would give rise to a certain reciprocal duty of fair dealing. Such duty might well include that of responding to plaintiff's offer which defendant itself had requested. But see 33 Harv. L. Rev. 595 (1920) for criticism of "duty" notion. Lastly, it was the defendant and not the plaintiff who was desirous of terminating the original contract. In this connection it is significant that Texas follows the majority, *Crye v. O'Neal and Allday*, 135 S.W. 253 (Tex. 1911), in holding that a client "breaks" the contract by unwarranted dismissal of the attorney. Hence, if the original contract was entered into in Texas, or the New York rule was not proved, it would seem that if the defendant did not accept the proposed new agreement by its silence, it was guilty of a breach of the old contract. The court might well be disposed in this situation to treat the silence as an acceptance of the plaintiff's offer. Cf. Note, 46 Harv. L. Rev. 846 (1933).

EARL F. SIMMONS

Equity—Jurisdiction of Equity Court to Enjoin Enforcement of a Foreign Equity Decree—Prohibition—[Missouri].— *X*, a resident of Indiana, and an employe of the petitioning railroad company, was fatally injured in Indiana while in the line of his duty. The railroad company, an Indiana corporation, was operating in the states of Indiana and Missouri. *X*'s wife, who was also a resident of Indiana, as administratrix, sued the railroad company under the Federal Employers' Liability Act in the the circuit court of the city of St. Louis, Missouri. The railroad company obtained a permanent injunction in the circuit court of Clinton County, Indiana, restraining prosecution of the suit in the Missouri court. Nevertheless, the administratrix proceeded and recovered a verdict in her favor. The railroad company then moved that she be cited for contempt by the Indiana court. Whereupon, the administratrix obtained an order in the circuit court of the city of St. Louis restraining the railroad company from prosecuting the citation for contempt in the Indiana court. The railroad petitioned the Supreme Court of Missouri for a writ of prohibition against the circuit court of the city of St. Louis, prohibiting it from entertaining jurisdiction of the proceedings to enjoin the railroad from prosecuting the contempt proceedings in the Indiana circuit court. *Held*, the writ of prohibition should be granted. *State ex rel. New York C. & St. L. R. Co. v. Nortoni, Circuit Judge*, 55 S.W. (2d) 272 (Mo. 1932).

The court in its opinion relies on two propositions: first, that the Indiana court had jurisdiction to enjoin the administratrix from prosecuting the suit against the railroad in the Missouri court; second, that the Missouri court did not have jurisdiction to enjoin the railroad from further prosecution of the contempt proceedings.

The first proposition is clearly correct. On the facts of the case, there appears no reason why the general rule that a court of equity has the power to restrain a person within its jurisdiction from prosecuting a suit in another state should not apply. *Fisher v. Pacific Mutual Life Ins. Co.*, 112 Miss. 30, 72 So. 846 (1916); *Ex parte Crandall*, 53 F. (2d) 969 (C.C.A. 7th 1931). Even where the court has been unwilling to assume jurisdiction, the power to grant such injunctions has been freely admitted. *Ill. Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N.E. 554 (1917); *Chicago, M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218 (1921). Thus the court correctly considered that the right to prosecute in the Missouri court under the Federal Employers' Liability Act was "qualified by the jurisdiction of a court of equity to restrain the bringing of a suit in a foreign jurisdiction provided the facts in the case warrant such action."

The second proposition perhaps deserved more consideration than it was given. This is especially true in the light of the recent Minnesota case of *Peterson v. Chicago, B. & Q. Ry. Co.*, 244 N.W. 823 (Minn. 1932). In this case a lower Minnesota court had granted an injunction restraining the prosecution of contempt proceedings in another state. Upon appeal to the Supreme Court the injunction was affirmed.

On the second proposition, in the present case the Supreme Court held that the lower Missouri court had no jurisdiction to enjoin the railroad company from prosecuting the citation for contempt. In so holding, they say, "It is familiar law that where the jurisdiction of a court and the right of a party to prosecute the proceedings therein have once attached, that right cannot be arrested or taken away by proceedings in another court. *Stevens v. Central Nat. Bank of Boston*, 144 N.Y. 50, 39 N.E. 68." Although the case cited by the court was later reversed, it was upon other grounds. *Central Nat. Bank of Boston v. Stevens*, 169 U.S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807 (1897). From the quotation, it can be seen that the court considers the right to prosecute the contempt proceedings as unqualified and that consequently the right cannot be taken away by an injunction. This is incorrect. The courts of Missouri have recognized the general rule that a court of equity has the power to enjoin a citizen of its own state from instituting or continuing a suit in another jurisdiction. *Grey v. Independent Order of Foresters*, 196 S.W. 779 (Mo. 1917); *Kansas City Rys. Co. v. McCardle*, 288 Mo. 354, 232 S.W. 464 (1921). This rule has not been limited to actions at law, but, on the contrary, has expressly included suits in equity. *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326 (C.C.A. 8th 1923); *Horst v. Barrett*, 213 Ala. 173, 104 So. 530 (1925). In a New Jersey case, the court determines there is the power to enjoin suits in equity, but they refrain from exercising it for lack of a proper case. *Bigelow v. Old Dominion Copper Co.*, 74 N.J.Eq. 457, 473–485. Although the Minnesota court seems to differ from the Missouri court on the propriety of issuing such an injunction as the one in the principal case, *Peterson v. Chicago, B. & Q. Ry. Co., supra*, is authority for the proposition that the injunction would not be absolutely void. Thus, it is submitted that the equitable right to prosecute the contempt proceedings in the Indiana court is a right qualified by the power of an equity court in Missouri, which has jursidiction of the railroad company, to enjoin the prosecution. Consequently, the Supreme Court of Missouri was wrong in holding on its second proposition that the lower court lacked jurisdiction to entertain the case.

