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Judicial Self Denial and Judicial Activism - the Personality of the Original Jurisdiction of the Federal District Courts

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(Second of Two Parts)

REMOVAL JURISDICTION.

Defined.

REMOVAL JURISDICTION IS THE AUTHORITY by which a cause of action or claim can be transferred, before trial, from a state court to a federal district court. This jurisdiction is purely statutory and as such finds its authority and the manner and conditions upon which that authority is to be exercised, in the acts of Congress. In the grant of that authority, Congress is confined to the limits of the constitution. Congressional authority for removal jurisdiction is not found in any of the express grants of jurisdiction in the constitution. Congress' power to provide for removal jurisdiction is an implied power which is necessary and proper to give effect to its express powers.[149]

Source of Removal Jurisdiction.

The source of authority for removal jurisdiction is found in section 1441, Title 28, of the United States Code; paragraph (b) thereof states:

> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

A reading of this section reveals that the removal jurisdiction of the federal courts is confined by their original jurisdiction. In other words, removal jurisdiction cannot attach if the suit could not have been originally brought in the federal courts. If the claim involves a federal question, then removal does not depend

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149 Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).

on citizenship. However, if jurisdiction is based upon diversity of citizenship, removal is reserved only to the non-resident defendant or defendants. The presence of a resident citizen, properly joined, defeats the right to removal.

As a Derivative Jurisdiction.

Removal jurisdiction is a derivative jurisdiction.[150] "The power of removal is certainly not, in strictness of language an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere." [151] The federal court receives a claim in the condition in which it leaves the state court; if the state court had no jurisdiction then the federal court has none. This is so even if the federal court would have had original jurisdiction of the claim, if it were brought in the federal court in the first instance.[152] The reasoning seems to be that a case cannot be removed from a forum that never had authority itself to take cognizance of the case. If the state court lacked jurisdiction, a removal to the federal court cannot remedy the jurisdictional defect.[153] However, once a removal is effected, and the state court had jurisdiction upon that removal, subsequent events which might occur that would not have supported the jurisdiction of the state court in the first instance are unavailing to affect the federal courts' jurisdiction, provided it was a claim of which the federal courts would have had original jurisdiction in the first instance.[154]

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150 See, Evans, Walter M., "The Removal of Causes; Federal Removal Jurisdiction in Diversity of Citizenship Cases," 1947, 33 Virginia Law Review 445, 450-453.

151 Martin v. Hunter's Lessee, 1 Wheat. 304, 350-7 (1816).

152 "The jurisdiction of the Federal court on removal is, in a limited sense a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction." Lambert Run Coal Co. v. Baltimore & Ohio R. Co., 258 U. S. 377, 382 (1921).

153 "When a cause is removed from a state court into a Federal Court, the latter takes it as it stood in the former. A want of jurisdiction in the State court is not cured by the removal. . . . General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261, 288 (1922).

154 "We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court. If the federal court has jurisdiction of the removed cause and if the amendment to the complaint could have been made had the suit originated in the federal court, the fact that the federal court acquired jurisdiction by removal does not deprive it of power to allow the amendment." Freeman v. Bee Machine Co., 319 U. S. 448, 451 (1942).

Federal Question and Diversity Jurisdiction.

When jurisdiction is predicated on a federal question, the test of removability is the plaintiff's complaint.[155] Just as in federal question jurisdiction, the plaintiff is the master of his complaint, and no action on the part of the defendant is availing in the determination as to whether or not the plaintiff's claim arises under a federal law. The *form* of the plaintiff's complaint independent of the merits of his claim, or the allegations of the defendant, is the determinate as to the existence of federal question jurisdiction.

When jurisdiction is based on diversity of citizenship, the petition for removal is the determinate factor. The plaintiff's allegations as to the citizenship of the defendant are not final, because diversity must actually exist to support jurisdiction. This diversity must obtain both when the suit is begun in the state court, and also when the petition for removal is filed.[156]

Waiver.

The right of removal was historically established for the defendant's protection and benefit and as such, it is deemed a privilege which the defendant may waive, expressly or impliedly. An express waiver presents no problem, but a waiver by conduct is not always easy to discern.[157] The test is whether the defendant's actions in the state court indicate such a design to abide by the state court's jurisdiction as to estop him from claiming otherwise.[158] It has been held, that the mere taking of depositions under the state law is not only not a waiver but indeed a method in support of contentions for or against removal.[159] A general

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155 "In the absence of a fraudulent purpose to defeat removal, the plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case arising under a law of the United States when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, non-removed when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses toward a conclusion." Great Northern R. Co. v. Alexander, 246 U. S. 276, 282 (1917).

156 Gibson v. Bruce, 108 U. S. 561 (1883).

157 Flory, Ira S. Jr., "Federal Removal Jurisdiction," 1939, 1 Louisiana Law Review 499, provides a good perusal of the instances amounting to waiver, pp. 510-514.

158 Duvall v. Wabash Ry. Co., 9 F. 2d 83 (1923).

159 Ibid.

appearance is not a waiver.[160] Applying for and obtaining a bill of particulars is, however, a waiver.[161] One case has held that the filing by a defendant, in the state court, an answer and motion to dissolve a restraining order which had been awarded ex parte is not a waiver.[162] A demurrer to a complaint, because it does not state facts sufficient to constitute a cause of action, was held a waiver because the demurrer raised issues involving the merits. The court felt that to allow a removal in such an instance would permit a litigant to experiment in the state court and if he were unsuccessful, to remove to the federal court.[163]

Safeguarding the Right to Remove.

The courts have been willing and diligent in the safeguarding of the right to remove. That right was beset by a *Denial* attitude, which has since been rejected. In the *Home Insurance Co. of N. Y. v. Morse* case,[164] a state statute which directed that a corporation organized in another state could not transact business within the local state unless it agreed in advance not to remove, any action brought against it by a citizen of the local state, to the federal courts, was held unconstitutional. Not long after, the same state, through its legislature, passed an act which directed the secretary of state to revoke the license of any foreign insurance company licensed to do business in that state, if that insurance company should remove a suit brought against it, by a resident citizen, to the federal courts. In upholding the validity of the statute, the court in *Doyle v. Continental Ins. Co.* stated:

> "The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal Courts, or to cease to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question." [165]

This *Denial* holding acknowledges "the injustice, the prejudice or the wrong" which will result therefrom. All that the holding perceives, is the sovereignty of the state and its sovereign right to

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160 Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. 2d 196 (1926).

161 Ex parte Bopst, 95 F. 2d 828 (1938).

162 Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 131 F. 657 (1904).

163 Alley v. Nott, 111 U. S. 472 (1883).

164 Home Ins. Co. of N. Y. v. Morse, 20 Wall. 445 (1874).

165 Doyle v. Continental Ins. Co., 94 U. S. 535, 542 (1876).

control within its boundaries. No considerations of the national economic repercussions of such enactments affect the reason of the majority opinion. On the other hand, the dissent is a socio-economic discourse of generously *Active* proportions;

> "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporation. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital.
>
> They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would deprive the people of those states of the benefits of their enterprise." [166]

Not one legal premise is couched in this reasoning, except that it is mindful of the national equities involved in the case. Suffice it to say that the dissent finally offers a legal premise to effect its holding, but no one should have any doubts as to the spirit motivating the dissent. Eventually the *Doyle* case was overruled by the *Terral v. Burke Construction Co.* case.[167] Whatever the reason, the federal courts are not willing to sacrifice the national right to invoke the jurisdiction of the federal courts by removal or otherwise, in favor of state sovereignty.[168]

Separate and Independent Claims or Causes of Action.

