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Thomas F. Green Jr.

JURISDICTION OF UNITED STATES DISTRICT COURTS IN MULTIPLE-CLAIM CASES

THOMAS F. GREEN, JR.*

The jurisdictional problem peculiar to a case which involves more than one claim is: Shall the court entertain the entire action when it would have jurisdiction of one or more of the claims, but not all, if they were sued separately?[1] The application of this question to the United States district courts raises conflicting considerations. On the one hand is the fact that most of the claims which would not be within federal jurisdiction if sued alone, present questions of state rather than federal law. In general the more appropriate tribunals to deal with such questions in the first instance are the state courts. On the other hand, it is desirable to have the parties settle their disputes in one action. It is also desirable to settle in one action disputes relating to a transaction or related transactions even though more than two parties are involved. If some of the claims involve patents, copyrights, or other matters within the exclusive cognizance of the federal courts, these courts are the only ones which can accomplish the two latter desiderata.

Federal-state relationships naturally involve complicated questions of policy and the balancing of local and national interests. Problems of constitutional and statutory interpretation are also present. Suppose that the United States and another plaintiff bring an action in which the United States pleads a claim in favor of it alone. Suppose further that (a) the other plaintiff sets forth in the same complaint a related claim that he alone has against the defendant, or (b) the defendant pleads a counterclaim against the other plaintiff alone, or (c) the defendant impleads another person on a third party complaint, or (d) there are two defendants, one of whom cross-claims against the other. Is an action involving (a) or (b) or (c) or (d) a controversy to which the United States is a party within the meaning of the Constitution?[2] Are they civil actions, suits or proceedings commenced by the United States?[3] Must each counterclaim and cross-claim show its own ground of federal jurisdiction independent of grounds disclosed by the plaintiff's claim? Similar questions may be put concerning federal questions, diversity of citizenship and other grounds of jurisdiction as well as questions concerning other types

* Professor of Law, University of Georgia.

1. The present discussion will not cover venue or service of process.
2. U.S. CONST. Art. III, § 2.
3. 28 U.S.C.A. § 1345 (1950).

of multiple-claim actions. In the present connection it seems useful to examine the following procedural situations:

1. The joinder of claims by the plaintiff or plaintiffs in the complaint in a United States district court.
2. The removal to such district court of an action in which the complaint filed in the state court joined two or more claims.
3. Counterclaims.
4. Cross-claims.
5. Impleader (third-party practice).
6. Interpleader.
7. Class actions.
8. Intervention.

JOINDER IN THE COMPLAINT

The joinder in a single complaint of a number of claims, each of which would be within federal jurisdiction if sued alone, ordinarily presents no jurisdictional problem. However, in case of an attempt to join in one action a claim against the United States and a claim against another defendant, the plaintiff may run into difficulties. The Supreme Court has said that under the Tucker Act[4] the district courts are not authorized to adjudicate suits which could not be maintained in the Court of Claims. The Court continued, "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued."[5] This seems to mean that even where the district court would have jurisdiction of each of the two claims separately, one on the ground that the United States is a party and the other on some other ground, the two claims cannot be joined in a single proceeding in the district court.[6] The Tucker Act and its successors[7] authorized the district court to entertain suits against the United States for claims not exceeding $10,000 founded on a statute or a contract, and certain suits against the United States to recover taxes alleged to have been improperly collected. A more recent law of Congress is the Federal Tort Claims Act.[8] The decisions are in conflict on the question, whether a district court may entertain a joint action against the United States and a joint tort-feasor when there is diversity of citizenship between the

4. 24 STAT. 505, §§ 1, 2 (1887).
5. United States v. Sherwood, 312 U.S. 584, 591, 61 Sup. Ct. 767, 85 L. Ed. 1058 (1941).
6. The point actually was not involved in the case because there was no independent ground of jurisdiction for the claim to which the United States was not a party.
7. 28 U.S.C.A. § 1346(a) (1950).
8. 60 STAT. 842 (1946). The Act is now codified and appears in various sections of the Judicial Code. See, *e.g.*, 28 U.S.C.A. § 1346(b) (1950).

