Cleveland State Law Review

Volume 3 | Issue 2 Article

1954

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

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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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(*First of Two Parts*)

MORE THAN OFTEN, I have heard the legal pun wherein the judge sitting on the federal district bench asks of the plaintiff's attorney how he got to the court, whereupon the attorney informs the judge quite seriously that he made use of the subway. The judge, of course, is referring to the plaintiff's claim, and whether or not it is properly before the district court; whether or not the case falls within the jurisdiction of the district court. The answer given by the attorney to the district judge is indicative of the lack of consideration given to the jurisdictional aspects of a claim brought into the federal court, especially in the case of general practitioners. Much attention is given to the merits of the case and jurisdiction is readily presumed. "Constitutional Law" words like *Federal Question* and *Diversity of Citizenship* become broad magic formulae to support an action in the federal courts. The case books are replete with actions thrown out of the federal courts on cute distinctions involving the lack of proper jurisdiction. As in all other courts, true jurisdictional defect cannot be waived in the federal courts.[1] Because of this rule, and the lack of a thorough working knowledge of federal jurisdictional requirements, many a case has gone to trial, and been decided upon the merits only to be later dismissed for lack of jurisdiction, thereby causing the loss of valuable time, effort and money. These pitfalls call for a greater understanding of the background, structure and personality of federal jurisdictional law.[2]

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[1] Mansfield, Coldwater & L. M. Ry. Co. v. Swan, 111 U. S. 379, 384 (1884): "the course of the court is, when no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction. . . . It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted."

[2] "For it is not too much to say that many members of the bar refrain from approaching the federal jurisdiction because their unfamiliarity with its practice makes them feel as strangers to that forum." Evans, Walter M., "The Removal of Causes; Federal Removal Jurisdiction In Diversity of Citizenship Cases," 1947, 33 Virginia Law Review 445, 447.

In the selection of a forum, a litigant's counsel has various factors to consider such as (a) the selection, tenure and powers of the judge, (b) the character of the jury, (c) the procedure, (d) the state of the calendar or docket, (e) the cost of the litigation and (f) the accessibility of the location of the tribunal to specific litigants.[3] These factors vary on the state and federal levels. In the federal courts, the judges are appointed for life and thereby theoretically free from political pressures. They have power to comment upon the evidence and to direct the verdict of a jury. Juries in the federal courts are thought to be from higher economic and cultural levels and more gracious in their verdicts.[4] The federal courts afford more liberal discoveries than in most state tribunals.[5] The rules for practice are generally less strict than those for state courts.[6] The calendars of the federal courts, although crowded, are not nearly as crowded and behind schedule as those of the state courts.[7] If counsel feels these few mentioned features of the federal courts will aid his client's cause, he should have some insight as to whether the claim is cognizable in the federal courts. An insight calls for an understanding of the temperament of the jurisdiction of the federal courts, and the manner in which the judges indulge that temperament. This jurisdiction must be understood as a personality with attending traits. Of still more importance is the prophecy of how the courts will receive, handle and develop these traits.[8]

It is the writer's desire to stimulate a better understanding of federal jurisdiction and the problems raised by it, by con-

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3 Yntema, Hessel E. and Jaffin, George H., "Preliminary Analysis of Concurrent Jurisdiction," 1931, 79 University of Pennsylvania Law Review 869, 907, 908.

4 "Many . . . cases are brought in the Federal Courts because the calendars in the Federal Courts, certainly in this District, are practically up-to-date, whereas the calendars in the New York State Courts are further behind, and also under the belief (whether mistaken or not) that the verdicts of juries in the Federal Courts exceed those in the State Courts." Tlusty v. Gillespie-Rogers-Pyatt Co., 35 F. Supp. 910, 912 (1940).

5 Compare sections 288, 306, 309, 322, 327 of the New York Civil Practice Act with rules 26, 33, 34, 35, 36 of the Rules of Civil Procedure for the United States District Courts.

6 Rules of Civil Procedure for the United States District Court: Rule 8 (a) "A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain; . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . . (e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

7 Tlusty v. Gillespie-Rogers-Pyatt Co., 35 F. Supp. 910 (1940).

8 "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, Oliver W., "The Path of the Law," 1897, 10 Harvard Law Review 457.

structing a simple and understandable treatment covering the background and structure of the subject. The intention of the treatment, however, is to emphasize the personality of the jurisdiction of the federal courts.

> "There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined than the subject of the jurisdiction of courts. It is a subject, too, about which much has been loosely said. Only occasionally have superior minds closely considered the principles involved and undertaken to define, with care, the boundaries of the jurisdiction of courts and the circumstances under which their jurisdiction will and will not attach." [9]

Personality is the sum total of a unit's assets and liabilities, actual and potential. It depends on interaction with other units for any successful measurement, otherwise it is just a passive entity, untried and untested. The personality of law depends upon its interpretation and application as well as its "raison d'etre." The law's interaction is with the courts. The courts activate this passive entity, the law, thereby giving some indication as to its assets and liabilities. This they do by interpretation and application of the law.

## JUDICIAL ACTIVISM AND JUDICIAL SELF DENIAL.

The jurisdiction of the federal courts is personalized by two predominant schools of thought. For the lack of better or more inclusive expressions, these two schools of thought may be characterized by the words *Judicial Activism* and *Judicial Self Denial.* These words are connotative and therefore lend to free association. They have been used in varying contexts, and may become confusing unless the writer attributes to them some special definition and/or connotation. *Judicial Activism* comprehends the potential in the law, whereas *Judicial Self Denial* is concerned only with the actual or being of the law.

The adherents of *Judicial Self Denial* suffer no violence to be done to the letter of the law and follow it strictly regardless of the hardship involved.[10] This is so even if such sternness violates dictates of common sense. Any action directly or indirectly hinting of judicial legislation is heresy to this group, who worship the doctrine of the separation of powers. It is this group that denies itself any fluidity of opinion or plasticity of application.

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[9] 14 American Jurisprudence 362.

[10] See, Richard H. Oswald Co. v. Leader, 20 F. Supp. 876 (1937).

They prefer to let the processes of legislation renovate the antique law, fill in the gaps and inaugurate new interpretation in existent laws, and meet the exigencies which social, political and economic conditions cause to arise in our legal system and in our laws.[11] It is this "slide rule" approach to judicial duties that the writer calls *Judicial Self Denial.*

On the other hand, the *Judicial Activists* like to feel the pulse of a law and "doctor" it when it becomes infirmed by impracticability and uselessness.[12] These are the men who, as did the Roman Praetors, deal in fictions to circumvent the letter of the law in favor of the spirit of the law.[13] To them justice is a living thing not to be divorced from the present social, economic and political scheme for living; law and society are co-extensive.[14] Like the pragmatist, they believe that the truth and worth of anything lies in its utility; no use, no truth.[15] Activists are ever mindful of the letter of the law, and where it injures the spirit is where the activity begins. Legal gymnastics are resorted to so as to reach a "popular" decision, and at the same time to justify any affront upon the letter of the law.[16] These men flirt with legislation and in so doing either invoke the wrath or the solicitudes of the legislature. Perhaps the greatest *Judicial Activist* was Justice Cardozo, whose expressed philosophy was: "The law never is, but is always about to be."

Mr. Justice Story has ably captured the basic philosophy of both of these projected schools of thought in his famous Rules of Interpretation of the Constitution. The rule more nearly in support of the Activist reasoning states that "a constitution of government, founded by the people for themselves and their pos-

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11 For a prototype reasoning see, "The Case of the Speluncean Explorers," opinion of Justice Keen; Fuller, Lon L., The Problems of Jurisprudence, 1949, Temporary Edition, pp. 16, 17.

12 Evidence of this process can be found in "The Case of the Speluncean Explorers," opinion of Justice Foster; Fuller, Lon L., The Problems of Jurisprudence, 1949, Temporary Edition, p. 6.

13 Burdick, William F., The Principles of Roman Law and Their Relation to Modern Law, 1938, p. 648.

14 "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said." Holmes, Oliver W., The Path of the Law, 1897, 10 Harvard Law Review 457.

15 Fuller, B. A. G., A History of Philosophy, 1945, p. 465.

16 For such a sentiment see, *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938), opinion of Justice Brandeis.

terity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects." [17] The *Denial* reasoning embraces a negative rule which warns judges that they are not to "enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous." [18] Both of these approaches to the interpretation of the constitution have a wisdom which, in the light of experience, transcends one another.

It must be recognized that *Judicial Activism* and *Judicial Self Denial* are sometimes attended by evil ends. The usurpation of power may be the true aim of the *Activist. Self Denial* could be a guise for irresponsibility and laziness. Self interest, fear of censure and not justice, are possible ends for both means. However, in the definitions for the terms *Judicial Activism* and *Judicial Self Denial,* no spurious nature was attached thereto, nor should such nature be assumed. Suffice it to say, that such prostitutions of judicial duties are not, by their very nature, judicial, and the use of the word "judicial" in such a sense is in actuality a misnomer. Although the general tendency of the *Activist* viewpoint is to accept jurisdiction, and the *Denial* viewpoint to deny jurisdiction, it should be pointed out that the two viewpoints applied may have opposite effects wherein the *Activist* rejects, and the *Denial* accepts jurisdiction.[19]

*Judicial Self Denial* and *Judicial Activism* are applied in varying degrees in all opinions interpreting positive law. Both of these attitudes find application in the field of law involving the jurisdiction of the federal courts, which is a matter of positive

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[17] Story, Joseph, Commentaries On The Constitution of the United States, 1833, ch. 5, sec. 190.

[18] Ibid., sec. 193.

[19] "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute . . . Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." Gulf Oil Corporation v. Gilbert, 330 U. S. 501 (1947).

law, and as such clearly recited. Whenever a question arises as to whether a controversy is properly before the federal courts, one or both of these schools of thought comes into play, although they may be camouflaged in lengthy perspective and reflective discourse and rationalization. It is the writer's objective to point out some of these practices and their effect upon the jurisdiction of the federal courts. This in turn will reveal how these schools of thought affect the personality of the law.

## JURISDICTION IN GENERAL.

Before embarking upon any lengthy discourse about jurisdiction, it would do well to define the word and reach an understanding as to what the term means. It is a term used loosely by both court and bar, and such laxity has caused confusion and misconception in the meaning and application of the term. Also, it is a term that has several distinctions that should be made clear at this point before any further discussion relating to the jurisdiction of the federal courts is pursued. "Jurisdiction is of several kinds as jurisdiction of the subject matter; of the parties; and what is termed venue jurisdiction." [20] The word "jurisdiction" is a derivative from the Latin "jus dicere" meaning the right to speak. Today it has transcended into a power afforded to the courts.

