *La Tourette v. McMaster*, 248 U. S. 465, 39 Sup. Ct. 160 (1919); 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 49; (1923) 41 HARV. L. REV. 387, 388; (1928) 28 COL. L. REV. 347, 349.

¹⁶ *Furbush v. Nye*, 17 App. Div. 325, 45 N. Y. Supp. 214 (1st Dept. 1897); *Smith v. Crocker*, 14 App. Div. 245, 43 N. Y. Supp. 427 (1st Dept. 1897); *Belden v. Wilkinson*, 44 App. Div. 420, 60 N. Y. Supp. 1083 (1st Dept. 1899); *Atkins v. Fitzpatrick*, 57 Misc. 341, 109 N. Y. Supp. 619 (Sup. Ct. 1908).

¹⁷ *Ferguson v. Neilson*, 58 Hun 604, 11 N. Y. Supp. 524 (Sup. Ct. 1890) mem.; *Hatfield v. Sisson*, *supra* note 12; *Collard v. Beach*, *supra* note 12; cf. *Latourette v. Clarke*, 45 Barb. 327 (N. Y. 1865) (erroneously reported in 30 How. Pr. 242 (N. Y. 1866)). In *Molony v. Dows*, *supra* note 1, the court was of the opinion that it had no jurisdiction of an action for damages for a personal tort committed in California where both parties resided. This was overruled by the case of *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949 (1890), an action for damages for a personal tort between residents of another state where the wrong was suffered, in which it was held that the exercise of jurisdiction by the Supreme Court would not be set aside because of defendant's failure to object seasonably, although the court might have done so of its own motion.

plaintiff resides, is persuasive of the propriety of refusing jurisdiction in such a case.

Suits against foreign corporations. Before any discussion as to when a court may in its discretion assume or decline jurisdiction over a foreign corporation in suits by a non-resident upon a foreign cause of action becomes pertinent, it is important to note that there is considerable question as to whether a state can constitutionally impose its jurisdiction upon a foreign corporation in this situation.¹⁸ It has been said that the Supreme Court of the United States has not yet definitely authorized the exercise of jurisdiction in such a case, and that no such sanction should be granted.¹⁹ But a more persuasive argument has been presented to the effect that in transitory actions jurisdiction can be imposed on the theory that a foreign corporation actually doing business through an agent is amenable to personal service precisely like an individual.²⁰ In New York, prior to 1913, a foreign corporation could not be sued by a non-resident unless the cause of action arose, or the subject matter of the suit was situated within the forum.²¹ But in 1913 the code was amended to extend jurisdiction, in actions by non-residents, to cases where the foreign corporation "is doing business within the state."²² This was construed, however, as leaving the courts with the power to exercise discretion as to the retention of jurisdiction of causes of action arising outside the forum.²³ The result may be summarized somewhat as follows: jurisdiction has been seldom denied except in cases where the action was based upon a personal tort suffered in another state where the suit could be brought without hardship to either party,²⁴ or where there

¹⁸ The problem has been discussed by Bullington, *Jurisdiction Over Foreign Corporations* (1928) 6 N. C. L. REV. 147; Scott, *Jurisdiction Over Non-Resident Motorists* (1926) 39 HARV. L. REV. 563, 572 *et seq.*; Fead, *Jurisdiction Over Foreign Corporations* (1926) 24 MICH. L. REV. 633.

¹⁹ Scott, *op. cit. supra* note 18, at 579, n. 40; Fead, *op. cit. supra* note 18, at 646-647.

²⁰ Bullington, *op. cit. supra* note 18, at 156-163.

²¹ N. Y. Code Civ. Proc. (1909) § 1780. *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625 (1889); *Johnson v. Victoria Chief Mining Co.*, 150 App. Div. 653, 135 N. Y. Supp. 1070 (1st Dept. 1912); *Fairclough v. Southern Pac. R. R.*, 171 App. Div. 496, 157 N. Y. Supp. 862 (1st Dept. 1916).