It is submitted that, if this be true, the writ of prohibition should not have issued. The theory upon which such writs are issued is that the lower court has acted in excess of jurisdiction or in usurpation of jurisdiction. *State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S.W. 72 (1914); *State ex rel. Fabrico v. Johnson, Circuit Judge*, 293 Mo. 302, 239 S.W. 844 (1922); *Wilkins v. Stiles*, 75 Vt. 42, 52 Atl. 1048 (1901); *Nichols v. Judge of Superior Court of Grand Rapids*, 130 Mich. 187, 89 N.W. 691 (1902). At times, it has been stated that a writ of prohibition would lie to keep a court within the limits of its power in a particular proceeding. *State ex rel. Ellis et al. v. Elkin*, 130 Mo. 90, 30 S.W. 333 (1895); *State ex rel. Sullivan v. Reynolds, Judge*, 209 Mo. 161, 107 S.W. 487 (1907). The language may be due to confusion as to the meaning of the term jurisdiction. Cook, The Powers of Courts of Equity, 15 Col. L. Rev. 106, 107 (1915). As a practical matter, the courts issue the writ only upon the theory that the judgment or order of the lower court is void and can be attacked collaterally. The language of the court in *State v. Elkin, supra*, shows this clearly. In *State v. Reynolds, supra*, also, the court

considers the lower court as lacking in power to appoint a receiver because another court had assumed jurisdiction by appointing a receiver and the assets of the action were in *custodia legis*. The appointment was considered void and the writ of prohibition issued. In the more recent case of *State ex rel. Hyde v. Westhues, Circuit Judge*, 316 Mo. 457, 290 S.W. 443 (1927) the court reaffirmed the general proposition that a writ of prohibition issues only where an inferior court proceeds without jurisdiction or in excess of jurisdiction, and expressly found the act of the lower court to be void before they issued the writ. The injunction restraining the prosecution of the contempt proceedings has been shown not to be void and consequently the writ of prohibition should not have been granted the petitioner here.

Further reason for denying the writ of prohibition might be found in that the petitioner had an adequate remedy at law. It has been held that such a writ will be denied when this is the case. *Mastin v. Sloan*, 41 Mo. 44, 11 S.W. 558 (1889); *State ex rel. Burns v. Shain, Circuit Judge*, 297 Mo. 369, 248 S.W. 591 (1923). That the petitioner's rights might well have been protected by an appeal is shown by the proceedings in the case of *Peterson v. Chicago, B. & Q. Ry. Co., supra.*

One sympathizes with the result of the Missouri case, but in considering the extraordinary nature of the writ of prohibition it would seem advisable to let the petitioner seek his remedy by appeal.

JOHN P. BARNES, JR.

Equity—Specific Performance—Contract to Support Infant—[New York].—Defendant agreed with the infant plaintiff's mother that if she would bring the plaintiff to New York from his uncle's home in Holland, and would permit the defendant to direct the plaintiff's education and religious training, the defendant having the benefits of the infant's companionship, then he, the defendant, would support the plaintiff for life. The plaintiff and his mother performed as far as possible, but after two years the defendant refused to perform further. The mother, as guardian, sued for specific performance. The Special Term's order denying the defendant's motion to dismiss the complaint was affirmed in the Appellate Division, with one judge dissenting on the ground of lack of mutuality, 236 App. Div. 14, 257 N.Y.S. 738 (1932); and reaffirmed in the Court of Appeals. *Weinberger v. Van Hessen*, 260 N.Y. 294, 183 N.E. 429 (1932).

The highest court concluded that the plaintiff, in suing, assumed the duty of full performance, citing *Epstein v. Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922); and that a decree conditioned upon the plaintiff's continued performance would protect the defendant. However, not only would the infancy of the plaintiff preclude the enforcement of the contract as against him, but the performance required would not be enforced in any event, on account of the delicate personal relationships involved; and it may be doubted whether that performance which the plaintiff might be disposed to render, short of full performance, would be so substantially equivalent, in its proportion to the whole performance contemplated, to the performance required of the defendant during that time, that a conditional decree would in fact be just to the defendant. See notes on the principal case in 17 Minn. L. Rev. 453 (1933), and 46 Harv. L. Rev. 724 (1933); see also 17 Iowa L. Rev. 388 (1932). Compare the cases of contracts to devise in consideration of personal care. *Poe v. Kemp*, 206 Ala. 228, 89 So. 716 (1921); contra, *Davison v. Davison*, 13 N.J.Eq. 246 (1861), and see dictum in *Teske v. Dittberner*, 65