### *Jurisdiction of the Subject Matter.*

According to Bouvier "jurisdiction is the authority by which judicial officers take cognizance of and decide cases." [21] It comprehends "the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence." [22] The term jurisdiction, unqualified, relates to the subject matter or the character of the parties involved in the controversy. The "true jurisdiction" of a court is defined by classes of cases over which it has capacity to entertain, and which capacity was conferred upon it by the sovereign authority which activated the court. If this jurisdiction is defective, it cannot be waived as in the case of "process and venue jurisdiction." If a case comes within the kinds of action of which the court has capacity to entertain, the requirements thereof though lacking

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[20] Brand v. Pennsylvania R. Co., 22 F. Supp. 569, 571 (1938).

[21] Bouvier's Law Dictionary, A Concise Encyclopedia of the Law, Rawles Revision, 1914, vol. 1.

[22] Illinois C. R. Co. v. Adams, 180 U. S. 28, 34 (1901).

will not disturb the jurisdiction of the court, even though the requirements of process and venue are met. Such a lack of *jurisdiction* cannot be waived and must be raised upon the court's own motion if the parties fail so to do.[23] The power of the court is the only concern of jurisdiction, and the rights of the parties as between themselves has no relation to its jurisdiction.[24] Being the power to decide, it follows that jurisdiction includes the power to decide wrongly as well as rightly.[25] Jurisdiction should not be confused with the merits of a case. A claim need not have merit to support the jurisdiction of a court.[26] Jurisdiction is the power to entertain a suit and consider the merits and make a final determination thereon. The merits are the elements which define and qualify the plaintiff's right to relief. Jurisdiction exists apart from the merits of a suit, and there may be jurisdiction without the presence of merits.[27]

*Venue Jurisdiction.*

Jurisdiction and venue should not be confused.[28] Venue merely connotes locality, the place where the suit should be brought.[29] It relates to area and is a province of practice and procedure.[30] As already stated, it is a matter of personal privilege which may be waived expressly or impliedly.[31] Unlike jurisdiction, the court has no power to dismiss an action on its own motion for improper venue.[32] If a suit comes within the purview of the subject matter or the classes of cases, or if the character of the parties involved in the suit is such, so that a federal court has jurisdiction to entertain it, the question as to whether that suit should be brought in a particular state, county, city, or district,

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23 Mansfield, Coldwater & L. M. Ry. Co. v. Swan, 111 U. S. 379 (1884).

24 People v. Sturtevant, 9 N. Y. 263.

25 Wilson v. Penn. Mut. Life Ins. Co., 91 F. 2d 417 (1937); Thompson v. Terminal Shares, 89 F. 2d 652 (1937).

26 Venner v. Great Northern R. Co., 209 U. S. 24 (1908).

27 General Invest. Co. v. New York C. R. Co., 271 U. S. 228 (1926).

28 "The word 'jurisdiction' is used in a variety of senses. Sometimes it is used in the sense of venue, even in cases where venue is not fundamentally jurisdictional and is subject to waiver." Burford v. Sun Oil, 186 S. W. 2d 306 (1945). For an example of how jurisdiction and venue can be confused see, *Caceres v. United States Shipping Board E. F. Corp.*, 299 F. 968 (1924).

29 Standard Stoker Co. v. Lower, 46 F. 2d 678 (1931).

30 Paige v. Sinclair, 237 Mass. 482.

31 Standard Stoker Co. v. Lower, 46 F. 2d 678 (1931).

32 Paige v. Sinclair, 237 Mass. 482.

rather than in another is not at all a question of jurisdiction. It is a question of venue. "Jurisdiction" as a word is often used in connection with "venue" and has thereby caused some confusion. "The distinction is one between essential jurisdiction on the one hand, and an exemption from process on the other." [33]

*Process Jurisdiction.*

Jurisdiction and "process jurisdiction" or jurisdiction of the parties should also be distinguished.[34] "Process jurisdiction" is jurisdiction of the person of the defendant which is usually obtained by a service of process of the court, or by the voluntary appearance of the party during the litigation.[35] Like venue, a jurisdictional defect involving the person of one of the parties may be waived, expressly or impliedly. These distinctions in jurisdiction should be borne in mind, especially in the light of the present discussion. Jurisdiction hereinafter referred to will comprehend jurisdiction of the subject matter or "true jurisdiction." "Venue and process jurisdiction" are matters of procedure and beyond the scope of this discussion.

## JURISDICTION OF THE FEDERAL COURTS.

"On no section of the constitution was the assault more bitter than on the provisions for the federal judiciary." [36] All the members of the Convention agreed that a national judiciary was necessary. The discord was precipitated by the extent of power to be accorded the federal judiciary. Three sources of opposition to the judiciary portions of the constitution were prominent: (1)

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33 Fribourg v. Pullman, 176 F. 981 (1910).

34 "Jurisdiction is of two kinds—one of the subject, the other of the parties—and both must exist in order to authorize the court to try and determine the cause. Unless the law gives the court jurisdiction of the subject, jurisdiction cannot be acquired by the consent of the parties, but, if the law gives jurisdiction of the parties by their consent. If A & B both reside in this state and A should sue B for a debt in the circuit court of a county in which neither resides, and the writ is served on B in that county, the court would have jurisdiction of the subject—that is, jurisdiction of subjects of that character—but it would not have jurisdiction of that case by virtue of the service of the process. But if B, without challenging the jurisdiction of the court should file his answer pleading to the merits, neither party could afterwards question the jurisdiction of the court because by their actions they are conclusively presumed to have consented to give the court jurisdiction of their persons." State ex rel. Furstenfield v. Nixon, 133 S. W. 340, 342 (1910).

35 Cooper v. Reynold's Lessee, 77 U. S. 308 (1870).

36 Friendly, "Historical Basis of Diversity Jurisdiction," 1928, 41 Harvard Law Review 483, 487.

the lack of a guarantee of jury trials in civil cases, (2) the provision giving the supreme court appellate jurisdiction both as to law and fact and (3) the diversity provisions.[37] The most serious question, however, was that of the establishment of the inferior courts.[38] They were viewed as an encroachment upon the rights of the states. The state courts were thought to be sufficient to dispose of the judicial business with the right of appeal from them to the national supreme court reserved.[39] Appellate review was enough to protect the federal interests. Sentiment was strongly in favor of leaving all litigation at the trial stage to the state courts. Some envisioned the inferior federal courts as an octopus reaching out with its tentacles and grasping causes from within the jurisdiction of the state courts. Such an attitude was expressed by Patrick Henry:

> "I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated." [40]

From Mason:

> "The Judiciary of the United States is so constructed and extended, as to absorb and destroy the Judiciaries of the several states; thereby rendering law as tedious, intricate and expensive and justice as unattainable, by a great part of the Community." [41]

From Luther Martin:

> "A National Judiciary extended into the states would be ineffectual, and would be viewed with a jealousy inconsistent with its usefulness." [42]

So strong were the voices against the establishment of inferior federal courts that a compromise was effected. The establishment

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37 Frank, John P., "Historical Bases of the Federal Judicial System," 1948, 23 Indiana Law Journal 236.

38 Farrand, Max, The Framing of the Constitution of the United States, 1913, p. 79.

39 "State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States and creating unnecessary obstacles to their adoption of the new system." Farrand, Max, The Records of the Federal Convention of 1787, 1937, vol. 1, p. 124.

40 Friendly, "Historical Basis of Diversity Jurisdiction," 1928, 41 Harvard Law Review 483, 489.

41 Farrand, Max, The Records of the Federal Convention of 1787, 1937, vol. 2, p. 638.

42 Ibid., vol. 1, p. 341.

of federal inferior courts was not required, but instead, the national legislature was permitted to establish them at its pleasure.[43]

It is interesting to note that the staunch Federalist, Hamilton, in contrast to those concerned about the usurpation of state power favored an almost completely unfettered judiciary in the Hamilton Plan, Article VIII; "The Legislature of the United States to have power to institute Courts in each State for the determination of all matters of general concern." [44] After the acceptance by the Convention of the new constitution, its ratification by the states was still doubtful because of those concerned about the invasion of the jurisdiction of the state courts. To those so worried Hamilton answered:

> "I hold that the state courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal." [45]

Hamilton realized that a new lawmaking power called for additional laws to be acknowledged by the state courts. In essence, this would enlarge upon the state courts' jurisdiction.

Regardless of the minor tensions and local jealousies exhibited during the Constitutional Convention in the formation of the national judiciary, it must be recognized that the Convention accomplished quite a feat. History shows that the members of the Convention had little experience from which to form a basis for a judicial system. The Articles of Confederation's contribution was a negative one, in that it experienced the folly in not having a strong judicial system. The states' legal heritage was that of England, where no written constitution existed and the jurisdiction of the courts was prescriptive.

*Source.*

Authority for the jurisdiction of the federal courts are the nine grants of jurisdiction found in article three, section two, paragraph one of the Constitution of the United States:

> "The Judicial Power shall extend to (1) all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—(2) to all cases affecting Ambassa-

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43 Farrand, Max, The Framing of the Constitution of the United States, 1913, p. 80.

44 Farrand, Max, The Records of the Federal Convention of 1787, 1937, vol. 1, p. 292.

45 McLaughlin, Andrew C., A Constitutional History of the United States, 1935, p. 214.

dors, other public Ministers and Consuls;—(3) to all Cases of admiralty and maritime Jurisdiction;—(4) to Controversies to which the United States shall be a Party;—(5) to Controversies between two or more States;—(6) between a State and Citizens of another State;—(7) between Citizens of different States;—(8) between Citizens of the same State claiming Lands under Grants of different States;—(9) and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

*Congress as the Source for the Federal Courts' Jurisdiction.*

The nine grants of jurisdiction are not self executory, and as such are not the direct source of the jurisdiction of the federal courts.[46] They are merely definitive of the jurisdiction of the federal courts. At first, it was thought that Congress was bound by the constitution to execute the judicial power, and that the mere establishment of a federal court vested it with jurisdiction as defined by the constitution.[47]

Article three, section one of the United States Constitution recites:

"The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ."

This section is qualified by section one, paragraph two of the same Article:

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

A reading of these two sections together will reveal that only the original jurisdiction of the supreme court is recited and fixed by the constitution. Inferior courts must look to Congress for

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[46] Cohens v. Virginia, 6 Wheat. 264 (1821).