plaintiff and the defendant other than the United States.[9] Professor Moore contends that joinder should be permitted between either a Tucker Act claim or a tort claim against the United States on one hand, and a claim against a different defendant on the other, if grounds of federal jurisdiction exist for the latter claim and if joinder is permissible from a procedural standpoint. He also takes the position that a plaintiff or plaintiffs should not be prevented by sovereign immunity from joining claims against the United States.[10]

Doubt exists as to the propriety of joining a claim triable before a three-judge court with one triable before an ordinary, one-judge district court. Where federal jurisdictional grounds are present for both claims and the venue is proper, there appears to be no real jurisdictional basis for refusing to entertain both in a single action.[11]

When an admiralty claim is joined in a single proceeding with a claim at law, the courts view the district court as though it were two distinct courts, one having jurisdiction of admiralty suits and the other of civil actions at law and in equity. Thus it is held that a claim in admiralty cannot be joined with a tort claim at law against a different defendant;[12] nor a claim by a plaintiff whose citizenship is diverse from that of the defendant with a claim in admiralty by a different plaintiff who is a citizen of the same state as defendant.[13] Although the district court would have federal jurisdiction of each claim separately and both arose from the same transaction and have common questions, yet it cannot retain the two claims joined in a single complaint. One must be dismissed. These cases reach a result that is unfortunate and unnecessarily technical. While not yet accepted by any court the sound view appears to be that the court should have inherent power to decide both claims on the merits.[14]

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9. Joinder is proper: Maryland v. Manor Real Estate & Trust Co., 83 F. Supp. 91 (D. Md.), *rev'd in part*, 176 F.2d 414 (4th Cir. 1949); Bullock v. United States, 72 F. Supp. 445 (D.N.J. 1947); Englehardt v. United States, 69 F. Supp. 451 (D. Md. 1947). *Contra:* Prechtl v. United States, 84 F. Supp. 889 (W.D.N.Y. 1949); Donovan v. McKenna, 80 F. Supp. 690 (D. Mass. 1948); Drummond v. United States, 78 F. Supp. 730 (E.D. Va. 1948); Uarte v. United States, 7 F.R.D. 705 (S.D. Cal. 1948), *aff'd*, 175 F.2d 110 (9th Cir. 1949). See also 7 VAND. L. REV. 290 (1954).

10. 3 MOORE, FEDERAL PRACTICE 2737-39 (2d ed. 1948).

11. See Atlantic Lumber Corp. v. Southern Pac. Co., 2 F.R.D. 313 (D. Ore. 1941). *But see* New York State Guernsey Breeders Co-Op v. Wallace, 28 F. Supp. 590, 593 (N.D.N.Y. 1939), *aff'd sub nom.* New York State Guernsey Breeders Co-Op v. Wickard, 141 F.2d 805 (2d Cir.), *cert. denied*, 323 U.S. 725 (1944).

12. McDonald v. Cape Cod Trawling Corp., 71 F. Supp. 888 (D. Mass. 1947); Eggleston v. Republic Steel Corp., 47 F. Supp. 658 (W.D.N.Y. 1942).

13. W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc., 155 F.2d 321, 325 (2d Cir.), *cert. denied*, 329 U.S. 735 (1946).

14. 3 MOORE, FEDERAL PRACTICE 2726 n.6 (2d ed. 1948).

The most significant question concerning joinder by the plaintiff or plaintiffs arises when independent grounds of jurisdiction exist for some but not all of the claims. The answer as to whether the court may take jurisdiction of the entire action depends upon whether the case is filed originally in the United States district court or arrives there by removal from a state court.