Today, the separable controversy is no longer an authority for removal jurisdiction. The new statute is indicative of the holding in the *Hurn* case and reads:

> "Whenever a separate and independent claim or cause of action, which would be removable is sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." [169]

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166 Ibid., p. 543.

167 Terral v. Burke Construction Co., 257 U. S. 529 (1921).

168 "The jurisdiction of federal courts may not be limited or impaired by state legislation conferring exclusive jurisdiction of litigation upon state courts or prescribing exclusive methods of invoking that jurisdiction." Barber Asphalt Pav. Co. v. Morris, 132 F. 945 (1904).

169 28 U. S. C. 1441 (c). For an exhaustive discussion of the new section 1441 (c) see, 19 A. L. R. 2d 748-762.

In order to understand the implications and changes wrought by the new act, a discussion of the separable controversy basis for removal should be discussed and understood.

Background of the New Act.

The old act was former section 71, Title 28, of the United States Code. It read:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

A reading of the section discloses that a separable controversy basis for removal depended upon diversity of citizenship alone, and that such diversity included only citizens of different states. The diversity grants with respect to aliens and the state as parties were not included. The statute shows, that in the determination of the existence or non-existence of a separable controversy, the status of the parties involved resolved the question, to wit, the defendant involved must have been of citizenship diverse to that of the plaintiff's, and the other defendants must not have been indispensable parties to the controversy the non-resident defendant is seeking to remove. If a party was an indispensable one and his presence in the suit destroyed diversity, the suit was not removable. The case of *Ford v. Adkins* will illustrate this point.[170] It was a suit in equity for the reformation of a deed against the present holders of the land and their grantor whose citizenship destroyed complete diversity. The case was removable since the presence of the grantor was not only not indispensable but wholly unnecessary.

Whether or not a separable controversy existed so as to support removal jurisdiction, was determined from an analysis of the complaint without any reference to the defendant's plea to the merits. The plaintiff had a right to control his action, and absent a fraudulent joinder, his desire was determinate. The complaint was measured by its subject matter and the object sought by the plaintiff, and if by these measurements no separable controversy existed, then there existed no jurisdiction for removal.[171] If defendants were charged with negligence, and the

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[170] Ford v. Adkins, 39 F. Supp. 472 (1941). For a full treatment of the old "separable controversy" rule and its application see, 5 LRA (NS) 58-59.

[171] Bachman v. Seaboard Air Line R. Co., 80 F. Supp. 976 (1948).

charge against the non-resident was of a several nature, or no joint liability was all alleged, removal by the non-resident defendant should have prevailed. On the other hand, if the defendants were sued jointly, in good faith, removal was not available, no matter that the non-resident defendant could have been sued separately.[172] There exists the possibility that the defendants were only severally liable, but the determination of that question was one of merits and not one of jurisdiction. Hence, the plaintiff's interpretation of his rights against the defendant provided the determinate if there were no fraudulent joinder. A good instance of a fraudulent joinder is found in *Wecker v. National Enameling and S. Co.* which was a personal injury action brought in a state court against two defendants, one of whom was of the same citizenship as the plaintiff.[173] The plaintiff in the course of his employment fell into a vat of boiling oil. He contended, among other things, that the defendants were negligent in failing to provide safety equipment to safeguard him. The non-resident filed a petition for removal alleging a separable controversy. The resident defendant was a draftsman who had drawn the plans, pursuant to directions, for the vat. The court held him to be a completely unnecessary party to the action, and that his joinder was for the sole purpose of preventing removal.

Shades of the *Hurn* case also plagued the courts in the determination as to the existence of a separable controversy. If the facts as stated by the complaint showed the violation of only one right, then only one cause of action existed. The qualm as against each party to this one cause of action was a *controversy*. This *controversy* was the only proper subject for removal by authority of the separable controversy statute. If the facts as stated by the complaint showed the violation of multiple rights, then there existed multiple causes of action. These separate causes of action were not separable *controversies* and sought their removal outside the authority of the separable controversy statute. Of course these separate causes of action, individually, could have contained therein a *controversy* which was removable.

This distinction between separate causes of action and separable controversies found expression in the practice of the removal of the whole cause of action, in which a separable contro-

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172 Pullman Co. v. Jenkins, 305 U. S. 534 (1938).

173 Wecker v. National Enameling & S. Co., 204 U. S. 176 (1906).

versy took place, to the federal courts.[174] If the suit contained a separable controversy, the entire suit could be removed. If the suit contained several causes of action, only those causes of action containing a separable controversy could be removed; the other cause or causes were left remaining in the state court. The case of *Texas Employers Insurance Association v. Felt* illustrates this practice.[175] It was an action for the death of one Felt, who was crushed to death by a bulldozer which he operated. The facts of the accident and the circumstances under which Felt was employed posed a question as to for whom of three employers Felt was working when the accident occurred. Because of this, three workmen's compensation insurance carriers in the alternative were sued. The citizenship of one of the carriers was the same as that of the plaintiffs. The non-resident insurers petitioned for removal and the whole case was removed to the federal court. The removal of the suit as against the resident insurance carrier was objected to on the ground that the removal could not affect a cause of action having a non-federal basis. Said the court:

> "If there were three separate suits in a single proceeding, the action should have been divided, two removed to the federal court, and one left in the State court; if there were three controversies in one suit, as we think, the entire suit was removable." [176]

The court reasoned that the plaintiff was seeking to enforce one contractual right, and that the issue in the suit was the fixing of the liability or non-liability for that right pursuant to the facts and circumstances of the case, irrespective of the number of parties included therein.

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174 "In observing the distinction between a suit which is removable in its entirety on the ground of a separable controversy wholly between citizens of different states, and which can fully determine as between them, and one where separate and unrelated causes of action are joined in the same complaint, it is interesting to note the play of similar principles when jurisdiction depends upon a substantial federal question, as an integral part of the plaintiff's case, though there be other non-federal questions involved. In such case, under both original and removal jurisdiction, the federal court will decide all issues necessary for decision, whether they be local or federal, and even though the federal question is not decided at all; but the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct cause of action because it is joined in the same complaint with one involving a federal question." Holmes, Edsin R., "The Separable Controversy—A Federal Removal Concept," 1939, 12 Mississippi Law Journal 163, 170.

175 Texas Employers Ins. Ass'n. v. Felt, 150 F. 2d 227 (1945).

176 Ibid., p. 232.

The New Act.

Section 1441 (c), Title 28 of the United States Code abolished the separable controversy as a basis for removal. Now only separate and independent claims or causes of action form the basis for removal jurisdiction by cutting out the ground of separable controversies to support removal.[177] When the bill was proposed, it met stiff opposition from academic circles. Their dislike for the bill was premised upon the nebulous conceptions existing in the courts as to the distinction between separate and separable controversies.[178] To them, the confusion which reigned by reason of the *Hurn* doctrine was about to be endorsed by the legislature. Also, if Congress felt that the volume of judicial business was too much for the federal court, the answer lay in the increase in federal facilities to handle this volume rather than in a decrease in jurisdiction.[179]

In many respects, the new act is similar to the old separable controversy act.[180] Removability under the new act still depends

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177 Congressional Revision Committee Report on the new removal statute, section 1441: "The accompanying committee report has this to say: 'It . . . permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation.'" Keefe, Arthur John and Lacey, Frederick B., "The Separable Controversy—A Federal Concept," 1948, 33 Cornell Law Quarterly 261, 269, 270.

178 Ibid., p. 270: "It is believed that the selection of words is unfortunate. The courts for years have been unable to distinguish clearly between 'separate' and 'separable.' Yet this bill requires that a distinction be drawn. Nothing in the proposed bill will aid the judges in drawing the line between the two."