[47] "If, then, it is the duty of Congress to vest the Judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. . . . It would seem therefore, to follow that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. The language of the clause extending jurisdiction is imperative thereby vesting it in the courts at organization." Martin v. Hunter's Lessee, 1 Wheat. 304, 331 (1816).

their authority, establishment and ordination. Their existence is dependent upon the action and sufferance of Congress. Only the original jurisdiction of the supreme court is beyond the purview of Congress.[48] It may not be altered in any form. This jurisdiction then is the only imperative and absolute grant. If then, the creation of the inferior federal court is a Congressional power, the necessary intendment thereof is that Congress has the power to define the jurisdiction of its creation within the constitutional limits, to wit, the aforementioned nine grants of jurisdiction. A suitor cannot come into the federal district court under the direct authority of the constitution. "Every federal court, other than the Supreme Court, derives its jurisdiction wholly from the authority of Congress."[49] The conclusion is that the source of the jurisdiction of the federal district courts is found in the enactments of Congress.

*Power of Congress Over the Federal Courts.*

As already explained, the constitutional grants of jurisdiction are permissive in that they are allowed, but they are not imperative.[50] "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases . . . ."[51] The constitution does not dictate that Congress establish inferior federal courts and invest them with jurisdiction. It follows that this jurisdiction to the federal courts, exclusive of the original jurisdiction of the supreme court, can be withheld, changed or taken away at the pleasure of Congress.[52] Courts currently in operation may be stripped of their jurisdiction and all actions pending in them may be transferred to other courts, existing or newly established.[53] This power of Congress over the federal courts relates only to the creation of the court itself and the type of cases it may try. Congress can restrict the courts' jurisdiction, but it cannot determine what law the courts are to apply in the

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48 Marbury v. Madison, 1 Cranch 137. For an interesting discussion and explanation of the *Marbury v. Madison* case see, Swisher, Carl Brent, American Constitutional Development, 1942, pp. 101-107.

49 Mason v. Hitchcock, 108 F. 2d 134, 135. For an interesting discussion of this point see, *Lockerty v. Phillips,* 319 U. S. 182 (1943).

50 Toledo Fence and Post Co. v. Lyons, 290 F. 637, 644 (1923).

51 Kline v. Burke Construction Co., 260 U. S. 226, 231 (1922).

52 Seligman's Inc. v. United States, 30 F. Supp. 895 (1939).

53 United States v. Haynes, 29 F. 691 (1887). An instance of this is found in the Act of April 28, 1802, 2 Statute 156. It annulled the courts established by the Act of February 13, 1801, 2 Statute 89, and ordered the transfer of all cases pending in them to the circuit courts, which it created.

exercise of that jurisdiction.[54] Although the original jurisdiction of the supreme court cannot be disturbed or augmented by Congress, it is clear that it has complete control of the supreme court's appellate jurisdiction.[55] The imperative grants of original jurisdiction to the supreme court are also found in the nine grants of jurisdiction. These grants to the supreme court are not recited as exclusive.[56] As a result thereof, Congress has the power to confer this original jurisdiction concurrently, but not exclusively, upon inferior federal courts. The question might be asked, that since Congress has complete control over the inferior courts, what is the result of Congress' failure to establish these inferior courts? How can a suitor thereby affect his rights as a national citizen? The answer is that the state courts are open to such a citizen. He does not lose these rights because Congress has not endowed the federal courts with original jurisdiction to take cognizance of cases wherein rights and benefits claimed under the federal constitution are in issue.[57]

*Federal Courts as Courts of Limited Jurisdiction.*

Federal courts have no existence apart from the authority of the constitution and statutory grants effectuating them. They are "paper courts"; creatures of written law. Their jurisdiction is found in the authority of written acts. They do not have the powers inherent in courts existing by prescription or by the common law.[58] Unlike courts of general jurisdiction, there is no presumption in favor of their jurisdiction. Their jurisdiction is defined and recited, and the facts upon which jurisdiction de-

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[54] "Having directed the court to try the case, Congress has no authority also to direct the court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. . . . The power of Congress to limit the jurisdiction of inferior courts refers to the character of cases and does not include power to limit the law to be applied in the trial of cases which the court has jurisdiction to hear." Payne v. Griffin, 51 F. Supp. 588, 591 (1943).

[55] Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).

[56] In a suit where the United States sought to condemn a strip of land in Idaho, and wherein the state of Idaho claimed that the inferior court had no jurisdiction because suits wherein the state is a party is within the original jurisdiction of the supreme court, the court answered: "Exclusive original jurisdiction of the Supreme Court is not prescribed and Congress may confer concurrent original jurisdiction on inferior courts." United States v. Forty Acres, More or Less, Of Land, etc., 24 F. Supp. 390 (1938); see also, Bors v. Preston, 111 U. S. 252 (1883).

[57] Harrison v. Hadley, 2 Dill. 229.

[58] Concord Casualty and Surety Co. v. United States, 69 F. 2d 78 (1934).

pends must appear affirmatively upon the record.[59] Every court of the United States is under a duty to inspect its own jurisdiction on its own motion. Of course, if the facts averring jurisdiction are beyond the statutory authority of the federal courts, the action must be dismissed for want of jurisdiction. Even the consent of the parties to litigate their differences in the federal court cannot confer jurisdiction upon the court, if the case is otherwise outside the jurisdiction thereof.[60]

*Concurrent Jurisdiction.*

Concurrent jurisdiction is "that which is possessed over the same parties or subject matter at the same time by two or more separate tribunals." [61] State courts of general jurisdiction have inherent power to take cognizance of all tort and contract actions. Unless dictated by sovereign authority, the citizenship of the parties involved in the controversy is of no moment. A priori, cases cognizable in the federal district court, because of diverse citizenship alone, can certainly be pursued in the state courts.[62] The Congressional grant of jurisdiction to the federal district courts in diversity of citizenship cases, gives these federal courts "original jurisdiction," but not "exclusive original jurisdiction." [63] In these classes of cases then, the federal district courts and the state courts each have authority to deal with the same subject matter. The choice is left with the litigants. With regard to actions arising under the constitution, laws and treaties of the United States, the same can be said. Here also, the grant to the federal district courts is not "exclusive." [64] The state courts have concurrent jurisdiction with the federal district courts to try federal question cases as long as they apply federal law.[65] Since these two classes of cases comprise a great deal of the jurisdiction

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59 Newcomb v. Burbank, 181 F. 334 (1910); Continental Life Insurance Co. of Hartford, Conn. v. Rhoads, 119 U. S. 237 (1886).

60 Jackson v. Ashton, 8 Pet. 148 (1834).

61 Bouvier's Law Dictionary, A Concise Encyclopedia of the Law, Rawles Revision, vol. 1, 1914.

62 "The reason for the rule that the pendency of an action in a state court is no bar and furnishes no ground for the abatement of another action for the same cause between citizens of different states in the federal court is that the latter court has concurrent jurisdiction of such controversies with the courts of the state, and that citizens of different states have the constitutional right to the independent opinion and judgment of the judges of the national courts . . . ." Barber Asphalt Pav. Co. v. Morris, 132 F. 945 (1904).

63 See, 28 U. S. C. 1332.

64 See, 28 U. S. C. 1331.

65 The Constitution of the United States, Article VI, clause 2.

of the federal district courts, it can be said that much of the jurisdiction of the state and federal district courts is concurrent.[66]

## PERSONALITY OF THE JURISDICTION OF THE FEDERAL DISTRICT COURT.

From what already has been said, it should be no problem in understanding that the personality of the jurisdiction of the federal district courts is an inhibited one. Its scope and receptive potential are *limited* and confined by the repressive dictates of Congress under the authority of the constitution of the United States. This personality dwells in a national environment circumscribed by constitutional restriction, and it is denied any association with influences, forces and contacts outside of its recited orbit. It has no heritage in history, tradition, the common law or prescription to give it individuality. In this respect the personality is passive, for the jurisdiction of the federal district courts never *actively* attaches in the sense that jurisdiction is to be presumed. This personality, as such, finds expression in the decisions of the federal courts. Because this personality is passive, resolute and inhibited, the federal courts start out at a disadvantage in the development thereof. This management should be measured in terms of that disadvantage. The question for discussion then, is whether or not the federal courts, in their management of the personality of the jurisdiction of the federal district courts, indulge this inhibited personality or remove some of the inhibition therein. Herein, is where *Judicial Denial* and *Judicial Activism* comes into the picture.

Federal Question Jurisdiction, Diversity Jurisdiction, Removal Jurisdiction, Jurisdictional Amount and Ancillary Jurisdiction, will hereinafter be considered with some analysis of some of the decisions incorporating *Judicial Activism* and *Judicial Denial* attitudes.

## FEDERAL QUESTION JURISDICTION.

Federal question jurisdiction includes all civil actions arising under the constitution, laws or treaties of the United States.

### *Source.*

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises

66 See, Forrester, Ray, Federal Jurisdiction and Procedure, 2nd Edition of Dobie and Ladd, 1950, p. 151.

under the Constitution, laws or treaties of the United States." [67]

The above quoted section of the United States Code is the federal district courts' present authority to entertain federal question causes.

*The Osborn Case.*

In the *Osborn* case,[68] the complainants sought an injunction to restrain Osborn, the auditor of the state of Ohio from proceeding against them under a state statute taxing all banks, individuals, companies and associations transacting banking business in the state of Ohio without authority of the legislature thereof. The Bank of the United States, by an Ohio legislative act, was held to be transacting business contrary to the state law. The complainants charged that an agent of Osborn proceeded by violence to the office of the United States Bank and took $1,000.00 in specie and bank notes and delivered it to Osborn, and that it was subsequently delivered to the then current state treasurer, one of the defendants. The bill prayed that the state treasurer and Osborn, in their official and private character, make discovery and be enjoined from dispensing with the money, and be decreed to restore the same and be further enjoined from proceeding under the State statute. The injunction was granted in the circuit court. Osborn, among other things, questioned the jurisdiction of the court, claiming that the questions which may arise would depend on general principles of law and not on any act of Congress. The complainants answered that the jurisdiction was expressly conferred by the act of Congress incorporating the Bank, that the act gave the Bank the power to sue and to be sued in any circuit court of the United States, and that Congress had constitutional authority to confer this jurisdiction on the circuit courts. Chief Justice John Marshall delivered the opinion of the court. The main question involved was whether this case at hand was one arising under a law of the United States. Marshall held:

"If the appellants contention were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to

[67] 28 U. S. C. 1331.

[68] Osborn v. The Bank of the United States, 9 Wheat. 738 (1824).

mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States." [69]

Here the court does not answer the appellant's contention. The appellant does not deny the Bank's capacity to sue and be sued, so as to put in issue the statute under which the Bank was empowered. Only the facts which led to the granting of the injunction are in issue. The court intimates that the statute authorizing the Bank will have to be construed. It then proceeds, on that premise, to reduce the appellant's contention to an absurdity, hinting that it is ridiculous to think that the entire case should involve the construction of a federal law.