The statute conferring original jurisdiction was interpreted in the leading case of *Hurn v. Oursler*.[15] There the plaintiffs sought an injunction against the production of a play alleged to have incorporated therein certain ideas taken from the copyrighted and uncopyrighted versions of a play written by plaintiffs. Damages and an accounting were also prayed and the complaint alleged that the action of defendants was a violation of the copyright laws of the United States and also constituted unfair competition. All the parties were citizens of the same state. The Supreme Court of the United States held that the district court had jurisdiction of the issue of unfair competition concerning the copyrighted play as well as the issue of infringement; that the former should be decided on the merits although there was found to be in fact no infringement of the copyright law. However, the trial court was held to have no jurisdiction of allegations of unfair competition concerning the uncopyrighted version of the play. The Court announced the doctrine that federal jurisdiction extends to a federal ground and a nonfederal ground in support of a single cause of action but not to a separate nonfederal cause of action simply because it is joined with a federal cause of action. The *Hurn* case, therefore, stands for the proposition that the matter in controversy in an action does not arise under the Constitution, laws, or treaties of the United States so as to support federal jurisdiction of the entire action unless all the causes of action thus arise. The decision in the case was that one cause of action arose under the laws of the United States and must be decided on the merits but what the court found to be a second cause of action must be dismissed for lack of jurisdiction because it did not so arise. A cause of action was said to consist of the unlawful violation of a right.[16] Even if one disregards the dubiousness of the view which considers the right involved to be a right to the protection of the copyrighted play rather than a right to the protection of the play whether copyrighted or uncopyrighted, the result is still surprising. Where does the federal court get power to exercise jurisdiction over

15. 289 U.S. 238, 53 Sup. Ct. 586, 77 L. Ed. 1148 (1933). The particular statutory provision which was applied by the case is now included in 28 U.S.C.A. § 1338 (1950). The doctrine of the *Hurn* case was applied to an action involving more than one defendant and brought under the Federal Employers' Liability Act in Pearce v. Pennsylvania R.R., 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947).

16. 289 U.S. at 246.

only a part of an action? Both the Constitution and the statutes indicate that the court will have jurisdiction of certain actions and (by implication) will not have jurisdiction of any other actions.[17] The language suggests that from a jurisdictional standpoint the courts are to deal with an action as a whole. Perhaps authority to retain a part of a suit and dismiss another part was given by Section 5 of the Act of March 3, 1875,[18] which may imply that, if a suit involves a controversy within the jurisdiction and also a controversy not within the jurisdiction, the suit shall not be dismissed. But *Hurn v. Oursler* says that when the two controversies are two separate causes of action the court does not have jurisdiction of the action. If the action cannot be retained as a whole nor dismissed for want of jurisdiction, the solution is to dismiss, for want of jurisdiction, the cause of action which lacks grounds of jurisdiction. This was the course adopted in the *Hurn* case. Should both causes of action be within the judicial power of an available state court and should the plaintiff wish to try them together, he must seek to dismiss his federal action.

The serious objection to the *Hurn* case is the difficulty of application—the problems involved in distinguishing between situations involving two causes of action and those involving merely two grounds.[19] Professor Wechsler suggests that Congress should give jurisdiction over all claims that are asserted in a single action in accordance with procedural rules of joinder but at the same time give discretion to the trial judge to dismiss without prejudice any claim not having its own grounds of federal jurisdiction. Under this plan dismissal would be ordered unless the applicable principle of substantive law is well settled in the state. Thus the assumption of the functions of state courts would be minimized.[20]

The Supreme Court has shown no inclination to abandon the *Hurn* doctrine. Consequently, Congressional action will probably be the only chance for a change. Congress undertook to deal with the subject

17. U.S. CONST. Art. III, § 2, and 28 U.S.C.A. §§ 1331-1333 (1949), 1334-1359 (1950).

18. 28 U.S.C. § 80 (1946), which was as follows: "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." This provision was omitted from the 1948 revision of Title 28.

19. Note, 52 YALE L.J. 922 (1943); 32 MICH. L. REV. 412 (1934).

20. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 232-33 (1948).

in the 1948 revision of Title 28 of the Code but the effect of the provision is not altogether clear. The language is as follows: "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."[21] The Code deals only with the narrow holding of *Hurn v. Oursler* rather than the general principle because the principle announced by the case is not limited to unfair competition or to claims under the copyright, patent or trademark laws.[22] Whether the new provision codifies the holding of the case or on the other hand expands the jurisdiction is debatable. The Reviser's Notes[23] say that the provision enacts the pre-existing rule but the words of the Code subsection seem to be broader than the doctrine of the previous decisions.[24] If the subsection is given the broader meaning, the result will be that unfair competition claims can be joined with related infringement claims even though each claim is a separate cause of action but other demands will have to come within the principle of *Hurn v. Oursler, i.e.,* will have to consist of state-law grounds and federal grounds comprising the same cause of action.