179 Ibid: "Do we want a reduction in the volume of litigation in the federal courts if it has to be secured in this manner? Undeniably the federal calendars are overcrowded, but it is suggested that we should have more federal judges, rather than less federal jurisdiction, to solve the problem."

180 "Under the new Judicial Code, separable controversies were abolished, as a distinct ground of federal removal jurisdiction, and Section 1441 (c) of said code was substituted in lieu thereof. The separable controversy was uprooted, but the soil in which it flourished remains. The difference between the two concepts is one of degree, not of kind; and the basic principles are as applicable now as they were under prior statutes. We are still governed by the local law as to the plaintiff's substantive right and the joint or several character of his claim. The federal authorities are still potent to the effect that the plaintiff has the right to select the forum; to elect whether to sue joint tort-feasors jointly or separately; and to prosecute his own suit in his own way to a final determination. They are also potent to the effect that, if the complaint is filed in good faith, the cause of action, for the purpose of removal, is deemed to be that which the plaintiff has undertaken to make it; that the defendant cannot make separate a cause of action which the plaintiff has elected to make joint; and the same is true as to all other questions with respect to federal jurisdiction and the statutory remedy of removal." Bentley v. Halliburton Oil Well Cementing Co., 174 F. 2d 788, 791 (1949).

upon the original jurisdiction of the federal court, in that the cause of action or claim, to be removed, must have been one that could have been brought in the federal court in the first instance. Under the old act, the controversy to be removable, had to contain the element of complete diversity whereas under the new act a claim posing a federal question is removable regardless of the citizenship of the parties. In this respect, the new act is broader than the provisions of the old act. The plaintiff is still the master of his complaint, and the determination as to whether there exists one or more claims or causes of action which can support removal is found in the reading thereof, unfettered by the allegations of the defendant. As in the application of the old act, the state law still dictates the plaintiff's substantive rights, and whether or not a single or multiple causes of action are pleaded are resolved by state law.[181] The new act allows a removal of a cause of action or claim where, had it been sued upon alone, it would have been removable. This means that pursuant to the general requirements of removal, all of the defendants must join in the removal petition. Under the old act, if the requisite diversity existed in the controversy "either one or more of the defendants" could have removed. Unlike the old act, once a claim or cause of action is successfully removed under the new act, all of the claims or causes of action joined therewith may be removed, and claims having a federal and a non-federal basis alike, may be determined in the federal courts. Considerations of justice, expense and dispatch are weighed in the retention of the entire suit.[182]

The new act then, deals only in separate and independent claims or causes of action. It involves not the joinder of parties but rather the joinder of causes of action or claims. The yardstick in the application of the new act is the number of violated rights revealed by the facts; one violated right, one cause of action,

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181 Billups v. American Surety Co., 87 F. Supp. 894 (1950).

182 In a case wherein a complaint brought in a state court stated eleven causes of action, five of which were triable in the federal court, and having the requisite diversity and jurisdictional amount, the federal court refused a motion to remand the remaining six non-federal causes of action saying: "The Congress having made this possible in the discretion of the court, by this very substantial change in the statute, upon reconsideration, the court has determined that more is to be gained in the expeditious and less expensive administration of justice, and no legal rights will be violated, if the original motion were denied in toto, and so it will be." McFadden v. Grace Lines Inc., 82 F. Supp. 494, 495 (1948).

multiple violated rights, multiple causes of action.[183] If there is but the violation of one right, then any interest that bears the semblance of being several is in reality a separable controversy no longer removable.[184] Even in instances where the plaintiff charges the defendant with only several liability or liability in the alternative, if there is but one injury, there are no separate and independent claims or causes of action to validate removal.[185]

The American Fire and Casualty Co. v. Finn Case.

The *American Fire and Casualty Company v. Finn* case, hereinafter referred to as the *Finn* case, presents a good picture of the judicial attitudes under discussion with reference to the application of the new act.[186] The case is peculiar in that it involves a repudiation by a non-resident of his own removal after judgment goes against him. It also gives an indication as to how rigid the courts will be in the interpretation of this new act. The plaintiff, a citizen of Texas, brought this suit in a state court for a fire loss, against a Florida insurance corporation, an Indiana insurance corporation, and one, Reiss, the local agent of both corporations and a citizen of Texas. The plaintiff alleged that one or the other company, through its agent, insured the property damaged, and that the agent was responsible for anything that would defeat the plaintiff's recovery. The case was removed and a motion to remand the case back to the state court was denied. A judgment was rendered on the merits against one of the insurance companies. This company then moved to vacate the judgment for lack of diversity jurisdiction. The logic of this company was that the plaintiff had suffered the violation of one right, to wit, the breach of an insurance contract, and that because of this, there was no separate and distinct cause of action under the act to authorize removal, therefore the federal court had no jurisdiction because one of the other defendants destroyed complete diversity. The supreme court agree, that but a single wrong, emanating from a series of interlocked transactions, was pleaded

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183 Rodewald v. Phillips Petroleum Co., 91 F. Supp. 700 (1950); Burns v. Carolina Power & Light Co., 88 F. Supp. 767 (1950); Harward v. General Motors Corporation, 89 F. Supp. 170 (1950); Willoughby v. Sinclair Oil & Gas Co., 89 F. Supp. 994 (1950).

184 Buckholt v. Dow Chemical Co., 81 F. Supp. 463 (1948).

185 Butler Mfg. Co. v. Wallace & Tiernan Sales Corp., 82 F. Supp. 635 (1948).

186 American Fire & Casualty Co. v. Finn, 341 U. S. 6 (1950).

by the plaintiff; that wrong being the failure to compensate the plaintiff for his loss in the property. In a very strict interpretation of the new act, the majority opinion held that the district court lacked jurisdiction to have a trial on the merits. This is indeed a *Denial* attitude.

The dissenting opinion of the *Finn* case by Justice Douglas is an *Active* one. He was of the conviction that since the removing defendant asked for and obtained removal of the case to the district court, and lost its case therein, it was estopped from having it remanded to the state court. To go further, Justice Douglas reasoned that the suit against the removing defendant was one which could have been brought originally in the federal district court, there having been present the requisite diversity and jurisdictional amount. Also, the judgment under review, involved only the removing defendant and no other. Only the bare circumstance of the removing defendant having invoked the federal district court's jurisdiction, was offensive to that court's jurisdiction. In *Activist* language, Justice Douglas concluded:

> "I think it is abusive of the interests of justice when the challenge now made is raised to the dignity of a jurisdictional question. Any requirement of section 1441(c) that was not met in this case rose to no level higher than an irregularity, so far as petitioner is concerned." [187]

The holding in this *Finn* case indicates that the courts intend to adhere to the letter of the law in the interpretation and application of the new act. If the court ever intended to relax the rule of the new act this *Finn* case was an inviting occasion. A situation like this cries out for *Judicial Activism.* The *Denial* answer to Justice Douglas informs, that the defendant did not obtain removal because the court had not jurisdiction to retain the case in the first instance. Since the court had no jurisdiction, the judgment even if only against the petitioner was ineffectual. Besides, it's no revelation that the consent of the parties cannot confer jurisdiction upon the federal courts, if jurisdiction is otherwise lacking. Perhaps, after the new act and its effect is allowed time to jell in the judicial mind and opinion, some credence will be given to the Douglas viewpoint. At present the test of the new act reaches confusing proportions which, perhaps, ought not to be made more complex with new and equitable applications.

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[187] Ibid., p. 19.

COMMENTS AND OBSERVATIONS.

In Defense of the Separable Controversy as the Basis for Removal Jurisdiction.