"We think, then, that when a question to which the Judicial power of the Union is extended by the Constitution, *forms an ingredient of the original cause,* it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other question of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses . . . and that charter is a law of the United States." [70] (Emphasis supplied.)

The effect of the use of the word "ingredient" is to extend the jurisdiction of the federal courts to instances where a federal law is merely present in the case, and no rights thereunder are in controversy. In the instant case, no rights under the federal statute are sought. The Bank was the suitor and Osborn did not deny the Bank's right to sue. This is, at least, a liberal interpretation as a case arising under the laws of the United States. This is *Judicial Activism.* Justice Johnson's *Denial* dissent serves to show by comparison the *Active* indications of the majority opinion:

"the principle of a *possible occurrence* of a question as a ground of jurisdiction, is transcending the bounds of the Constitution, and placing it on a ground which will admit of

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[69] Ibid., p. 820. Concerning the construction of the law, the court said: "A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be depleted by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action, be made out, then all other questions must be decided as incidental to this, which gives jurisdiction."

[70] Ibid., p. 823. Italics added.

an enormous accession, if not an unlimited assumption, of jurisdiction." [71]

It is possible that the court's opinion in this case was motivated by political reasons. It must be remembered that during the time of this decision in 1824, the federal government was meeting stiff opposition in attempting to establish its constitutional supremacy over the state governments. In 1816, the second Bank of the United States was chartered for twenty years. Certainly the Federalists, of whom Chief Justice Marshall was one, didn't wish to see the National Bank taxed. Only six years prior, in *McCulloch v. Maryland,* Marshall had held an attempt by a state to tax the Bank's notes as unconstitutional. To deny jurisdiction in the *Osborn* case, would have left the decision as to whether the state of Ohio's representatives could be enjoined in their indirect enforcement of the state statute taxing the Bank, to the sufferance of the state court.

*The Fair Case.*

The *Fair* case was an infringement of patent suit.[72] A bill in equity was brought by Kohler Company against the Fair for an injunction against the Fair's making and vending certain patented gas heating devices, or selling such devices at less than a stipulated sum, and for an accounting. The bill alleged that the plaintiff had the sole and exclusive right to make and sell the devices throughout the United States, and that the defendant with full notice, sold and is selling the devices without license and in violation of the plaintiff's right. Fair appeared specially and challenged the jurisdiction of the court, claiming that the devices in question were purchased from the plaintiff by a jobber, that the jobber paid the full price therefor, hence, no question arising under the patent or other laws of the United States was present. Said the court in upholding the jurisdiction:

"Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a suit arising under the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly

[71] Ibid., p. 889. Italics added. Note that the scope of the *Osborn* case has been diminished by, 28 U. S. C. 1349, which reads: "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." The case of *Fields v. Community Federal Savings & Loan Ass'n.,* 37 F. Supp. 367 (1941), explains the import of the above statute.

[72] The Fair v. Kohler Die & S. Co., 228 U. S. 22 (1912).

> jurisdiction cannot be conferred by the defense . . . when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be denied by a plea denying the merits of the claim." [73]

It seems that if the plaintiff's claim has a *federal basis,* the jurisdiction will be upheld. He is the determinate factor in the invocation of the federal courts' jurisdiction. No considerations as to whether or not the cause will involve facts independent of a federal statute are availing. Neither does the jurisdiction of the federal courts depend upon the plaintiff's assurance of victory in his cause. This case does not extend the jurisdiction of the federal courts quite as far as the *Osborn* case. A *federal basis* is desired in preference to an *ingredient.* At least a right or protection under a federal statute must be alleged in the first instance to support jurisdiction under the *Fair* decision. To be distinguished, however, is the allegation of a federal law in anticipation of a defense, so as to invalidate that defense.[74] It is the *claim* itself that must have the *federal basis.*

*The Gully Case.*

In the *Gully* case the plaintiff sued the defendant in the state court to recover a money judgment.[75] The assets of the First National Bank *of* Meridian were conveyed to the defendant, the First National Bank *in* Meridian under an agreement whereby the debts and liabilities of the former bank were assumed by the latter bank, which convenanted to pay them. Among these assumed debts and liabilities were monies owing to the plaintiff, the state collector of taxes. The defendant, the First National Bank *in* Meridian, failed to pay the taxes of the old bank, whereupon the plaintiff brought this action. The defendant filed a petition for removal of the action to the federal court. The petition was granted and a motion to remand the case back to the state court was denied. After a trial on the merits, the complaint was dismissed. The plaintiff put in issue the jurisdiction of the federal court. Jurisdiction was supported, therein, on the ground that

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73 Ibid., p. 25.

74 "It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United Sates. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show, that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." Campbell v. Chase Nat. Bank of City of New York, 71 F. 2nd 669, 671 (1934).

75 Gully v. First Nat. Bank, 299 U. S. 109 (1936).

the power to lay a tax upon the shares of national banks had its origin and measure in the provisions of a federal statute, and by necessary implication a plaintiff depends upon this statute in suing for the tax. The supreme court denied that jurisdiction existed for the district court to entertain the removed case, and ordered it remanded to the state court. It held that the suit was predicated upon a contract which had its genesis in the state law, and that the contractual obligation was a state creation. The tax, in controversy, was imposed under the authority of the state statute and the federal law didn't impose the tax or give the tax collector the capacity to sue for it.

> "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority." [76]
>
> "The most one can say is that a question of federal law is lurking in the background." [77]

Here is a complete rejection of the theory of the *Osborn* case. The idea that, the contingency that a federal law may be construed in the controversy, is capable of supporting the jurisdiction of the federal court, is denied.

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States *must be an element, and an essential one,* of the plaintiff's cause of action. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto." [78]

The restriction goes further. To support the jurisdiction of the federal courts, the federal law involved in the plaintiff's claim must be the *basic question* for the courts consideration. The result of the cause must depend on the determination of a federal law, to be a cause arising under a federal law.[79] By reason and analogy this interpretation, involving the jurisdiction of the federal courts, reaches the narrowest dimensions. To go further,

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[76] Ibid., p. 116. "The federal nature of the right to be established is decisive—not the source of the authority to establish it." People of Puerto Rico v. Russell & Co., 288 U. S. 476, 483 (1932).

[77] Ibid., p. 117.

[78] Ibid., p. 113. Italics added.

[79] "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, *upon the determination of which the result depends.*" (Italics added.) Shulthis v. McDougal, 225 U. S. 561, 569 (1911).

would deny federal question jurisdiction wherein the plaintiff's claim lacks merit, and the search for jurisdiction would involve a disposition upon the merits. This restrictive outlook is *Judicial Self Denial.*

*The Bell Case.*

The *Bell* case involved an action to recover damages against federal law enforcement officers for an alleged unconstitutional deprivation of liberty and unreasonable search and seizure.[80] The complaint alleged the court's jurisdiction to be founded upon federal questions arising under the *Fourth* and *Fifth* Amendments of the United States Constitution. The defendants moved to dismiss the complaint for failure to state a cause of action for which relief could be granted. The district court judge on his own motion dismissed the suit for want of jurisdiction, on the ground that the action was not one arising under the constitution or laws of the United States. Said the supreme court:

> "Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States . . . the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." [81]

To determine whether a claim comes within the purview of a federal law, is a question of jurisdiction and not a question of merits. To determine whether the federal law, under which a claim is being pursued, provides a remedy is a question of merits. The federal courts have jurisdiction to determine whether they have jurisdiction, to wit, to determine if a claim arises under a federal law. This is the purport of the *Bell* case. Nowhere in the constitutional grants will there be found authority to exercise jurisdiction to determine jurisdiction. It is an authority born of necessity. It is an authority that allows, at times, jurisdiction where there is none. Without it, however, the courts would become impotent.[82] It is a product of *Judicial Activism.*

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80 Bell v. Hood, 327 U. S. 678 (1945).

81 Ibid., pp. 681, 682.

82 Compare, United States v. Shipp, 203 U. S. 563; United States v. United Mine Workers of America, 330 U. S. 258, with the Bell decision. For a good explanation of the incidents of jurisdiction to determine see, King v. Poole, N. Y., 36 Barbour 242, 245, 246 (1862).

*The Hurn Case.*

The *Hurn* case was a suit to enjoin the defendants from publicly producing, presenting or performing a play called "The Spider" on the ground that it infringed a copyrighted play of the plaintiff's called "The Evil Hour." [83] The plaintiff alleged that the defendants were also practicing unfair business practices and unfair competition. The trial court, on the merits, found that "The Spider" in no way infringed upon "The Evil Hour" in violation of the copyright law of the United States, but the court rejected the claim of unfair competition for lack of jurisdiction, on the ground that only the claims concerning violations of the copyright law were within the court's capacity. The supreme court held that the conclusion of the lower court was correct, but that its reasoning was faulty. The court adopted the rule of the *Silver* case and the *Lincoln Gas* case, holding that once jurisdiction attached because of the federal question present, the federal court has the right to decide all other questions in the case, even if they were non-federal.[84] A distinction, however, is pointed out:

> "The rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the *non-federal cause of action.*" [85]

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[83] Hurn v. Ousler, 289 U. S. 238 (1932).

[84] Silver v. Louisville and N. R. Co., 213 U. S. 175, 191 (1908); The circuit court having acquired jurisdiction by dint of a federal question involved, "had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only"; *Lincoln Gas and E. L. Co. v. Lincoln*, 250 U. S. 256 (1919), where a city ordinance was attacked on the ground that it violated the 14th Amendment and the state law, and the federal district court held that the ordinance violated the state constitution and granted a permanent injunction against its enforcement. At page 264: "If the bill presented a substantial controversy under the Constitution of the U. S., and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions."

[85] Hurn v. Oursler, 289 U. S. 238, 245, 246 (1932).