²² N. Y. Laws 1913, c. 60.

²³ *Waisikoski v. Philadelphia Coal & Ice Co.*, 173 App. Div. 538, 159 N. Y. Supp. 906 (2d Dept. 1916), *aff'd* 228 N. Y. 581, 127 N. E. 923 (1920). But in suits by bona fide residents jurisdiction cannot be declined. *Gregonis v. Philadelphia Coal & Ice Co.*, 235 N. Y. 152, 139 N. E. 223 (1923); *Bagdon v. Philadelphia Coal & Ice Co.*, 217 N. Y. 432, 111 N. E. 1075 (1916); *Andriuszis v. Philadelphia Coal & Ice Co.*, 172 App. Div. 350, 156 N. Y. Supp. 260 (2d Dept. 1915).

²⁴ Jurisdiction exercised: *Commonwealth Mtg. Co. v. Sargent Co.*, 104 Misc. 558, 172 N. Y. Supp. 594 (Sup. Ct. 1918); *Moore v. Atchison T. &*

was collusion or fraud in invoking the jurisdiction of the court.²⁵

Conclusion. While the general policy of common law courts has been to entertain jurisdiction of transitory causes of action regardless of the residence of the parties or of the place where the cause of action arose, the New York courts have long recognized the expediency of making the exercise of jurisdiction, in suits between non-residents upon a foreign cause of action, depend upon the sound discretion of the court. With the calendars of courts congested, and the consequent impossibility of administering speedy justice, the propriety of refusing jurisdiction in actions which can be conveniently brought elsewhere becomes manifest.²⁶ Yet, as already noted, the refusal of jurisdiction has been confined, in the main, to tort cases in which no legitimate reason for suing in New York appeared.²⁷ It is interesting to note, further, that the New York courts have recognized that a non-resident can in effect require a court to assume jurisdiction, by assigning his cause of action to a resident, even though the assignment was without consideration, and for the express purpose of bringing suit.²⁸

S. F. Ry., 106 Misc. 58, 174 N. Y. Supp. 60 (Sup. Ct. 1919), *aff'd* 189 App. Div. 906, 178 N. Y. Supp. 878 (2d Dept. 1919) (jurisdiction of state courts not affected by Act of Congress relating to venue of suits against carriers); Davis v. Kessler Co., 118 Misc. 292, 194 N. Y. Supp. 9 (1922) (contract); Buonanno v. Southern Pac. R. R., 121 Misc. 99, 205 N. Y. Supp. 791 (Sup. Ct. 1923) (contract); Richter v. Chicago R. I. & P. Ry., 123 Misc. 234, 205 N. Y. Supp. 128 (Sup. Ct. 1924) (tort).

Jurisdiction declined: Waisikoski v. Philadelphia Coal & Ice Co., *supra* note 23; Bagdon v. Philadelphia Coal & Ice Co., 178 App. Div. 662, 165 N. Y. Supp. 910 (2d Dept. 1917); O'Hara v. Delaware, L. & W. R. R., 178 App. Div. 956 (1917) mem.

²⁵ Pietraroia v. New Jersey R. R., 197 N. Y. 434, 91 N. E. 120 (1910); Hoes v. New York, N. H. & H. R. R., 173 N. Y. 435, 66 N. E. 119 (1903).

²⁶ " . . . in the metropolis of the country, toward which and in close proximity other states having large cities and thickly populated communities converge, and where there are almost countless people engaged in business who reside in other states, it would impose an undue burden upon the courts of our state if the practice were established of assuming jurisdiction in such cases." Collard v. Beach, *supra* note 12 at 340, 87 N. Y. Supp. at 886.

²⁷ See cases cited *supra* notes 6, 7, 17, 24.

²⁸ McCauley v. Ga. R. R. Bank, 122 Misc. 632, 203 N. Y. Supp. 550 (Sup. Ct. 1924).