What has been said in favor of the need for diversity jurisdiction also supports the need for removal jurisdiction. Be there no doubt that defendants likewise can suffer indignations of local bias, prejudice and policy. It is established that, historically, removal jurisdiction had its inception in the desire to protect the defendant. Of some repute is the idea that this protection currently has a practical basis. Should the scope of that protection be lessened because the plaintiff pleads one cause of action? Rights and liabilities grow out of relationships between people. The disturbance of a fixed relationship or a contracted relationship may give rise to a right and a correlative liability. Freedom is a relationship that's defined by people's responsibility to each other. Law defines the relationships of people, fixes the relationships of people and conforms the relationships of people. In justice and in reason, it seems that the scope of removal jurisdiction should depend upon the relationship of the parties to each other and to the plaintiff. A claim or cause of action is but the projected result of a breach in the relationships between people. Why should it precede the event from which it originated, in importance? If a party, in his relative position, can remove a suit, within the confines of the original jurisdiction of the federal district court, without disturbing the interests of the other parties to the suit, he should be allowed to remove. If his liability grew out of a relationship, why should not his right to absolve that liability also grow out of a relationship? To this end, the separable controversy ground for removal jurisdiction seems, as a matter of jurisprudence, the better practice. This separable controversy ground should be augmented with the allowance of removal in federal question cases irrespective of citizenship. With the developments in modern methods for travel and communications, boundary lines become mythical, and space presents little problems. The relationships between people transcend space and boundary lines, and become more national in scope. A ship strike in San Francisco has an economic and dietary effect in New York. These national relationships cause an increase in the judicial business of the national courts. This increase should not be met with a restriction upon the allowable federal jurisdiction. Rather, the solution should be met by an extension of the facilities in the national courts, as already previously suggested.

The Personality of Removal Jurisdiction.

Elusive is one of the terms that may be used in describing the personality of removal jurisdiction. If, more than one party defendant is joined in an action, whether removal jurisdiction will attach is a conjectural matter depending upon the facts and circumstances surrounding the suit. Since removal jurisdiction is confined to the original jurisdiction of the federal district courts, it, as a personality, must conform to the rule of the *Gully* case in federal question cases and the various rules as to citizenship in diversity cases. No doubt this galaxy of rules frustrate and inhibit the personality of removal jurisdiction. The separate and independent claim or cause of action rule as a basis for removal, coupled with the courts' indicated strict and rigid adherence to this rule obstructs any liberal tendency this personality may have contained. These prohibitions imposed upon an already Congressionally inhibited personality fracture its stability so as to make it the most repressed and limited personality of the group under discussion. Any receptive potential which this personality of removal jurisdiction may have is confounded by the network maze of conceptions of rights and the facts which affect these rights.

JURISDICTIONAL AMOUNT.

Congress has further restricted the original jurisdiction of the federal district courts by the imposition of a jurisdictional amount in federal question and diversity cases.[188] Only when "the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs" can the jurisdiction of the federal courts be invoked in the two aforementioned circumstances, except wherein Congress has provided otherwise.[189]

How Ascertained.

How then is the presence of a proper jurisdictional amount ascertained? Usually the sum claimed by the plaintiff, in good faith, is decisive. Again the plaintiff is the master of his complaint. Allegations of the sum involved in the suit as contained in the complaint are controlling unless the defendant can show to a legal certainty that the plaintiff can not recover more than

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188 See, 28 U. S. C. 1331, 1332.

189 See, 28 U. S. C. 1333, 1334, 1338.

$3,000.[190] Even if it is apparent on the face of the complaint, that a valid defense exists to the claim, the plaintiff's allegation as to the amount prevails. In a suit to recover an amount, part of which is not yet due and discernible upon the face of the complaint, the amount alleged obtains.[191] However, if the complaint, on its face, discloses that the plaintiff cannot recover the amount alleged, the jurisdictional amount is lacking, and a mere *ad demnum* clause will not afford jurisdiction. Illustrative of this rule is the case of *North American Transportation and Trading Co. v. Morrison,* wherein the plaintiff brought a suit for damages arising out of the breach of a contract to transport the plaintiff and his baggage from Seattle, Washington to a city in Canada.[192] The trip to Canada was never completed because of unforeseen circumstances. The plaintiff alleged in support of the required jurisdictional amount the fare he paid, expenses incurred in having to return to Seattle, the wages which he could have earned at Seattle had he not proceeded on the abortive journey, the loss of his baggage, and the failure on the part of the defendant to carry him to Canada where he could have obtained employment, thereby causing the loss of wages for a year. All of these allegations totaled up to the required jurisdictional amount. It can be seen by the very allegations which the plaintiff makes with reference to wages to be earned in Canada, that the damages suffered thereof are at most remote and speculative, and as a matter of law are not even to be considered. This is how the court so held in denying jurisdiction to the plaintiff's cause because of the lack of the required jurisdictional amount. By way of dictum, the court held that the failure of a plaintiff to recover less than the jurisdictional amount in no way indicates a lack of a required jurisdictional amount.

Plaintiff's Viewpoint Rule.

This right of the plaintiff to determine the amount in controversy is defined by what is known as the plaintiff's viewpoint rule.[193] This rule makes the test for determining the amount in

[190] St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283 (1937).

[191] Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500 (1892).

[192] North American Transportation & T. Co., v. Morrison, 178 U. S. 262 (1899).

[193] For a discussion of the growth of the plaintiff's viewpoint rule see, Dobie, Armstead M., "Jurisdictional Amount In The United States District Court," 1925, 38 Harvard Law Review 733, 740-743.

controversy, the pecuniary result to either party which a judgment would produce.[194] The rule was not always so broad as it is stated above. The first classic expression of the rule is found in the case of *Mississippi and M. R. Co. v. Ward* which was a suit to abate a nuisance.[195] The plaintiff claimed the defendant created a nuisance by building a bridge across the river navigated by the plaintiff's three steamboats. The plaintiff sought no damages which made the determination as to the amount in controversy problematical. The court held that the absence of money damage was not fatal, and that the matter of controversy was the removal of the bridge which would involve more than the jurisdictional amount. The value of the object of the suit was the standard.[196] This case considered only the value to be afforded the plaintiff. In holding the removal of the bridge as the determinate, the court was thinking in terms of the plaintiff navigating the river with his three steamboats, unfettered by the presence of the bridge, and not in terms of the cost and loss to the defendant in removing the bridge. In *Cowell v. City Water Supply Co.*[197] the court held the amount in controversy to be the value sought to be recovered by the plaintiff, or the value which the defendant stood to lose if the plaintiff is successful. This court considered the detriment to the defendant in determining the amount in controversy. Some more recent cases have adhered to the *Cowell* case. The *Cowell* case has in a sense prostituted the plaintiff's viewpoint rule. The value sought by the plaintiff may not reach jurisdictional requirements, while the value the defendant will lose if the plaintiff is successful, may far exceed the jurisdictional amount. In that event, the amount in controversy is being measured from the defendant's viewpoint and not the plaintiff's viewpoint. Suffice it to say that the courts have developed a dual measurement to determine the amount in controversy. It would seem that the broad interpretation of the rule is more indicative of the amount actually in dispute. No doubt, each party to a suit thinks in terms of the effect that the outcome of the suit will have upon his interests, and he proceeds in the suit with that in mind. To each party the amount in controversy

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194 Ronzio v. Denver & R. G. W. R. Co., 116 F. 2d 604 (1940); Shipe v. Floral Hills, 86 F. Supp. 985 (1949).

195 Mississippi & Missouri R. R. Co. v. Ward, 67 U. S. 485 (1862).

196 See, Glenwood L. & W. Co. v. Mutual L. H. & P. Co., 239 U. S. 121 (1915).

197 Cowell v. City Water Supply Co., 121 F. 53 (1903).

is that amount representing his interests. Why then, should not the determination as to the amount in controversy comprehend both the interests of the plaintiff and the interests of the defendant? This broad interpretation of the rule which takes into account the pecuniary result to either party is an *Activist* product, and as such favors jurisdiction.