This *Self Denial* directs the suitor to the state court with half a case. Ignored is the waste of time and effort expended in bringing the case before the federal court in the first instance. No consideration is given the expense involved in prosecuting causes, having the same causation and factual basis, in separate tribunals. Justice and dispatch are divorced. Also must the suitor's cause run the gamut of enigmatic conceptions of what constitutes *a cause of action* as distinguished from a *ground.*

*A cause of action* is said not to consist of facts, "but of the unlawful violation of a right which the facts show." [86] There is no doubt that a single set of facts may contain multiple causes of action, or the violation of multiple rights. Also, multiple sets of facts may involve only one cause of action, or the violation of one right. One set of the multiple set of facts, under the latter premise, may be considered a *ground.* A *ground* and a *cause of action* are similar in that they are both determined by a consideration of the facts. The distinction is that the *cause* or *causes of action* are determined by a consideration of all the facts. If a citizen claims an immunity or right by reason of the federal law and the laws of his state, and that immunity involved but a single violation of his rights, he would have two *grounds* to support a single *cause of action.* According to the *Hurn* case, one *ground* can have a non-federal basis and still be cognizable in the federal courts if the other *ground* has a federal basis. The court therein held that the unfair competition emanated from the same facts which constituted the infringement, and that these facts involved the violation of a single right, that right being the protection of the copyrighted play.[87]

The rule of the *Hurn* case is more easily stated than applied. It contains implications not originally contemplated and caused serious consternation in the law of removal and the doctrine of separability.[88] For the courts and the legal profession, the distinction between a *ground* and a *cause of action* is one couched in

[86] "The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong." Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 321 (1926).

[87] Notice the present statute, 28 U. S. C. 1338 (b), which reads: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws.

[88] For a good discussion of the *Hurn* case and its implications upon the separability doctrine see, Schulman, Harry and Jaegerman, Edward C., "Some Jurisdictional Limitations On Federal Procedure," 1936, 45 Yale Law Journal 393, 398-403.

legal niceties, and very hard to make, especially in diversity cases where the federal courts must look to the state law to determine the aspects of a *cause of action.*[89]

## Comments and Observations.

### *Five Judicial Attitudes.*

The growth of federal question jurisdiction has been characterized by five judicial attitudes. Although these attitudes, in theory, are offensive to one another, they still exist today as authority for the determination as to whether a case arises under the laws, constitution and treaties of the United States. The *Osborn* attitude holds that if a federal law forms an *ingredient* of the plaintiff's claim, that claim involves a federal question. The same case holds that if a federal law needs be construed to affect the determination of a claim, that claim arises under a federal law. In addition to holding that the plaintiff is the party to determine the character of his claim with respect to whether or not it is federal in nature, the *Fair* case holds that that claim must have a *federal basis* to arise under a federal law. The *Gully* case, the most restrictive of all of the attitudes, holds that a federal law must be the *basic question* for the consideration of the federal court in the determination of a claim, for that claim to arise under a federal law. The consideration, of a federal law, must not be collateral to the claim involved. No speculations, that a federal law may have to be construed in the course of the prosecution of a claim, are availing to support federal question jurisdiction. Most liberal and most necessary of these judicial attitudes is that of the *Bell* case. It holds that, independent of the existence of a federal question, the federal courts have jurisdiction to determine whether or not a case arising under a federal law exists, to give them jurisdiction. It leaves the actual determination, as to what involves a federal question sufficient to invoke the jurisdiction of the federal courts, to the wisdom of the other attitudes. These five judicial attitudes, then, are:

1. Ingredient—the *Osborn* case.
2. Construction—the *Osborn* case.
3. Federal Basis—the *Fair* case.
4. Basic Question—the *Gully* case.
5. Jurisdiction to Determine Jurisdiction—the *Bell* case.

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[89] Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1937).

*Effect of the Gully Case Upon the Osborn Case.*

Representing the two extremes in federal question jurisdiction today, are the *Osborn* case on the one hand and the *Gully* case on the other. The *Gully* case denies the application of the rule of the *Osborn* case beyond its particular facts. The *Osborn* case was decided in 1824 during a period of resurgent nationalism when the national government was fighting to establish its supremacy. The *Gully* case was decided in 1936, unfettered by political implications. Legislation has since limited the extent of the *Osborn* case in reference to federal government chartered corporations.[90] Because of this legislation, and the many precedents which occasioned the *Gully* case, as well as the *Gully* case itself, the *basic question* attitude is perhaps the strongest authority for the determination of a federal question necessary to support the jurisdiction of the federal courts. Pursuant to the *Fair* case whether or not the federal law under which a claim is allegedly based is the *basic question* to be decided, the allegations of the complaint are determinative. Contradistinctive to the *Fair* case, a *Federal basis* alone is not enough.

Although the *Gully* case has greatly cut down the efficacy of the *Osborn* case, the theory of the *Osborn* case finds expression in many phases of federal jurisdiction today. Congress has given the federal district courts original exclusive jurisdiction over infringement of patent suits.[91] The determination of patent infringement is a question of fact, and as such involves no consideration of a law of the United States except upon the theory of the *Osborn* case. Bankruptcy proceedings are within the original, exclusive cognizance of the federal district courts.[92] Many bankruptcy proceedings involve only issues of fact; no issue of federal law need be involved. In most instances the effect of the law is readily admitted. Except by reason of the *Osborn* case, these bankruptcy proceedings, which involve purely issues of fact, would be beyond the jurisdiction of the federal courts.[93]

*The Personality of Federal Question Jurisdiction.*

The *Osborn* and *Gully* cases give the personality of federal question jurisdiction a dual aspect. Under the *Osborn* reasoning, in certain instances already stated, the personality of the

90 28 U. S. C. 1349.
91 28 U. S. C. 1338.
92 28 U. S. C. 1334.
93 Forrester, Ray, "The Nature of a Federal Question," 1942, 16 Tulane Law Review 362, 372, 373.

federal question jurisdiction is a liberal and receptive one, capable of retaining more and varied litigation than its counterpart. By dint of the *Gully* reasoning, this personality is a repressive and inhibited one. It is attenuated by strong and fine distinctions which greatly limit its receptive potential. Both of these personality types are frustrated by the confining *Hurn* case, in that it forces a rejection of that which was capable of being received by one or the other, or both, of the personality types in the first instance. A claim having been decided to be within the receptive potential of federal question jurisdiction is then divided by a perplexing rule, and snatched from the area of that potential, so as to make that potential nebulously determinate.

## DIVERSITY JURISDICTION.

*Source:*

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interests and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word 'States,' as used in this section, includes the Territories and the District of Columbia." [94]

The above quoted section is the federal district courts' authority to entertain cases involving diversity of citizenship. A reading of this section will reveal that the federal courts' jurisdiction by reason of diversity of citizenship, does not depend upon the type of cause of action involved nor the character of the law under which the cause is pleaded. The only consideration to support jurisdiction here is the character of the parties to the cause of action. Under this grant, the jurisdiction depends wholly upon the citizenship of the parties affiliated with the cause of action. *Status* rather than *rights* is the keynote of diversity jurisdiction.

### *Citizenship Defined.*

Since "citizenship" is the key word in diversity jurisdiction, it would do well to evolve some definite understanding as to what constitutes citizenship; how it is defined in reference to the

[94] 28 U. S. C. 1332.

jurisdiction of the federal courts. According to Black, citizenship is "membership in a political society, implying a duty of allegiance on the part of the member and a duty of protection on the part of the society." [95] How then, is this "membership" effected?

*Dual Nature of Citizenship.*

Citizenship in the United States is of a dual nature. There is both a national and a state citizenship.[96] Amendment Fourteen, the Constitution of the United States, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Birth or naturalization in the United States is all that is necessary to effect national citizenship. State citizenship, with reference to the jurisdiction, citizenship of a state requires a residence within that state coupled with an intention to make that residence a permanent one. State citizenship is not to be confused with bare residence. There must be a concurrence of both residence, or presence within the state, and an intention to make that residence permanent.[97] To put the rule negatively, a presence within a state for a transient purpose, or for a fixed period limited by a future event is insufficient to acquire citizenship within that state. It should be noted at this point, that state citizenship involves an alienage not found in the incidents of national citizenship, to wit, residence in the United States is not essential to the continuance of a national citizenship. It follows then, that a person can have a national citizenship without having a state citizenship, by reason of residence outside the United States along with the requisite intention to remain outside the country permanently. Be it known, that a state may endow foreign subjects with state citizenship privileges.[98] However, the type of state citizenship necessary to support the jurisdiction of the federal courts must include national citizenship.

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95 Black's Law Dictionary, Third Edition, 1933.

96 "It is quite clear, then, that there is a citizenship of the United States and a Citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." Slaughter-House Cases, 16 Wall. 36 (1872).

97 "To constitute citizenship of a state in relation to the judiciary acts requires—First, residence within such state; and, second, an intention that such residence shall be permanent. . . . The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied by an intention of remaining. . . . The two elements or residence, and the intention that such residence shall be permanent, must concur to make citizenship." Marks v. Marks, 75 F. 321, 324, 325 (1896).

98 Hammerstein v. Lyne, 200 F. 165 (1912).

The case of *Hammerstein v. Lyne* offers a very good example of the distinction between national and state citizenship.[99] It was a suit for an accounting and an injunction restraining the defendant from performing under the management of herself or anyone else besides the plaintiff. The plaintiff alleged, among other things, that he was a resident of the state of New York, and that the defendant was a resident of Missouri, that he and the defendant had contracted that he be the defendant's sole manager, and as such be entitled to a percentage of her earnings, that the defendant appeared in a musical production and received compensation therefor, and refused to account to the plaintiff for his contracted share. A restraining order was issued. The defendant contested the jurisdiction of a federal court on the ground that the defendant was or is not a citizen of the state of Missouri, and that she is a citizen of the United States, but residing in London. These facts were resolved in her favor. Thus a situation was presented wherein the defendant was not a citizen of a state, nor was she a foreign subject; hence the case didn't involve citizens of a state, and foreign states or citizens or subjects thereof, so as to become cognizable in the federal courts because of diversity of citizenship. Said the court:

> "It would appear conclusively from the facts presented . . . that the defendant in this case has established a domicile in London, England. She lives there. She declares it to be her home, and that it is her intention to remain there indefinitely. She has abandoned her former home in Missouri for an indefinite and uncertain period, with no present intention of returning." [100]

In holding that the defendant's residence in London, alone, did not make her an alien the court reasoned:

> "If she has lost her citizenship at all, it must be through some act of expatriation. . . . It will hardly be contended that mere change of residence, even with intention never to return, can have that effect." [101]

*Intention and Motive.*

One of the elements needed to effect a state citizenship is an intention to remain permanently or for an indefinite time in the state. That intention must not be confused with the motive for the acquisition of citizenship. Motive connotes purpose; intention

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99 Ibid.