The doctrine of the case when applied to some of the other grounds of jurisdiction is even less acceptable than in the instance of the existence of a federal question. For example, if an individual plaintiff joins his cause of action with one by the United States against the same defendant, the action seems to be one commenced by the United States even though it is also commenced by the other plaintiff. If a plaintiff joins in one complaint, in accordance with the rules of pleading, a cause of action against the United States and another against an individual defendant, the action is, according to the normal meaning of language, one against the United States. The statute[25] does not say against the United States alone. Assuming that sovereign immunity does not prevent it,[26] the district court should take jurisdiction of such an action even when there is no diversity

21. 28 U.S.C.A. § 1338(b) (1950).

22. "[A] rule of general application." 289 U.S. at 245. *Accord,* Southern Pac. Co. v. Van Hoosear, 72 F.2d 903 (9th Cir. 1934). The passage of 28 U.S.C.A. § 1338(b) (1950) does not limit the taking of jurisdiction of a related ground based on state law, to unfair competition or to copyright, patent, or trademark cases. The broad rule, announced by the earlier cases, that when a federal court has jurisdiction of a cause of action it will decide all questions involved therein is followed by the cases decided since the adoption of the section. Strachman v. Palmer, 177 F.2d 427, 12 A.L.R.2d 687 (1st Cir. 1949); South Side Theatres, Inc. v. United West Coast Theatres Corp., 178 F.2d 648 (9th Cir. 1949); Lindquist v. Dilkes, 127 F.2d 21 (3d Cir. 1942); Hogue v. National Automotive Parts Ass'n, 87 F. Supp. 816 (E.D. Mich. 1949).

23. 28 U.S.C.A. § 1338 at p.66 (1950).

24. 3 MOORE, FEDERAL PRACTICE 1815-16 n.9 (2d ed. 1948); Wechsler, *supra* note 20, at 232.

25. 28 U.S.C.A. § 1346 (1950).

26. See notes 5, 9 and 10 *supra.*

of citizenship between the individuals; the fact that the United States is a party is sufficient. The courts, however, do not seem inclined to concede this.[27] Indeed they go beyond what the language of the *Hurn* case requires. They decline to entertain a joint suit against the United States and a joint tort-feasor who is a citizen of the same state as the plaintiff.[28] This result is reached by courts which refuse to allow sovereign immunity alone to prevent joinder in a tort-claim case.[29] Yet it is arguable that the case presents a single cause of action.[30] The fact that an action and the single cause of action on which it is based are both against the United States seems to be sufficient ground for holding that the federal district court has jurisdiction of the action involving both defendants.

Although the presence of a substantial federal question will allow a federal district court to adjudicate an entire cause of action, even when it is necessary to decide questions of state law, the presence of diversity of citizenship between one plaintiff and one defendant is not sufficient to sustain original jurisdiction over an additional party who is a citizen of the same state as a party on the other side. The interpretation that the statute requires all the parties on one side of the case to be citizens of different states from those of which the parties on the other side are citizens, was first made in *Strawbridge v. Curtiss*.[31] Diversity in one cause of action apparently will not justify original jurisdiction over another joined in the same complaint if jurisdiction could not have been taken of the second cause of action when sued on alone.[32] The question whether the doctrine applies to claims between different parties was expressly left open by the opinion in *Strawbridge v. Curtiss* where it was said:

> "But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States."[33]