The plaintiff's viewpoint rule cannot anticipate the collateral effects of a judgment to make up the jurisdictional amount. That the probative effect of a judgment may result in a loss or gain far in excess of the jurisdictional amount is not sufficient to satisfy the jurisdictional amount requirement. The fact that an award to a landlord of an increase in maximum rent, if upheld, will increase the value of his premises three and a half times, does not increase the claims of the plaintiffs seeking to enjoin that award three and a half times so as to meet the jurisdictional amount standard.[198] Neither does the fact that a judgment, awarding an insured totally disabled plaintiff the sum of $50.00 per month, under an insurance contract, may result in the collection from the defendant insurance company of a sum greatly exceeding the jurisdictional amount, meet the requirements thereof.[199] In both of these instances the amount in controversy is the amount due and accrued to the plaintiffs involved. In a suit to enjoin the collection of a tax, the amount in controversy is the amount of tax that is due, and not the pecuniary probabilities of its enforcement or non-enforcement. Since the payment of the tax would quiet these probabilities, it is the only matter in dispute.[200] To be distinguished is an instance where a statute is challenged as a restriction of business without reference to the payment of a tax. In this event, the right to do business is the matter in controversy and the pecuniary result from its suppression is the amount in controversy.[201]

Recent Application of the Plaintiff's Viewpoint Rule.

Since the plaintiff's viewpoint rule is the keynote to jurisdictional amount, it would be well to illustrate some recent applications of that rule. In the case of *Ronzio v. Denver and R. G. W. R. Co.* a suit was brought to quiet title to water rights and to deter-

198 Spieler v. Hass, 79 F. Supp. 835 (1948).

199 Button v. Mutual Life Ins. Co. of New York, 48 F. Supp. 168 (1943).

200 Healy v. Ratta, 292 U. S. 263 (1933).

201 Ibid.

mine priorities under these rights.[202] The plaintiffs asked for damages amounting to $1,000, and a decree quieting title. The defendant removed the cause and the plaintiff filed a motion to remand on the ground that the requisite jurisdictional amount was lacking to support the jurisdiction of the federal court. The court held that the matter in controversy was the object sought by the plaintiff through his complaint, and that the test for determining the amount in controversy was the *pecuniary result to either party* which the judgment would produce. The court in applying these premises reasoned that the object of the plaintiff's suit was to establish the validity and priority of his water rights over those claimed by the defendant, and if a judgment were given in the plaintiff's favor it would establish the defendant's rights as secondary, and thereby destroy its value and "result in a pecuniary loss" far in excess of the jurisdictional amount. Thus the amount in controversy was sufficient to satisfy the jurisdictional requirements. The case of *Shipe v. Floral Hills* is a similar holding.[203] In this case, the plaintiff brought a class action to secure the appointment of a receiver to take over all the property and assets of the defendant so as to fulfill the contractual obligations incurred by the defendant, and arising out of the sale of burial plots made to the plaintiff and his class. According to contract, the defendant was to establish an irrevocable trust fund of at least ten percent of the gross amount received from the sale of all the lots sold in Floral Hill Cemetery. The plaintiff alleged that the defendant had sold over one million dollars worth of lots, and had not deposited more than $50,000 in the trust fund. The court held that the value of the object of the suit was by reason of the trust fund, the $50,000, and that if the defendant were obligated to set up the trust fund as alleged, the pecuniary result to him would be a liability of $50,000, which indeed satisfies jurisdictional requirements. In both these cases, the pecuniary result which the defendant might suffer determined the amount in controversy. Both of these cases also have a two step approach in determining the amount in controversy. First, the object of the suit as pleaded by the plaintiff is ferreted out. This is termed the matter in controversy. Second, the pecuniary result to either party which a final determination of this matter in controversy would produce is ascertained, and this is resolved as the amount

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202 Ronzio v. Denver & R. G. W. R. Co., 116 F. 2d 604 (1940).

203 Shipe v. Floral Hills, 86 F. Supp. 985 (1949).

in controversy. This amount in controversy is allowed two chances to make the grade. If the pecuniary result to the plaintiff is insufficient, then resort is had to the pecuniary result to the defendant. In the first case it was stipulated that the value of the plaintiff's water rights was not in excess of $2,000, so that there was no doubt as to the amount in controversy from the plaintiff's viewpoint. Nevertheless, the court considered the pecuniary interest of the defendant, and held his interest as the amount in controversy. It is apparent that the plaintiff's viewpoint rule is no longer confined to the plaintiff's point of view.

ANCILLARY JURISDICTION.

By reasons of necessity and expedience, there has emanated from the constitutionally authorized grants of jurisdiction, a type of jurisdiction that has no express constitutional, or congressional sanction, termed ancillary jurisdiction. Strictly speaking, ancillary jurisdiction is not a jurisdiction, in the sense that it does not find its authority, as does the other phases of jurisdiction, in the dictates of Congress. Like removal jurisdiction, ancillary jurisdiction depends upon a previously authorized exercise of jurisdiction and it exists solely by dint of a relationship thereto. When standing alone, ancillary jurisdiction and the exercise thereof may violate the limitations of the constitution. However, it finds its "raison d'etre" as a jurisdictional vehicle for proceedings incidental or supplemental to the main claim. It is a jurisdiction in aid of the principal proceedings and depends upon the principal proceedings for its efficacy.

The evolution of ancillary jurisdiction has been espoused of many concepts ranging from the desire to protect property already within the jurisdiction of the court to the desire to do justice to all matters relating to the claim currently before the court. Since the federal courts are courts of limited jurisdiction and the exercise of their jurisdiction was and is always under scrutiny, there have been attempts to ascribe definitive aspects to the scope of ancillary jurisdiction. Perhaps the most inclusive of these attempts is one that assigns the exercise of ancillary jurisdiction to two classes of proceedings.[204] One class includes those proceedings which affect the property already in the custody or control of the court. The other class includes those proceedings which deal with the processes, pleadings, judgments or

[204] Cooperative Transit Co. v. West Penn. Electric Co., 132 F. 2d 720 (1943).

records of the court in the principal case. The scope of ancillary jurisdiction was not always as broad as the aforementioned classes of proceedings might indicate. At first, the reasons assigned for the exercise of an ancillary jurisdiction had their basis in the possession by the court of a res which was the focal point of the controversy. This possession of the res coupled with the need to do complete justice in the final disposition of that res among all the parties having an interest therein effected ancillary jurisdiction.[205] Also among the earlier reasons assigned for the exercise of ancillary jurisdiction, was the necessity to make effective the orders, judgments and decrees of the courts. A perusal of the opinions dealing with ancillary jurisdiction will reveal that the courts will readily take jurisdiction of proceedings incidental to the main claim which involve property, and such property is in the possession of the court, irrespective of whether the proceeding is one which may not have been legally within the original cognizance of the federal court. It is also elementary that ancillary jurisdiction will operate to aid the execution or effectuate a judgment already entered in a suit.[206]

The case of *Compton v. Jesup* is the early authority for the exercise of ancillary jurisdiction.[207] It was a suit brought in a federal court to foreclose one of several mortgages held upon a railway system. The railway system was sold under foreclosure decrees but the property was not ordered to be turned over to the purchasers, leaving the property still in the possession of the receivers. While this property was still in the receivers' possession, mortgagees under a prior mortgage began a suit in the same court to foreclose their mortgages. Numerous persons having interests or claims in the property, and whose citizenship destroyed complete diversity, were made parties to the second suit. The court admitted that it did not have original jurisdiction over the second foreclosure suit, but held that it was not a suit, but in essence a proceeding ancillary to the main foreclosure suit. It reasoned that no other court, except that court wherein the receivers were appointed could give the first mortgagees relief, because no other court could wrest the present court of possession

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205 Fulton National Bank v. Hozier, 267 U. S. 276 (1924).