100 Ibid., p. 170.

101 Ibid., p. 171.

connotes the means to effect that purpose. Except that the motive may give some indication of the intention, it is of no moment in realizing state citizenship. One may even change his citizenship for the sole purpose of enabling himself to prosecute a claim in the federal court.[102] The case of *Anderson v. Splint Coal Corporation* involved a personal injury action against the defendant, a Kentucky corporation.[103] The plaintiff's right to invoke the jurisdiction of the federal courts depended upon his being a citizen of a state other than that of Kentucky. The defendant claimed that the plaintiff's allegations as to his being a citizen of Indiana were false, and that in fact the plaintiff was a citizen of Kentucky, and that his change of residence from the state of Kentucky to the state of Indiana was for the express purpose of fraudulently claiming federal jurisdiction in the case. The court held that although the purpose in mind was to bring an action in the federal court after moving to another state so as to effect diversity of citizenship, it did not operate to defeat the right to proceed in the federal court, and of itself implied no illegal motive. It also ruled that the length of time spent in the new residence did not "control or limit" the right to immediately invoke the jurisdiction thereof. The intention to remain in the new residence for an indefinite time will support state citizenship even if there concurrently exists a "floating intention" to return to the old residence at some indefinite time in the future.[104] The actual residence and inseparable intention to remain permanently, or for an indefinite period in that residence, is the determinate for citizenship, but the measure therefor starts from the date the suit is begun.[105]

*Complete Diversity.*

The diversity required to support the diversity jurisdiction of the federal courts relating to actions between citizens of different

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102 Morris v. Gilmer, 129 U. S. 315 (1888); this case contains a good discussion of the elements of citizenship, and how to invoke the federal courts' jurisdiction thereby.

103 Anderson v. Splint Coal, 20 F. Supp. 233 (1937).

104 Baker v. Keck, 13 F. Supp. 486 (1936).

105 In an action in equity for specific performance of a realty contract, the plaintiff, at the time the suit was brought, was a citizen of Ohio, and the defendant a citizen of Kentucky. During the progress of the suit, the plaintiff moved to and became a citizen of Kentucky. This was shown to the court and its jurisdiction was attacked. Said the court: "We are all of the opinion that the jurisdiction having once vested, was not divested by the change of residence of either of the parties." Morgan's Heirs v. Morgan, 2 Wheat. 290, 297 (1817).

states must be complete diversity. Complete diversity is succinctly defined by the rule of the *Strawbridge* case which states:

> "The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the federal courts." [106]

The purport of this rule is that each plaintiff of several plaintiffs must be able to sue each defendant of several defendants, to wit, the citizenship of each plaintiff as against each defendant should not be the same. If any one of the plaintiffs is of the same citizenship as any one of the defendants, complete diversity does not exist. There is no need for complete diversity as among all the plaintiffs themselves. The same holds true as among all the defendants themselves. The diversity jurisdiction is defined by actions between citizens of different states. Since there is no action as between all the plaintiffs themselves, or all the defendants themselves, complete diversity is not essential.

In the determination as to whether or not there is complete diversity, the true status of the parties to a cause of action is examined. No matter what a party's position as far as the pleading goes, he is aligned according to his true interest. If then, in this reshuffle, the aligned party's citizenship is the same as his adversary's, there is no complete diversity. *Hamer v. New York Railways Company* is a good example of the alignment of parties process.[107] A railroad company issued bonds totaling $1,500,000 and secured them by a mortgage of its property to a trust company. A railway company delivered a guaranty of these bonds to the trust company. Later, the railway company passed into the hands of receivers. Thereafter, default was made in the payment of interest on the bonds. A bondholders' committee was formed and at its request, the trust company declared the bonds due and brought suit in a state court to foreclose the mortgage. There was a deficiency judgment. The claim arising out of the railway guaranty was not allowed in the receivership proceedings and suit was brought in the federal district court by the bondholders' committee. They named as defendants, the railroad company, the railway company, and the trust company. None of the plaintiffs were citizens of New York and the three defendants were corporations organized under the laws of New York State. The

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106 Strawbridge v. Curtiss, 3 Cranch 267 (1805).

107 Hamer v. New York Railways Co., 244 U. S. 266 (1916); compare *Lee v. Lehigh Valley Coal Co.*, 267 U. S. 542 (1924).

defendant railway company objected to the jurisdiction of the court claiming that the committee and trust company's interests were identical, and hence no diversity of citizenship necessary to support the jurisdiction of the court existed. The trust company was joined as a party defendant because of its alleged refusal to sue on the deficiency judgment. The court held, that since the trust company was, in legal contemplation, the true owner of the guaranty and bonds, it had a real interest. It then aligned the trust company as a party plaintiff because of its interest. In denying jurisdiction the court said:

> "No reason is assigned in the bill or in the answer of the Trust Company for its refusal to sue; and none suggests itself save the willingness of an accommodating trustee to enable its beneficiaries to present that appearance of diversity of citizenship essential to conducting this litigation in the Federal Court." [108]

This *Denial* attitude refuses the jurisdiction of the federal courts to a suitor whose interest is entwined with that of a recalcitrant interest. It seems, that if a party wishes to pursue his interests but is hindered thereby because of the hesitance and uncooperativeness of a like interest, a controversy could be fictionalized between the two like interests to support the jurisdiction of the federal courts, if the requisite diversity between the two interests exists. This should be, especially if the recalcitrant interest is indispensable to the prosecution of the action.

*Whose Citizenship Counts.*

The citizenship of the real party in interest determines diversity.[109] It is the citizenship of the executor and not his testator, the administrator and not his intestate, the trustee and not his beneficiary that counts.[110] In a foreclosure action, the plaintiffs, citizens of New York and Pennsylvania, sued as trustees for the benefit of an alien and a citizen of New Jersey. The defendant was a citizen of Pennsylvania, and he objected to the court's jurisdiction on the ground that he and one of the plaintiffs were of the same citizenship. The court refused to exercise jurisdiction holding that if the executors and trustees were of such citizenship personally to bring an action in the federal courts, the jurisdiction is not defeated by the fact that the parties citizenship whom they

108 Ibid., p. 274.

109 See, rule 17 (a) of the Rules of Civil Procedure for the United States District Courts.

110 Continental Life Insurance Co. v. Rhoads, 119 U. S. 237 (1886).

represented will defeat jurisdiction. However, if their citizenship defeated jurisdiction, the citizenship of the persons whom they represented is unavailing, and jurisdiction would be denied.[111] The idea is that there is legal title in these aforementioned parties, independent of the interest held by those whom these parties represent. A bare agent is not a real party in interest so as to affect diversity.[112]

*Citizenship and Corporations.*

One of the phases of diversity jurisdiction that was developed by *Judicial Activism* is that phase which deals with the characterization of corporations as citizens. The case of *Strawbridge v. Curtiss* had held, "that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." [113] In *The Bank of The United States v. Deveaux,* the court in strict adherence to the rule of the *Strawbridge* case held that in a case involving a corporation as a party, the jurisdiction of the federal court rested on the personal citizenship of the stockholders and that the corporation had no citizenship apart from the "character of the individuals who compose the corporation." [114] *Judicial Self Denial* is very prevalent in this decision because of a recited recognition of the consternation the decision would cause, coupled with an intimation that the court made an effort to deny jurisdiction in this instance:

> "the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken." [115]

The folly of the Deveaux opinion was later pointed out in the *Active* holding of the case of *The Louisville, Cincinnati and Charleston Railroad Company v. Letson.*[116] It was a case in-

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111 Susquehanna and W. V. R. and Coal Co. v. Blatchford, 11 Wall. 172 (1870).

112 Donovan v. Campion, 85 F. 71 (1898): "An agent who was employed to procure the title to real estate, and convey it to his principal, and who had done so, is neither an indispensable nor a necessary party to a bill against his principal to set aside the deed for fraud, and to recover the property and its proceeds."

113 Strawbridge v. Curtiss, 3 Cranch 267 (1905).

114 The Bank of the United States v. Deveaux, 5 Cranch 61, 91 (1809).

115 Ibid., p. 88.

116 The Louisville, Cincinnati and Charleston R. R. Co. v. Tetson, 2 How. 497 (1844).

volving the breach of a construction contract. The jurisdictional question for the consideration of the court was whether the citizenship of the members of the corporation bringing the suit would defeat the jurisdiction of the court, if that citizenship were the same as the citizenship of the defendant. The court held:

> "Jurisdiction in one sense, in cases of corporations, exists in virtue of the character of members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts by a citizen of another state, by the fact, that the subject of controversy between them has arisen upon a contract to which the former are parties, in their corporate and not in their personal character." [117]

Here the court recognizes the fictional existence of a correlative liability as emanating from the right to the use of the federal Courts. From here, it reasons that unless the court's jurisdiction is predicated on the collective character of the members therein, parties could escape this "liability," which it thinks cannot be done:

> "Constitutional rights and liabilities cannot be so taken away, or be so avoided. If they could be, the provision which we are here considering could not comprehend citizens universally, in all the relations of trade, but only those citizens in such relations of business as may arise, from their individual or partnership transactions." [118]

Here the court feels that the provision relating to actions between citizens of different states is not so provincial as to think only in terms of citizens singularly involved in business. It is considering the economic effect of allowing parties to escape their "constitutional liabilities" because of the composition of a corporation. For the court to consider an economic effect of a rule is an *Activist* process. In holding a corporation to be a citizen of the state in which it was created the court stated:

> "A corporation created by a State to perform its functions under the authority of that State, and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State." [119]

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[117] Ibid., p. 552.

[118] Ibid., pp. 552, 553.

[119] Ibid., p. 555.

The rule of the *Strawbridge* and *Deveaux* cases were considered as unavailing without even legal equivocation:

> "We remark, too, that the cases of *Strawbridge v. Curtis* and *The Bank v. Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction." [120]

The law then, is that the members of a corporation are presumed to be citizens of the state of incorporation for the purposes of diversity jurisdiction.[121] This rule is extended to situations wherein corporations are incorporated in more than one state. A corporation is deemed a citizen of every state in which it is incorporated.[122] However, this multiple citizenship would seem to work only to the disfavor of a corporation incorporated in more than one state, in that if the corporation of multiple citizenship sues a defendant who is a citizen of any one of the states of incorporation, the diversity required fails.[123] On the other hand, a plaintiff, who is a citizen of any one of the states in which a corporation of multiple citizenship is incorporated, is still allowed to invoke the jurisdiction of the federal courts on the ground of diversity of citizenship.[124] A partnership, unlike a corporation, has no citizenship independent of the parties who comprise it; it is their citizenship that is determinate in supporting complete diversity. This is so, even if the law where the action arose gives a partnership a status as an entity, capable to sue and be sued.[125]

*Doctrine of Separability.*

Rule 19 (b) of the Rules of Civil Procedure for the United States District Courts in relating to persons who are not indispensable parties to the action states that:

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120 Ibid.

121 "The persons who act under these faculties, and use this corporate name, must be justly presumed to be resident in the state which is the necessary habitat of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there and can find them there and nowhere else." Marshall v. The Baltimore & Ohio Railroad, 16 How. 314, 328 (1853).