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27. Bullock v. United States, 72 F. Supp. 445 (D.N.J. 1947); Dickens v. Jackson, 71 F. Supp. 753 (E.D.N.Y. 1947).
28. Dickens v. Jackson, 71 F. Supp. 753 (E.D.N.Y. 1947).
29. Bullock v. United States, 72 F. Supp. 445 (D.N.J. 1947).
30. Brinsmead v. Harrison, L.R. 7 C.P. 547, 554 (Ex. Ch. 1872); PROSSER, TORTS 1096-97 (1941).
31. 3 Cranch 267, 2 L. Ed. 435 (U.S. 1806). See also New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44 (U.S. 1816); *accord*, Florida Cent. & P. Ry. v. Bell, 176 U.S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486 (1900). The statutory language when *Strawbridge v. Curtiss* was decided was more in keeping with the decision in that case than the present language is. The statute read: "[W]here . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." 1 STAT. 73, 78 (1789).
32. Tillman v. Russo Asiatic Bank, 51 F.2d 1023 (2d Cir.), *cert. denied*, 285 U.S. 539 (1931). If joined under FED. R. CIV. P. 18(b) ancillary jurisdiction would exist. *Cf.* Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295 (2d Cir. 1927).
33. 3 Cranch 267, 2 L. Ed. 435 (U.S. 1806).

The Supreme Court seems never to have decided the question but its dictum in *Hurn v. Oursler* to the effect that a federal court is unable to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within the jurisdiction, sounds as though it applies to diversity as well as federal questions.

The jurisdictional amount is a statutory requirement,[34] but the statute does not say how the requirement shall be applied to multiple claims. The cases allow the value of all the claims of a single plaintiff against a single defendant to be added when joined in one suit.[35] For the purpose of reaching the jurisdictional minimum in the case of multiple claims, by more than one plaintiff or against more than one defendant, the total due on a joint claim or claims is the amount in controversy[36] but claims due severally to or from multiple parties cannot be added to reach the required minimum.[37]

Removal of Claims Joined by Plaintiff

The decisions establishing the requirement of complete diversity were cases of original jurisdiction, *i.e.*, actions filed in the federal court by the plaintiff. In removal questions the removal statutes have brought about a different result. In 1875 Congress passed an act revising the jurisdictional law for the federal courts and included a provision for the removal of cases involving what have become known as separable controversies.[38] The statute provided for the removal of the entire case to the federal court by the defendant or defendants involved in a separable controversy wholly between citizens of different states. The Supreme Court's decision in *Barney v. Latham*[39] indicated that the district court could take jurisdiction of a case in which there was not complete diversity of citizenship if the parties interested in the separable controversy as plaintiffs were citizens of states different from those of which the interested defendants were citizens. The separable controversy has been spoken of as a separate cause of action, and in a fairly recent case the Su-

34. 28 U.S.C.A. §§ 1331, 1332 (1949).

35. Baltimore & Ohio Southwestern R.R. v. United States, 220 U.S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384 (1911); Schunk v. Moline, Milburn & Stoddart Co., 147 U.S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255 (1893); *cf.* Woodside v. Beckham, 216 U.S. 117, 30 Sup. Ct. 367, 54 L. Ed. 408 (1910) (no aggregation of claims held by plaintiff as assignee for collection).

36. Pinel v. Pinel, 240 U.S. 594, 36 Sup. Ct. 416, 60 L. Ed. 817 (1916); Pacific Live-Stock Co. v. Hanley, 98 Fed. 327 (C.C.D. Ore. 1899). Common liability will also justify adding the value of multiple claims to reach the jurisdictional amount. Sovereign Camp Woodmen of the World v. O'Neill, 266 U.S. 292, 45 Sup. Ct. 49, 69 L. Ed. 293 (1924); McDaniel v. Traylor, 196 U.S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533 (1905).

37. Chamberlin v. Browning, 177 U.S. 605, 20 Sup. Ct. 820, 44 L. Ed. 906 (1900); Pinel v. Pinel, 240 U.S. 594, 36 Sup. Ct. 416, 60 L. Ed. 817 (1916).

38. 18 Stat. 470 (1875).

