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Courts: Prohibition: Where Similar Action is Pending in Federal Court

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is by its duly authorized agents, present within the state where service is attempted." *State,* ex rel. *Consolidated Textile Corp.* v. *Gregory,* 289 U.S. 85, 88, 53 Sup. Ct. 529, 77 L.ed. 1047 (1933), reversing a decision of the Wisconsin Supreme Court. *Cf. People Tobacco Co. Ltd.* v. *American Tobacco Co.,* 246 U.S. 79, 87, 38 Sup. Ct. 233, 62 L.ed. 587, 590 (1918). Nor can a state burden interstate commerce by using its process on foreign corporations engaged in such commerce, but this fact alone, that they are engaged in such commerce, does not render the corporation immune from the ordinary process of the courts of the state. *International Harvester Co.* v. *Kentucky,* 234 U.S. 589, 34 Sup. Ct. 944, 58 L.ed. 1479 (1914). In Wisconsin see *American Food Produce* v. *American Milling Co.,* 151 Wis. 385, 138 N.W. 1123 (1912), where there was a dispute as to the service on the defendant foreign corporation, and where the court held that it was immaterial whether the officer served was in the state on the business of the corporation, since the corporation owned property within the state, and such service was allowed by statute; and *Tetley, Sletter & Dahl* v. *Rock Falls Mfg. Co.,* 176 Wis. 400, 187 N.W. 204 (1922), where the agent of the foreign corporation served had been soliciting orders in the state for four years, and where the corporation was engaged in interstate commerce, and where the court held that mere presence of the agent in the state was not sufficint to give the court jurisdiction, but that the fact that the corporation carried on interstate commerce through duly authorized agents did not exempt it from suit within the state; and the recent case, *Petition of Northfield Iron Co.,* (Wis. 1938) 277 N.W. 168, where the court held that the foreign corporation was doing business within the state and could be served with process through its agent whom it had appointed to carry out a contemplated continuous course of sales, although the agent had effected only two sales when service was made upon him.

JOHN BURKE.

COURTS—PROHIBITION—WHERE SIMILAR ACTION IS PENDING IN FEDERAL COURT.—One John Clancy, a resident of Illinois, brought an action in federal court in Illinois against one Louis Phelan, a resident of Wisconsin. The action was to recover money alleged to be due by reason of a sale by Phelan to Clancy of an interest in an invention. After the action was at issue and set down for an early trial, Clancy commenced an action in the Circuit Court of Rock County, on the same cause. He also subpoenaed Phelan to appear at an adverse examination and to produce a great number of papers and documents. A similar examination had been taken in the suit in federal court. Phelan moved for an order to stay all proceedings in the state court pending the trial in federal court. The Wisconsin circuit court refused to stay any of the proceedings, and Phelan petitioned the Supreme Court of Wisconsin for a writ of prohibition. *Held,* the writ of prohibition issues. "Where an action similar in all respects, involving the same issues and the same parties, is pending in a court of the United States, which action is at issue and set down for an early trial and where the action in the state court has been commenced after the commencement of the action in the federal court, in the absence of a showing that it is reasonably necessary for the protection of some substantial right of a party that proceedings be also had in a court of this state, the state court should unquestionably defer to the jurisdiction of the federal court and stay all proceedings in the action in its court, unless the action in the federal court be dismissed, leaving the state court free to proceed without conflicting with the jurisdiction of the federal court." In re *Phelan,* (Wis. 1937) 274 N.W. 411.

Two questions are provoked by this case: (1) should a state court stay proceedings in an action *in personam* pending determination of a prior action brought in a federal court between the same parties on substantially the same cause of action? (2) should a federal court stay proceedings in such an action, pending determination of a prior action brought in a state court? There is a conflict in the holdings. The federal view, as expressed in several cases which deny a stay of proceedings in the federal court pending determination of a prior action in a state court, is that the matter is discretionary with the federal district court. *City of Ironton, Ohio,* v. *Harrison Construction Co.,* 212 Fed. 353 (C.C.A. 6th, 1914); *Southern Pacific Co.* v. *Klinge,* 65 (2d) 85 (C.C.A. 10th, 1935). But in the case of *Great North Woods Club* v. *Raymond,* 54 F. (2d) 1017, 1018 (C.C.A. 6th, 1931), in which the federal district court stayed proceedings pending determination of a prior suit in a state court, the Circuit Court of Appeals held that the stay order must be vacated. The court state: "Where a federal court has jurisdiction of parties and of subject matter, it is usually true that plaintiff in that court has an absolute right to have his case in that jurisdiction proceed to trial, and there is no discretion to stay that action, pending the results of an earlier one in the state court." See also *Checker Cab Mfg. Co.* v. *Checker Taxi Co.,* 26 F. (2d) 752 (N.D. Ill. 1928). These decisions indicate that a defendant has little opportunity to stay an action begun in federal court pending the determination of a prior suit in a state court. However, the majority of state courts hold that the granting or refusal of a stay of proceedings begun in the state court, pending the results of a prior action in federal court, is discretionary with the state court. *Curlette* v. *Olds,* 110 App. Div. 596, 97 N.Y. Supp. 144 (1906); *Western Union Telegraph Co.* v. *Howington,* 198 Ala. 311, 73 So. 550 (1916); *State* ex rel *Milwaukee Lumber Co.* v. *Superior Court,* 147 Wash. 615, 266 Pac. 1054 (1928). In the *Western Union* case, the appellate court would not set aside the lower court's determination to stay proceedings; in both the *Milwaukee Lumber Co.* case, and the *Curlette* case the appellate court would not disturb the lower tribunal's refusal to stay proceedings. The Wisconsin Supreme Court, in the principal case, does not follow this rule of discretion. In Wisconsin, a stay of proceedings where a prior action is set down for early trial in a federal court, is not discretionary but mandatory on the trial court, unless such action in the state court "is reasonably necessary for the protection of some substantial right of a party." The principal case is the first definite holding of our supreme court in this manner. The court discards the dicta of the early case of *Wood* v. *Lake,* 13 Wis. 94 (1860), which stated that the Wisconsin courts need not abate proceedings pending the results of a suit between the same parties on the same cause of action in a federal court. It is interesting to trace the development of the Wisconsin doctrine from *Wood* v. *Lake,* through *Ashland* v. *Whitcomb,* 120 Wis. 549, 98 N.W. 531 (1904), and *Ashland* v *Wis. Central Railway Co.,* 121 Wis. 646, 98 N.W. 532, 99 N.W. 431 (1904), to the principal case.

PAUL G. NOELKE.

EVIDENCE—CRIMINAL PROSECUTION—SELF-CRIMINATION—The defendant was prosecuted for driving an automobile on the public highways while under the influence of intoxicating liquor. A physician testified in the case concerning the results of a chemical analysis of the defendant's urine for ethyl alcohol content, a sample of which had been voluntarily furnished by the defendant. The urinalysis interpreted according to a scientific standard disclosed the defend-