122 "No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer." Patch v. Wabash R. Co., 277, 283.

123 Town of Bethel v. Atlantic Coast Line R. Co., 81 F. 2d 60 (1936).

124 Muller v. Boston and Maine R. R., 9 F. Supp. 802 (1935).

125 People of Porto Rico v. Fortuna Estates, 279 F. 500 (1922).

> "The court in its discretion may proceed in the action without making such persons parties, . . . if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Rule 21 of the Rules of Civil Procedure for the United States District Courts states:

> "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

*Classification of Parties.*

These two rules read together form the basis of the doctrine of separability. The idea thereof is, if the presence of a party destroys the complete diversity needed to support the jurisdiction of the federal courts, his removal from the action may be effected so as to cure the jurisdictional defect. Rule 19 of the Rules of Civil Procedure, however, compels the joinder of all indispensable parties, hence an *indispensable party must be joined* as a party to the action, even if his joiner destroys diversity. A proper or necessary party should be joined in an action, but if his citizenship destroys diversity, this defect can be cured by a motion to dismiss the action as against this party. Joinder of nominal or formal parties does not come within the purview of Rule 19 and their joinder may be ignored.[126] The question arises, who then are formal, nominal, proper, necessary and indispensable parties? Persons who have an interest in the suit, and who should be made parties to the suit, so that the court may fully determine the entire suit and do complete justice to all the interests therein, are necessary parties. If their interests can be severed from the interests of the other parties to the suit and the court can proceed to a final determination of that severed interest without affecting the other interests not before the court, then these parties are not indispensable parties. On the other hand, persons who have an interest, in the suit, of such a nature that a final determination cannot be made without affecting that interest, or that a final determination without the presence of that interest would be inconsistent with the dictates of equity and good conscience, are in-

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126 Schuckman v. Rubenstein, 164 F. 2d 952 (1947).

dispensable parties and must be before the court in the determination of the suit of which their interest is a component part.[127]

Formal or nominal parties are unnecessary parties. A good illustration of a nominal party is found in *Salem Trust Co. v. Manufacturers Finance Co.*[128] A Massachusetts corporation assigned an indebtedness due it to the plaintiff. Later, the Massachusetts corporation assigned a portion of the same indebtedness to the defendant. Still later, the Massachusetts corporation again assigned a portion of the same indebtedness to the defendant finance company. Neither the defendant nor the debtor knew of the previous assignment. The defendant finance company, on the date of the last assignment notified the debtor of its assignment. The Massachusetts corporation then went into receivership. The plaintiff and defendant finance company agreed that the net proceeds of the Massachusetts corporation should be deposited with the defendant trust company in the name of the defendant finance company as trustee for either the plaintiff or defendant finance company, whichever was entitled thereto. Failing to agree as to who should get the funds, the plaintiff brought a bill in equity in the state court against the defendant finance company to establish its right to the amount on deposit. The defendant finance company filed a petition for removal to the federal court but the citizenship of the defendant trust company was the same as that of the plaintiff's and no diversity of citizenship existed to support the jurisdiction of the federal court. Even through this maze of facts it is easy to see that the defendant trust company is a nominal party to the plaintiff's action. It has no interest in who gets the funds. It is merely a stakeholder. There is no doubt but that the court can render a decree without its presence, since no interest of it will be affected thereby. Perhaps the only interest the defendant trust company can have in the determination of the

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127 Minnesota v. Northern Securities Co., 184 U. S. 199 (1901). After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience. . . . if any one of the four questions is answered in the negative, then the absent party is indispensable." State of Washington v. United States, 87 F. 2d 421, 428 (1936). Note, United States v. Swink, 41 F. Supp. 98, 101 (1941): "In my opinion Rule 21 was not adopted to give relief to a plaintiff who sues the wrong party, but to a plaintiff who sues too many parties, or not enough parties."

128 Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182 (1923).

plaintiff's claim, is that either the plaintiff or defendant finance company produce a bona fide order of the court so that it will pay the money to the correct claimant, which at the most is too remote to make it more than a nominal party. As the joinder of nominal parties cannot defeat, or confer, jurisdiction, the presence of the defendant trust company was disregarded and jurisdiction attached.

*State Law as the Determinate of a Party's Interest.*

Whether or not a party is necessary or indispensable is resolved by state law. Under the Erie doctrine, a party's rights, in diversity cases alone, is determined by state law. It follows that the tenor of his attendant interests in those rights should be ascertained by state law. Illustrative of this procedure is the *Weaver v. Marcus* case which involved a death claim action.[129] The plaintiffs' intestate was killed in Virginia in an automobile collision with the defendant's truck, driven by the defendants' employee. The defendants were partners. One of the plaintiffs was a citizen of Virginia. All of the defendants were citizens of West Virginia, except one partner, who was a citizen of Virginia. The defendants attacked the jurisdiction of the federal court because of lack of complete diversity. The plaintiffs then moved for a dismissal of the action as to the Virginia defendant, so as to afford the federal court complete diversity. The motion was denied. The appellate court examined the law of the state in which the accident took place and where the suit was brought, which law specified partners to be jointly and severally liable in tort. The court then held that concurrent joint and several liability gave an option to the plaintiff, and as such, it was not necessary for the injured plaintiff to sue all the partners, and that the plaintiff could, under Rule 21, dismiss the action against the Virginia defendant.[130]

*The Hepburn and Tidewater Cases.*

A very interesting development in diversity jurisdiction from both the *Activist* and *Self Denial* viewpoints is found in the *Hepburn* and *Tidewater* cases. The *Hepburn* case reached the supreme court in the form of a certified question.[131] The question

[129] Weaver v. Marcus, 165 F. 2d 862 (1948).

[130] Compare, Chidester v. City of Newark, 162 F. 2d 598 (1947), which involved an action in ejectment against tenants in common, some of whom were not joined to affect diversity.

[131] Hepburn v. Ellzey, 2 Cranch 445 (1804).

presented was whether the plaintiffs, who were citizens and residents of the District of Columbia, could maintain an action in the circuit court against the defendant, who was a citizen and inhabitant of Virginia, or whether the suit should be dismissed for lack of jurisdiction? The basic question for determination was whether a citizen of the District of Columbia was such a citizen as to come within the purview of the grant of jurisdiction relating to cases between citizens of different states? The answer to this question depended upon the political status to be given the District of Columbia; whether or not it was to be considered as a state. Chief Justice Marshall delivered the court's answer:

> "But as the act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the states contemplated in the constitution." [132]

This picayune attitude is indeed *Judicial Self Denial.* Certainly the members of the Constitutional Convention must have thought of the Confederacy, as a whole, as being a state. Indeed the framers, in establishing a national government, thought in terms of the protection of the citizens of this whole national state in the formulation of the jurisdictional grants. That they did not expressly say "citizens of the National state" is not indicative of a denial of such right to use the federal courts on a diversity basis. In a closely following opinion, the same court recognized the wisdom of the framers of the constitution in dealing with generalities:

> "A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles." [133]

The court, after holding that the word "state" in the congressional grant derived its meaning from the constitution, and that meaning was restricted to members of the Confederacy, recognized the injustice of such a holding by stating:

> "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to citizens of every state in the

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132 Ibid., p. 452.

133 The Bank of the United States v. Deveaux, 5 Cranch 61, 87 (1809).

union, should be closed upon them. But this is a subject for legislative, not for judicial consideration." [134]

The last sentence of this statement is an ensign of *Judicial Self Denial.*

The *Tidewater* case is a peculiar case in that it completely changed the legal incidents of the *Hepburn* case, but it did not overrule the *Hepburn* case.[135] The *Tidewater* case is within itself a complex of both judicial attitudes under discussion. In the final analysis, the *Tidewater* case is a holding born of *Judicial Activism* although this *Activism* finds its expression in difference sources. The case dealt with the question of the constitutionality of a statute passed by Congress which in effect opened the federal courts to actions by the citizens of the District of Columbia against citizens of any of the states.[136] The action was to recover a money judgment upon a claim arising from an insurance contract. No federal question was involved, and the jurisdiction of the federal court was predicated on diversity of citizenship. Both the district court and court of appeals held that the statute enabling a citizen of the District of Columbia to sue citizens of different states in the federal courts by reason of diversity was unconstitutional and beyond the power of Congress to pass. The statute was held to be constitutional by a majority of the supreme court. However, the majority was made up of two opinions, each holding the act valid but on a different premise. Justices Jackson, Black and Burton in upholding the statute refused to disturb the standard of the *Hepburn* case. Instead, they proceeded to find some authority in the Constitution itself to support this statute:

"The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states, are not present here. In mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times." [137]

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[134] Hepburn v. Ellzey, 2 Cranch 445, 453 (1804).

[135] National Mutual Insurance Company v. Tidewater T. Co., 337 U. S. 582 (1948).

[136] See, 28 U. S. C. 1332 (b), the present statute.

[137] National Mutual Insurance Company v. Tidewater T. Co., 337 U. S. 582, 585, 586 (1948).

At the outset these justices announce their *Activist* intentions. They recognize the reactionary impositions of the *Hepburn* precept:

> "By Article I, Congress is empowered 'to exercise exclusive Legislation in all Cases whatsoever over such District.' And of course it was also authorized 'to make all Laws which shall be necessary and proper for carrying into Execution' such powers." [138]

Here the justices are conceiving of an authority to effect their intentions and they further reason:

> "It is elementary that the exclusive responsibility of Congress for the welfare of the District includes both power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states." [139]

The idea then, is that Congress, can by legislation, extend the jurisdiction of the federal courts under authority of Article I. The *Active* indications of this premise, if carried to the ultimate, could be authority for the extension of jurisdiction to the exercise of all the powers enumerated in Article one, even if that extended jurisdiction violates the confinements of Article three. Also, considerations of responsibility and welfare are not tenets for authority and powers, except maybe to the *Activist.*

> "We conclude that where Congress in the exercise of its powers under Article I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship." [140]

This makes Article three, section two merely a supplement to the specific powers of Congress.

Justices Rutledge and Murphy upheld the statute in question, but rejected the idea of Article one extension of jurisdiction. Their holding turned on a disregard for the *Hepburn* case:

> "However, nothing but naked precedent, the great age of the Hepburn ruling, and the prestige of Marshall's name, supports such a result. It is doubtful whether anyone could be found who now would write into the Constitution such an

138 Ibid., p. 589.

139 Ibid., p. 590.

140 Ibid., p. 600.

> unjust and discriminatory exclusion of District citizens from the federal courts. All of the reasons of justice, convenience, and practicability which have been set forth for allowing District citizens a furtive access to federal courts, point to the conclusion that they should enter freely and fully as other citizens and even aliens do." [141]

Here is a statement chock-full of *Judicial Activism. Activism* words like "convenience" and "practicability" are the motives supporting the present refutation of the *Hepburn* case. These judges are apparently annoyed with the inexpediency of the *Hepburn* rule since hardly any authoritative legal reasoning is exhibited in their decision to overrule the *Hepburn* case.