39. 103 U.S. 205, 26 L. Ed. 514 (1881).

preme Court seems to assume that the federal court on removal could take jurisdiction of the entire case although complete diversity was present only in the separable controversy and the different controversies involved different causes of action.[40] On the other hand, in the *Pacific Railroad Removal Cases*[41] only one cause of action was removed and the other causes of action involved in the state court suit were left in the state court. Lower federal courts have reached similar results.[42] The Court of Appeals for the Second Circuit attempts to explain the difference between *Barney v. Latham* and the *Pacific Railroad* case by saying that a separable controversy does not arise from a joinder of numerous unrelated causes of action and that in the case of unrelated causes of action the controversies are separate rather than separable.[43] The concepts involved are so difficult to apply that the reviser of Title 28 decided to eliminate the distinction. For the separable controversy provision, the new Title substitutes subsection (c) of Section 1441 which is as follows:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."[44]

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40. Pullman Co. v. Jenkins, 305 U.S. 534, 59 Sup. Ct. 347, 83 L. Ed. 334 (1939). The contention has been made that an entire case removable on the ground that it contained a separable controversy constituted but a single cause of action. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 244 (1949). However, Moore agrees (*id.* at 247) with the statement in the *Pullman* case, 305 U.S. at 539, "There was clearly a separable controversy with respect to Kash." "The complaint alleged two causes of action, one against all the defendants, the other against Kash alone." *Id.* at 536. The Court speaks, therefore, of the separable controversy as a cause of action complete in itself and different from the one making up the rest of the case. See also Torrence v. Shedd, 144 U.S. 527, 530, 12 Sup. Ct. 726, 36 L. Ed. 528 (1892).

41. 115 U.S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1885).

42. Stewart v. Nebraska Tire & Rubber Co., 39 F.2d 309 (8th Cir.), *cert. denied,* 282 U.S. 840 (1930); Nebraska v. Northwestern Engineering Co., 69 F. Supp. 347 (D. Neb. 1946); Lucania Societa Italiana Di Navigazione v. United States Shipping Board Emergency Fleet Corp., 15 F.2d 568 (S.D.N.Y. 1923).

43. Tillman v. Russo Asiatic Bank, 51 F.2d 1023 (2d Cir.), *cert. denied,* 285 U.S. 539 (1931). The reasoning of this case is questionable. Actually, the *Pacific* decision refused removal of the case as a whole because a part of it was an administrative rather than a judicial proceeding. The suit viewed as a whole did not constitute a "case or controversy" in the constitutional sense.

44. 28 U.S.C.A. § 1441(c) (1950). See Reviser's Note, 28 U.S.C.A. § 1441(c) (1950). The concept, "separate and independent claim or cause of action," may prove more difficult to apply than separable controversy. *Compare* Bentley v. Halliburton Oil Well Cementing Co., 81 F. Supp. 323 (S.D. Tex. 1948), *rev'd,* 174 F.2d 788 (5th Cir. 1949), and Buckholt v. Dow Chemical Co., 81 F. Supp. 463 (S.D. Tex. 1948), *with* Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788 (5th Cir. 1949), Billups v. American Surety Co., 87 F. Supp. 894 (D. Kan. 1950), and Butler Mfg. Co. v. Wallace & Tiernan Sales Corp., 82 F. Supp. 635 (W.D. Mo. 1949). *Cf.* Leppard v. Jordan's Truck Line, 110 F. Supp. 811 (E.D.S.C. 1953), 67 HARV. L. REV. 519 (1954); Duffy v. Duffy,

The new provision is broader than the old in two respects. It permits the entire case to be removed even where the causes of action which show no grounds of federal jurisdiction are separate from, and independent of, the cause of action involving grounds of jurisdiction and justifying removal. Also, it applies to cases where the parties are not citizens of different states but a federal question or some other ground of jurisdiction is involved in one of the claims or causes of action. Formerly the entire case could be removed only when it contained a controversy wholly between citizens of different states.

The new provision may be considered narrower in two respects. It applies to a controversy in an action only if the controversy constitutes a separate claim or cause of action, and even then the district court has discretion to remand all causes of action which do not involve independent grounds of jurisdiction. The choice of language in the subsection is striking in its use of both claim and cause of action. In other sections the reviser has followed the example of the Civil Procedure Rules by using the word "claim," and omitting any reference to cause of action.