206 In re Maryland Coal Co. of West Virginia, 36 F. Supp. 142 (1941); Hume v. City of New York, 255 F. 488 (1918); Union Trust Co. v. Jones, 16 F. 2d 236 (1926); Ferguson v. Omaha, 227 F. 513 (1915); Oklahoma v. Texas, 258 U. S. 574 (1921); Barnett v. Mayes, 43 F. 2d 521 (1930).

207 Compton v. Jesup, 68 F. 263 (1895).

of the property, decree it to be sold and deliver to the purchaser a clear title. Because of that unfettered possession the court had inherent ancillary power to hear and decide upon all claims upon the property in its possession. Appended to this reasoning was the premise that every court had "inherent equitable power" to control its proceedings, so that its judgments and decrees will not cause injustice to any person. This case places the emphasis on the presence of a res in the claim, and the possession of that res, actually or constructively, in the court, and to that effect it is the present authority.[208] The case also intimates, and very strongly, that a court may have ancillary jurisdiction to effectuate a judgment already entered in a suit. Currently there is much authority on these two phases of the exercise of ancillary jurisdiction. They are deemed, as a matter of necessity, inherent judicial powers.

Of later origin is the idea that ancillary jurisdiction admitted of procedural matters.[209] The reasons assigned for the exercise of ancillary jurisdiction in procedural matters are convenience and the desire to do complete justice to all the persons who are or may be affected by the claim and the facts surrounding it.[210] One of the more important procedural expressions of ancillary jurisdiction is found in the third party practice of the federal district

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208 Compare the case of *Cooperative Transit Co. v. West Penn. Electric Co.*, 132 F. 2d 720 (1943), wherein the purchaser of property in a foreclosure proceeding brought an action claiming that certain barns were within the after acquired property clause of the mortgage under which he purchased. The barn property had never been before the court, nor had it been the subject of litigation in the foreclosure action. The parties who were brought in alleged they were bona fide purchasers of the bar property and their citizenship destroyed diversity.

209 "It is true that the ancillary jurisdiction of the federal courts in the sense that the term is used here is most frequently based on the possession of a res, and the necessity of doing complete justice in its final disposition among all parties interested; or in supplementary proceedings necessary to make effective the orders, judgments and decrees of the court. The type of suit we are here dealing with is, of course, not a suit in rem but in personam; but it is by no means certain that the nature of ancillary jurisdiction must be limited to a case where the court has possession of a res, or a supplementary proceeding to enforce a valid judgment. We are here dealing with procedural matters only, and there is very substantial ground for the view that as the general jurisdiction of the court properly attached under constitutional and statutory provisions to the suit between the original plaintiff and the original defendant, it should proceed to do final and complete justice as between all parties affected by or liable on account of the same set of facts." Tullgren v. Jasper, 27 F. Supp. 413, 417 (1939).

210 "These rules are a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court." Lesnik v. Public Industrials Corporation, 144 F. 2d 968, 973 (1944).

courts, as found in rule 14 of the Rules of Civil Procedure. The Rule permits a defendant to serve a summons and complaint upon a person not a party to the action, but who is or may be liable to the defendant for all or part of the claim the plaintiff asserts against the defendant. The original defendant is then termed a third party plaintiff and the new defendant is termed a third party defendant. The rule gives the third party defendant the same impleading rights that the original defendant has.[211] The original plaintiff has impleading rights to the same extent when a counterclaim is asserted against him. This rule allows the federal district court to take cognizance over claims of which it could not take originally, because the claim against the impleaded party may lack the jurisdictional amount or because the citizenship of the third party defendant may destroy diversity. The jurisdictional intendments of this rule is implemented by ancillary jurisdiction. Unlike the clear cut cases of ancillary jurisdiction where a res is present, proper jurisdiction in third party practice cases requires more thought manipulation. Neither is the application of the rule as liberal in the invocation of ancillary jurisdiction as found in rem proceedings.

Under the third party practice if the jurisdiction of the court over the original claim is based on diversity of citizenship, that jurisdiction is not lost because other parties whose citizenship is objectionable, are subsequently impleaded into the case.[212] However, that impleader must essentially take the form of an incidental or ancillary proceeding. To put it another way, the defendant by impleading a third party defendant, cannot subtly change the plaintiff's claim so as to be a claim against the third party defendant.[213] For a claim to be ancillary or incidental, the third party plaintiff must seek to recover from the third party defendant upon a secondary liability which arises out of the plaintiff's claim against the original defendant.[214] In an action by a Georgia resident for injuries sustained in an automobile collision, the defendant filed a third party complaint upon two Georgia residents claiming them to be liable to the plaintiff in the original defendant's stead. The court held that the defendant was at-

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211 See, Nora v. Pittston Stevedoring Corporation, 90 F. Supp. 35 (1950); a case where a motion was granted permitting a 4th party defendant to implead a 5th party defendant.

212 Johnson v. G. J. Shenard Co., 2 FRD 164 (1941).

213 Baltimore & Ohio R. Co. v. Saunders, 159 F. 2d 481 (1947).

214 Liberty Mut. Ins. Co. v. Vallendingham, 94 F. Supp. 17 (1950).

tempting to substitute a new and separate claim for the plaintiff, and the original defendant was not asserting a right to indemnity so as to make the suit an ancillary one.[215] The courts have just about narrowed down claims considered as ancillary to a main claim, to claims wherein the third party plaintiff claims a right to indemnity, or a right to contribution or a right to subrogation.[216] Other claims by the third party plaintiff have to stand the original jurisdictional test of the federal courts, and ancillary jurisdiction is unavailing.

Comments and Observations.

A Judicial Activist Innovation.

Ancillary jurisdiction in the federal courts by its very nature owes its existence to Judicial Activism. It is not traceable to any one of the nine constitutional grants of jurisdiction, nor has it any statutory recognition. To go further, ancillary jurisdiction is a means used by the courts which even violates the constitutional confinements. Each extension of the idea of ancillary jurisdiction is an *Activist* step from the letter of the law and a bane to *Judicial Denial.* Ancillary jurisdiction's ultimate authority inheres in the Judicial Activism components of necessity, justice and expedience. For whatever ancillary jurisdiction is worth, credit for its inception and promulgation belongs to the *Judicial Activist.* It should be mentioned that there are some *Judicial Self Denial* influences evident in the field of ancillary jurisdiction. As previously discussed, the courts seem constrained to give the third party practice some semblance of compliance with the original jurisdiction to the federal district courts. In federal question cases, the rule of the *Hurn* case forbids the assumption of a non-federal *cause of action* but concedes the jurisdiction for a non-federal *ground.* Both of these instances are *Denial* checks on the import of ancillary jurisdiction. Perhaps some day power and authority will come to mean the same as justice, expedience and necessity; but until that time comes, a fictional jurisdiction to facilitate these socio-legal cogencies, need be countenanced, under the sponsorship of *Judicial Activism* and subject to the vigilance of *Judicial Self Denial.*

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[215] Akers Motor Lines v. Newman, 168 F. 2d 1012 (1948).

[216] Pearce v. Pennsylvania R. Co., 7 FRD 420 (1946); Liberty Mut. Ins. Co. v. Vallendingham, 94 F. Supp. 17 (1950); Lee Inc. v. Transcontinental Underwriters, 9 FRD 470 (1949).

Statutory Recognition of Ancillary Jurisdiction.