The remaining four justices refused to disturb the rule of the *Hepburn* case. Likewise, they refused support to the logic employed in Article one extension of jurisdiction saying:

> "The framers unquestionably intended that the jurisdiction of inferior federal courts be limited to those cases and controversies enumerated in Article 3. I would not sacrifice that principle on the altar of expedience." [142]

Expediency is not the province of *Judicial Self Denial.* It has no hearing with *Denial.*

*Import of the Tidewater Case.*

The *Tidewater* case shows that judicial attitudes are fundamentally a matter of application and not a matter of personalities. It is a *Judicial Activism* holding resting on different *Active* reasonings. Each of the two groups which affected the majority opinion rejected the *Active* opinion of the other in favor of its own *Active* reasoning. The import of the *Tidewater* case is questionable beyond the holding that the statute enabling citizens of the District of Columbia access to the federal courts in diversity cases was constitutional. What of the *Hepburn* case? Is it still the law? What of the idea of article one extension of jurisdiction? Is it the law? Numerically, three justices held for article one extension of jurisdiction, while six held against it; two justices held for the overruling of the *Hepburn* case, while seven refused to disturb the case. Whatever consternation these numbers may occasion, the practical effect of the *Tidewater* case was to overrule the *Hepburn* case and sanction the extension of jurisdiction. However this confusion may be resolved, the case was the result of a

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141 Ibid., p. 618.

142 Ibid., p. 645.

desired *Active* end. It shows how the *Activists,* at times, sacrifice uniformity for expediency.

## Comments and Observations.

### *The Attack Upon Diversity Jurisdiction.*

From its inception, in the Constitutional Convention in 1787, diversity jurisdiction has been a political bone of contention. It was further beset with suspicion and confusion in 1842 by the doctrine of *Swift v. Tyson,* which gave a non-resident a choice of two courts, state or federal, in which to prosecute his action. Each court had a different disposition toward what the law was with respect to the non-resident's claim. Locally established rights were disregarded by the federal courts and their conceptions of general jurisprudence were substituted. The injustice of this doctrine as facilitated by diversity jurisdiction was exemplified in the *Black and White Taxicab* case, wherein a corporation which could not maintain a monopoly under the state law in which it was incorporated as against another resident corporation, moved "lock, stock and barrel" to another state, invoked the jurisdiction of the federal court by reason of diverse citizenship, and successfully maintained an action to effect its monopoly because of the application of a federal notion as to what the law of the situation should be.[143] During the years between 1928 and 1931, a movement was afoot to abolish diversity jurisdiction because of such circumstances it afforded as the *Black and White Taxicab* case.[144] It was contended, that since the reason for the grant of diversity jurisdiction was based on the fear of local bias in the state courts, and since local prejudice, as a reason, has long disappeared, the grant had outlived its usefulness. One of the spearheads for the abolishment of diversity jurisdiction was Felix Frankfurter, then a professor of law. He felt that diversity jurisdiction was the result of a political compromise which had no current efficacy. He contended that diversity jurisdiction was overloading the federal courts and that the increase in appointments of federal judges to meet that situation was weakening the federal judiciary, because "a powerful judiciary implies a relatively small number of judges."[145] To him, this increase in the

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143 Black & White Taxicab & T. Co. v. Brown & Yellow Taxicab & T. Co., 276 U. S. 518 (1927).

144 Yntema, Hessel E. and Jaffin, George H., "Preliminary Analysis of Concurrent Jurisdiction," 1931, 79 University of Pennsylvania Law Review 869, 873; footnote #7.

145 Frankfurter, Felix, "Distribution of Judicial Power Between United States and State Courts," 1928, 13 Cornell Law Quarterly 499.

federal judicial business was to be stopped at its legislative source, to wit, diversity jurisdiction.

Those who opposed the proposed abolishment of diversity jurisdiction thought the solution lay in the abolishment of the *Swift v. Tyson* doctrine. It was felt, that to abolish diversity jurisdiction would disrupt a fixed policy that had evolved for the protection of citizens. These opposers pointed out that the federal judges lifetime term freed them from the intervention of political interests, whereas the short tenure of state judges caused them to be evermindful, in their decisions, about their political futures, and that a plaintiff suitor could escape this pressure on the judges by invoking the jurisdiction of a federal forum. They pointed out that the dangers of local prejudice had not disappeared, reminding the "abolitionists" of the southern states and their actual hostile and discriminatory policies against resident and nonresident Negroes alike in the securing of their rights.[146]

The diversity grant of jurisdiction withstood this attack, but was, and is still under the scrutiny of persistent critics.[147] Perhaps, the most influential event in removing much of the objection to the diversity jurisdiction of the federal courts is the advent of the Erie doctrine in 1938, which made state law controlling law in the federal courts. The plaintiff no longer has a choice of courts that would afford him a choice of law. His only choice now, is that of a court. Federal courts will now follow the state courts in anything that will affect the outcome of the case. If by the state application of a law in the federal courts, the outcome would be different if the federal law is applied, the federal courts will apply the state law, whether these laws be termed as procedural or substantive, notwithstanding.[148] Locally established rights now get a local interpretation. No longer is a person apprehensive about what law determines his rights in his relations with nonresidents. Contracts are now made with the assurance of the application of one law. No ridiculous affronts upon justice as witnessed by the *Black and White Taxicab* case are now possible. It might be that the attacks upon, and the threatened extermination of, the diversity jurisdiction of the federal courts had some influence upon the decision of the *Erie* case.

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146 Newlin, Gurney E., "Proposed Limitations Upon Our Federal Courts," 1929, 15 A. B. A. J. 401, 403.

147 See the dissenting opinion of Justice Frankfurter in Burford v. Sun Oil Co., 319 U. S. 315 (1942).

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

*The Need for Diversity Jurisdiction.*

The need for diversity jurisdiction has suggested itself throughout the past discussion. There are indeed instances in which a claim, although arising by virtue of a local right, transcends local interest. Although no federal question is present, one of the litigants by virtue of his position may prefer a forum with a national outlook, and rightly so. Take the instance of a nonresident corporation which has established a meat packing plant in a locality that affords easy access to transportation facilities. This same plant employs just about all of the citizens of that locality and also citizens of neighboring states. It also supplies meats throughout the states to local wholesale houses for local consumption. Suppose an injunction were sought by a local resident against this corporation to abate an alleged nuisance caused by the odor emanating from the plant, and that the successful maintenance of such an action would compel the corporation to close its plant. There is ample reason to believe that the corporation would prefer a forum with a national outlook, since its business interests go beyond state limits. The action affects more than just the corporation alone; it affects workers and consumers in states other than where the action is being brought. There can be no doubt that the corporation is entitled to a forum free from local influences, and a forum which comprehends the national scope of the situation, and is thereby more able to weigh the attending equities.

Enough justification for diversity jurisdiction can be found in the need for the protection of minority interests. It is no deep dark secret or speculation, that minority groups suffer the indignations of prejudice and discrimination in various sections of the country. There are those sections of the country that are anti-Semitic, those that are anti-Catholic, those that are anti-Oriental, and those that are anti-Negro. A forum unfettered by local sentiment, pride and sometimes hatred is needed to protect these minority interests. What are the probabilities, today, of a Negro or a Jew from a northern state, suing a local white businessman in one of the more remote counties in the state court of Mississippi, in tort, being afforded complete justice and the dignity which a court of justice implies? Politically, there are sections of the country that are anti-industrial, anti-agricultural, anti-business, anti-labor, anti-cosmopolitan, anti-east, anti-west, anti-north, anti-south, anti-creditor, anti-debtor and anti-anything not local. These local prejudices are sometimes expressed through

the local courts because of political pressures. Most state and municipal judges are either elected or appointed for limited terms. Their reelections and reappointments depend upon political favor. As a result, much of the judicial business is carried on with a view to that favor. If the politics of an area indicates certain prejudices, the judges who seek that favor must sponsor those prejudices. Who can deny that the platforms and consequent elections of some locally influential politicians have their basis in the promulgation of disrepute for certain interests and groups? The tenure of the federal judge is for life and his remaining upon the bench is not conditioned upon his political good behavior. He need not conform to local pressures and prejudices. Be it not for diversity jurisdiction, a non-resident litigant subject to local wrath, could not find a security therefrom in the federal courts.

Law is the most provincial of all the professions. It lacks universality in the sense that there are as many conceptions of the law as there are states in the union. A lawyer has not the benefit of uniformity, the practice of the law varying in each state. The nearest approach he has to a uniform practice is the practice in the national courts. Because of this uniformity and the simplicity of the federal rules of procedure, a non-resident client and his non-resident attorney can escape the technical jungle of procedural rules of many states, of which the non-resident attorney has no knowledge and of which only extensive study and experience afford an understanding. Diversity jurisdiction enables a non-resident litigant to pick an attorney from his own environs, with whom he can personally communicate without inconvenience and expense. In turn, that attorney can litigate his client's case without being hamstrung by complex local rules of procedure with which he is not acquainted and with which he need not acquaint himself.

*The Personality of Diversity Jurisdiction.*

*Judicial Activism* has played a great part in the personality development of diversity jurisdiction. It seems that the courts have effected therein a retentive personality. Judicial attitudes have been in favor of jurisdiction. The idea that a party can acquire a citizenship for the express purpose of invoking the jurisdiction of the federal courts gives this personality a generous nature. An inquisitive aspect has been imposed upon this personality, by the *Denial* rule of the *Strawbridge* case and the

alignment of parties process, which tends to inhibit that generous nature. The allowing of splitting of causes of action to cure jurisdictional defects, under the separability practice liberalizes this personality. The *Active* presumption that the members of a corporation are citizens of the state of incorporation, and the majority holdings in the *Tidewater* case affirm the generous and retentive traits of this personality. Best of all, there is no *Hurn* case to perplex and mystify the personality of diversity jurisdiction, as the determinate therefor is the status of the parties and not the subject matter of the suit. Born of a sympathetic attitude towards non-resident suitors, diversity jurisdiction may be said to have remote sympathetic and protective tendencies, in that one of its aims is to protect a non-resident suitor from local bias. By comparison, the personality of diversity jurisdiction is the most receptive of all the phases of the jurisdiction of the federal courts.

*(To be concluded in next issue.)*