COUNTERCLAIMS

It seems clear that the Supreme Court of the United States if presented with the question would hold that a counterclaim is a cause of action separate and distinct from the cause of action on which the plaintiff brings his suit. The court has repeatedly said that for jurisdictional purposes a cause of action consists of the violation of a right.[45] The plaintiff's claim is based upon his right and the defendant's counterclaim upon his right. If the plaintiff files a counterclaim it will be upon a right different from the one upon which he originally sued. Any other party filing a counterclaim will also rely on his own right. Thus each counterclaim is based upon its own cause of action.[46] If the doctrine of *Hurn v. Oursler* were extended to include counterclaims a district court could never

89 F. Supp. 745 (S.D. Iowa 1950). *Compare* Harward v. General Motors Corp., 89 F. Supp. 170, 173 (E.D.N.C. 1950), *with* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702 (1951), on the point whether a given case which was removable under the old separable controversy provision could possibly be removable under § 1441(c). And see Oldland v. Gray, 179 F.2d 408 (10th Cir.), *cert. denied*, 339 U.S. 948 (1950), in which removal of "separable controversy" is passed upon without any notice being taken of the change in statutory language.

45. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702 (1951); United States v. Memphis Cotton Oil Co., 288 U.S. 62, 68, 53 Sup. Ct. 278, 77 L. Ed. 619 (1933); Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 321, 47 Sup. Ct. 600, 71 L. Ed. 1069 (1927).

46. Hann v. Venetian Blind Corp., 15 F. Supp. 372, 377 (S.D. Cal. 1936), *aff'd*, 111 F.2d 455 (9th Cir. 1940); Hauser v. Burge, 121 S.W.2d 314, 316 (Mo. App. 1938); Nichols v. Olympia Veneer Co., 145 Wash. 59, 258 Pac. 1028 (1927).

entertain a counterclaim unless it showed independent grounds for jurisdiction. But the Supreme Court decided in *Moore v. New York Cotton Exchange*[47] that a district court having jurisdiction of a suit because of the plaintiff's claim can entertain a compulsory counterclaim over which there would be no jurisdiction if it were brought as a separate suit. Probably the three principal reasons for a different result concerning counterclaims are (1) the court ordinarily looks to the complaint rather than to later pleadings to determine jurisdiction; (2) a court in order to do justice must hear the defendant's defenses and there is much in common between counterclaims and defenses; (3) a counterclaim can be filed only by a person who is already in court as a party to the action. In the *Moore* case a compulsory counterclaim was involved and it was not necessary for the Supreme Court to decide whether the rule laid down would apply also to permissive counterclaims. The lower federal courts have repeatedly said that there is a distinction from the standpoint of federal jurisdiction between compulsory and permissive counterclaims and that a permissive counterclaim requires independent grounds of jurisdiction.[48] No case gives a satisfactory discussion of this proposition and in practically all of the cases where the statement was not dictum the decision was erroneous because the counterclaim was actually a compulsory one.[49] The decided cases on this question are believed to be unsound for a number of reasons.

First, the federal statutes confer jurisdiction over certain actions,[50] and an action is begun by the plaintiff[51] and includes any counterclaim filed in connection therewith. Rule 54(b) of the Federal Rules of Civil Procedure speaks of claim and counterclaim as parts of the same action and provides for a separate final judgment upon either, only when a special determination is made by the court. The authorities generally seem to support this view of an action.[52]

47. 270 U.S. 593, 46 Sup. Ct. 367, 70 L. Ed. 750 (1926).

48. The cases are collected in Green, *Federal Jurisdiction over Counterclaims*, 48 N.W.L. REV. 271, 283-84 nn.65-69 (1953).

49. See, *e.g.*, Derman v. Stor-Aid, Inc., 141 F.2d 580 (2d Cir. 1944), *overruled*, Cutting Room Appliances Corp. v. Empire Cutting Machine Co., 186 F.2d 997 (2d Cir. 1951).

50. 28 U.S.C.A. §§ 1331-1333 (1949), 1334-1359 (1950).