A passing comment should be made upon the statute relating to the removal of separate claims or causes of action, and the authority therein to remove a whole suit involving multiple causes of action, some of which are non-federal.[217] Could this be a *statutory recognition* of ancillary jurisdiction? It must be conceded that Congress has no express constitutional power to allow the federal courts to take cognizance of a non-federal *cause of action* merely because it is joined with a federal cause of action. Where then, lay the justification for such a grant as given by Congress to the federal courts? Under the old separable controversy basis for removal, various reasons were assigned in sanctioning the federal courts' right to determine federal and non-federal questions in a removed suit, when the constitutionality of such a practice was put in issue. Among these reasons were the production of proper results, the economical and expeditious administration of justice, the supreme court's indulgence in such a practice, the existence of Congressional necessary and proper powers to execute its Article three, section two powers, and the ancillary properties of such a practice.[218] The last of these reasons incorporates most of the others. In any event, these reasons were acceptable enough to keep the authority for such a practice from being cast into the limbo of the unconstitutional. It is suggested that Congress was mindful of this reasoning in authorizing the reception of non-federal causes of action in the act making separate and independent claims a basis for removal. Perhaps they felt these reasons and their ancillary propensities coupled with the legal contrivance of the *Activist* would lend authority to this enactment. Is this, then, a *statutory recognition* of ancillary jurisdiction?

Ancillary Jurisdiction and the Personality of the Original Jurisdiction of the Federal Courts.

Ancillary jurisdiction is not a personality. It has no existence apart from that which the courts give it. It is an agency enlisted in aid of the original jurisdiction of the federal district courts. It is an Activist conceived process used in the development of the personality of original jurisdiction. A party wishing to have his

217 See, 28 U. S. C. 1441 (c).

218 Hoffman v. Lynch, 23 F. 2d 518 (1928); Texas Employers Ins. Ass'n. v. Felt, 150 F. 2d 227, 233, 234 (1945); Sperry v. Wabash R. Co., 52 F. Supp. 337 (1943).

day in a federal court can invoke either the federal question, or the diversity or the removal jurisdiction thereof, depending upon the circumstances of the claim involved. Each of these jurisdictions has its own tenets, and a party may avail himself of one jurisdiction independent of the other. This he cannot do with ancillary jurisdiction because ancillary jurisdiction is a facility and not an entity, capable of having a personality. As a mere means of application, ancillary jurisdiction itself has no receptive potential, however, it is able to promote such a potential, which seems to be its chief province. It tends to militate against some of the punctilious attitudes of *Self Denial.*

OBSERVATIONS AND REFLECTIONS.

The Suitor Denies.

The state of the original jurisdiction of the federal courts is elusive. The law defining that jurisdiction is repelling and effacing. It endorses avoidance of the jurisdiction of the federal courts and scrutinizes the invocation thereof. There are no ingenious devices to confer jurisdiction for the use of the suitor, save that of moving to another state and affecting a citizenship diverse to that of the intended defendant or defendants. At least, such a method is expensive and inconvenient. Perhaps, the dropping of all but indispensable parties to affect diversity of citizenship may be said, remotely, to confer jurisdiction. On the other hand, there are numerous recognized devices for avoiding the jurisdiction of the federal courts by preventing removal. One such of these devices is the bringing of a suit in a state court for less than the jurisdictional amount in both federal question and diversity cases. Such a right is so well countenanced by the federal courts, that a plaintiff may bring an action in a federal court, have it dismissed without prejudice, and bring the same action in the state court for a reduced amount, and thereby prevent removal.[219] Another of these sanctioned devices is the bringing of an action in a state court for less than the jurisdictional amount, and later increasing the claim by amending it at the trial.[220] In diversity cases, wherein no federal question is involved, a plaintiff may join a resident defendant and plead only one cause of action to escape removal. Although an assignment

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219 Brady v. Indemnity Insurance Co. of North America, 68 F. 2d 302 (1953); Iowa C. R. Co. v. Bacon, 236 U. S. 305 (1914).

220 Northern Pacific Railroad Co. v. Austin, 135 U. S. 315 (1889).

to confer jurisdiction, by creating diversity of citizenship, cannot do so, one to prevent removal may have, according to state law, the desired effect.[221] In certain instances, a plaintiff, whose citizenship will allow removal, may even go so far as to procure a plaintiff whose citizenship will not allow removal. This was instanced in *Mecom v. Fitzsimmons Drilling Co.*,[222] where an administratrix, after having her wrongful death action removed to the federal court, dismissed the action, resigned as administratrix, and had an administrator of the same citizenship as the defendant appointed at her request, thereby preventing removal. Since only a non-resident may remove, a suitor may escape removal, in a case wherein no federal question is involved, by bringing his action in a court of the state in which the defendant is a citizen. As a passing comment, in federal question cases, the plaintiff may be able to invoke the jurisdiction of the federal court under the less restrictive *federal basis* concept of the *Fair* case, but by the same token the defendant may seek to deny that invocation by pleading the strict *basic question* concept of the *Gully* case. And so it goes; the law is geared to the denial of litigation in the federal courts with appreciable participation therein by the suitors.

From Whence Came the Two Attitudes.

Perhaps the greatest political invention of all time was the Constitution of the United States. It was assembled by men who were invested with a dream that reached far and beyond the contemporary realizations. In that paper they tried to project all the ambitions that failed them in the mother country. It was fashioned of ideals considered beyond the reach of mortal man. It was the precursor to the manifest destiny the Union was later to realize. It was a canon formulated to serve its adherents for time immemorial. These qualities, after some one hundred sixty odd years still obtain. The Constitution is a unique instrument in that it is plastic and versatile. However, it does not operate of itself. It depends upon application to become active. It serves as a guide to facilitate its intended ends. What then are these ends?

To understand these ends, it must be realized that the Constitution was conceived of fragmentary concepts of natural law existing in England at the time of the exodus into the new

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221 Rule 17, Rules of Civil Procedure for the United States District Courts; 28 U. S. C. 1359.

222 Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931).

"promise land." These were the same concepts that were being successfully resisted in England in favor of the prerogatives of government. The advent of the industrial revolution had dictated something more secure than "popular" notions of the rights of man, if it were to reach a successful inclusion into English society. Contractual rights had to be adjusted to the social and economic changes wrought by the industrial revolution. The doctrine of laissez faire, which was espoused by those of the natural law school of thought, was considered as a deterrent to progress. The lawyers and middle classes of the time wanted something more practical than a code of personal ethics to guide the community. As legislatures became more politically secure, they began to foster nationalism and the allegiance thereto as the prime consideration in law. The analytical school of thought was progressively supplanting the natural law influence in England. Tyrannies infiltrated into the law society. This was the background for the establishment of the federal government.

The colonists had migrated to America to escape these new influences. When the Constitution was being formed, the concepts of natural law rights were utmost in the minds of the framers. Phrases like "liberty or death" were the order of the day. As a result, the Constitution was framed under natural law influence. Of prime consideration was the desire to establish effective limitations upon government and to guarantee the individual his transcendental rights. With this in mind, the Constitutional Convention emerged with a law symmetrical, containing mechanical means to facilitate these ends.

Succinctly, the federal government gives credence to three postulates: the protection of individual "inherent" rights, the promotion of a national government while allowing to the states the right of local self-government, and a system of governmental checks and balances. On the national judiciary rests the duty to make this system work.[223] The judges who first embarked upon this duty were imbued with the politics of their time, and their influences in turn were manifested clear up to the beginning of the twentieth century.[224] Property rights were given a parity with human rights, corporations were protected with natural law interpretations of contracts and child labor flourished; slavery

223 Parker, John J., "The Federal Judiciary," 1948, 22 Tulane Law Review 569.

224 Swisher, Carl Brent, American Constitutional Development, 1943, p. 500.

was supported by the natural law concept of due process, a slave was a property right not to be disturbed; natural law limitations were also imposed upon the police power of the states. These were the nascent beginnings of *Judicial Self Denial. Stare Decisis* reigned on the pretense that uniformity was more important than justice. These *Denial* influences with their mechanical interpretations still exist today.

In the early nineteen hundreds, there sprung up a revolt against these natural law influences and mechanical interpretations of the law. This revolt was spearheaded by men like Holmes, Brandeis and Pound. They felt that jurists had a greater duty to law and country than that of discovery of the law alone. They reasoned that law was made for man; that it should satisfy his needs, wants and vicissitudes. Herein was the nascent beginnings of *Judicial Activism,* although traces of this attitude can be found in earlier judicial review. To the men of this school expediency was the keynote. Under them, transitions in the law "from forms to functions, from concepts to activities, from statics to dynamics, from individual ends to social ends, from the satisfaction of intellectual ideals to the satisfaction of human wants" was the creed.[225] According to Pound, law was to adopt its principles and doctrines to human conditions, it being an instrument rather than a factor. He felt that law was to be judged by its adequacy and not its conformity. The banner of *Judicial Activism* was perpetuated by jurists like Stone and Cardozo. Today, men like Black and Douglas spearhead this school of thought. No one can deny the progressive imprint these men, and men like them, have had and have upon the national society. Much of the currently recognized progressive legislation that these men judicially supported is a necessary part of the national social and economic structure today, and of which few deny should be.[226]

In Defense of Judicial Activism.

With scientific, economic and commercial advancements, the world grows smaller every day. Local interests become inextricably bound with national interests. Local problems have effect throughout the nation. Interstate commerce reaches into every home. Folks in California eat apples from the state of

225 Commager, Henry Steele, The American Mind, 1950, p. 375.

226 Commager, Henry Steele, The American Mind, 1950; acknowledgment is made to this author for much of the material relating to the early political philosophy of the American government.

Washington. A bank failure in Chicago affects a Florida citizen. Many facets of life transcend state boundaries. The law should become conversant with the needs of the nation. No longer are there thirteen separate colonies with an independent culture, society and currency. The old natural law concepts which first occasioned the constitution are obsolete. There is a new and greater and stronger economy today. In the law of nations, we are but a single state and the community of nations grows nearer every day. Our pledge to the United Nations as a national unit calls for an exercise of that organization's tenets as a national unit. Reasons of expedience, nationally and internationally, call for a new interpretation of human rights and property rights. The constitution is not a fixed dogma; it depends upon application. It is not self-effacing. The need for *Judicial Activism* is apparent in the benefits already reaped from such a practice. This discussion has sought to point out how *Judicial Activism* is sometimes beneficial. Look at the economic implications the *Deveaux* case would have espoused if it were not for the *Activist* rejection of such a situation. The economy of this country dictates the union of capital for enterprise. What an injustice would have been perpetrated if the doors of the national courts were closed to a suitor because one stockholder, out of a multitude, was of the same citizenship as that of the suitor. By the same token, a corporation may have been denied the right to a federal forum because one of its many stockholders was of the same citizenship as the defendant. True, the state courts were open, but interests, availability, location, venue, and process may have decreed a broader forum. History, yes even history, and the portent of a hysterical future threatened with inflation, war and economic crises, press the need for *Judicial Activism* just as the dark days of the early Franklin Roosevelt administration begged for and needed *Judicial Activism.* It should be pointed out that this defense of *Judicial Activism* is by no means a complete condemnation of *Judicial Self Denial.* There is certainly a need for the latter attitude to check a precocious growth of the law. The anxiety to mete out justice and dispatch can cause confusions as witnessed by the *Tidewater* case. There is a need for a conservative influence to give the law stability; but the prime veneration should be for man and his needs.

How Have These Attitudes Affected the Personality of the Jurisdiction of the Federal Courts?

Generally speaking, how then, have these two attitudes of *Judicial Activism* and *Judicial Self Denial* affected the personality of the jurisdiction of the federal courts? In the federal question development, it is evident that the *Denial* attitude has prevailed. Starting with the broad *Active* interpretation of federal question cases found in the *Osborn* case, this *Denial* attitude persistently inhibited the scope of that jurisdiction until it reached the repressive proportions of the *Gully* case. Since the *Osborn* case was never overruled, fragments of its *Active* indications are still found in some phases of federal question jurisdiction. Because of this, federal question jurisdiction may be said to have somewhat of a conjectural and dual personality; one side retentive and the other side renouncing. This conjectural personality was further perplexed by the mystifying *Denial* holding of the *Hurn* case. However, the *Active* concept of ancillary jurisdiction operated to broaden the receptive potential of federal question jurisdiction, and it even found expression in the strict, confining *Hurn* reasoning. In diversity jurisdiction, the restrictive *Denial* rule of the *Strawbridge* case was mitigated by the *Active* doctrine of separability innervated by ancillary jurisdiction. The *Active* formulation of the presumption that members of a corporation are citizens of the state of incorporation relaxed some of the restriction of the *Strawbridge* rule and broadened the receptive potential of diversity jurisdiction. The *Active* reasoning in the *Tidewater* case, in opposition to the *Denial Hepburn* case made for a more equitable personality. *Denial* influences and checks, in the *Tidewater* case, kept the *Active* influences from placing a licentious aspect to diversity jurisdiction. In removal jurisdiction, the Active protection of the right to remove gave some outlet to the personality. However, it was a personality frustrated by a heritage seethed in political trauma, frustrated by a dependence upon the state's conception of jurisdiction, and confused by a dependence upon the *Active* and *Denial* rules of federal question and diversity jurisdiction. To carry the frustration further, was the *Hurn* inspired section 1441 (c) of the judicial code, allowing removal of only separate and independent claims. Some of this frustration was alleviated by the *Active* therapeutics of ancillary jurisdiction. In venerating uniformity, the *Denial* holding in the *Finn* case inhibited any condescending tendencies this jurisdiction might have had. Throughout all the

jurisdiction of the federal courts, *Denial* influences have kept the *Active* application of ancillary jurisdiction from converting the jurisdiction into a completely officious personality. To sum it up, the courts, with what they have had to work with, have made federal question jurisdiction a "guess" with a dual personality receptive on the one side and restrictive on the other side, both beset by complex manners in being approached. In diversity jurisdiction, they have developed a rather retentive personality with relatively few inhibited traits. In removal jurisdiction, they have evolved a tense, complex and rejecting personality, beset by the same mystifying manners in being approached as in the federal question jurisdiction.

It seems that the federal courts, in determining their authority to decide a case or controversy, exercise two main views. These views seem to be sponsored by a desire to interpret the law as it is written on the one hand, and a desire to mete out justice with dispatch and convenience on the other hand. Because the jurisdiction of the federal courts is limited, the *Denial* school finds more support in the law proper. On the other hand, the *Activist* school, hampered by the "Constitutional Grants" of jurisdiction, finds support in legal philosophies and expedients. Both are extreme schools of thought and are neutralized by the effect of one upon the other. The *Denial* viewpoint does not let the federal courts forget their literal limitations and recited functions in the federal set-up. The *Activist* viewpoint does not let the federal courts forget their broad function as pinnacles of justice having a responsibility, a current responsibility, to the law and the people affected thereby. They feel that this responsibility cannot be facilitated by a denying of jurisdiction upon every technicality. Together, these two viewpoints insert into the jurisdiction of the federal courts a discernible personality which should be evaluated by members of the bar as readily as they would evaluate the personality of a client, or a witness, or even an adversary.