51. See FED. R. CIV. P. 3.

52. *E.g.*, Eng. Rules of Sup. Ct., 0.19, r.3., Ann. Prac. 1945, p.352; the New Jersey rule quoted in Blume, *Free Joinder of Parties, Claims, and Counterclaims*, 2 F.R.D. 250, 258 (1943). Consult also the language of N.Y. CIV. PRAC. ACT § 271 recognizing parties to counterclaims as parties to action begun by plaintiff. See Clarkson v. Manson, 4 Fed. 257, 261 (C.C.S.D.N.Y. 1880) (counterclaim is a part of the same action as the plaintiff's claim within the meaning of the federal removal statute although it could be considered a suit by itself under the state statute); Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257 (1943). A counterclaim or set-off is not a separate action. Pate v. Gray, 18 Fed. Cas. 1291, No. 10,794a (Ark. Ter. 1831); Taylor v. New York, 82 N.Y. 10, 19 (1880); Otto v. Lincoln Sav. Bank, 268 App. Div. 400, 51 N.Y.S.2d 561 (2d Dep't 1944); White v. Hill, 283 S.W. 529 (Tex. Civ. App.

Second, the jurisdiction of the court is determined as of the time the action is brought.[53] When jurisdiction is based upon a federal question in the case the allegations of the complaint must show that the action arises under the Constitution, laws or treaties of the United States.[54] "What the defendant claims when his turn comes is immaterial."[55]

Third, trial efficiency, convenience and economy are promoted by disposing of both claims in one action.[56] If the jurisdictional statutes are ambiguous, considerations such as these may properly influence the courts in giving a meaning to the congressional language.[57]

Fourth, a court necessarily has the power to hear defensive counterclaims. The federal district courts have both chancery and common-law jurisdiction and consequently can entertain any defense which the substantive law and the rules of procedure permit.[58] A counterclaim may be used to reduce or prevent the plaintiff's recovery and in that respect is similar to a defense.[59]

Fifth, it is impractical to distinguish between defensive and offensive use of counterclaims so far as federal jurisdiction is concerned. If the counterclaim consists of a claim by defendant for money damages and is interposed to a claim by plaintiff for damages, the use of the counterclaim as a defensive set-off, and the granting or refusing of the affirmative relief to the defendant, usually depend on the same issues and evidence. When the two phases of the counterclaim are disposed of together in the federal court the additional burden on the court is small, but when the federal court is limited to hearing the counterclaim as a defense and it turns out that there is a balance due the defendant he must bring a separate action to

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1926); Craigen's Executrix v. Lobb, 12 Leigh 627 (Va. 1841); *In re* Milwaukee Commercial Bank. 236 Wis. 105, 294 N.W. 538 (1940).

53. Mollan v. Torrance, 9 Wheat. 537, 539, 6 L. Ed. 154 (U.S. 1824).

54. Gully v. First National Bank, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936); Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894).

55. BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 56 (5th ed. 1949). Consequently a district court cannot entertain a case consisting of a claim by plaintiff which could not be sued on alone in federal court and a counterclaim which is within federal jurisdiction. Goldstone v. Payne, 94 F.2d 855 (2d Cir. 1938). *Cf.* Isenberg v. Biddle, 125 F.2d 741 (D.C. Cir. 1941).

56. CLARK, CODE PLEADING 645 (2d ed. 1947); Clark, *The Influence of Federal Procedural Reform,* 13 LAW & CONTEMP. PROB. 144, 154 (1948).

57. The effect of a given interpretation is relevant. American Security and Trust Co. v. District of Columbia, 224 U.S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856 (1912). See also Cook, *Scientific Method and the Law,* 13 A.B.A.J. 303, 308 (1927); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 893 (1930).

58. 3 MOORE, FEDERAL PRACTICE 54 (2d ed. 1948); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 YALE L.J. 393, 414-15 (1936).

59. Flagg v. Locke, 74 Vt. 320, 52 Atl. 424 (1902); CLARK, CODE PLEADING 640 (2d ed. 1947).

recover this balance.[60] In such instances the federal court and the state court will frequently have to hear the same evidence; the claim will be established in the federal court for the purpose of defeating the plaintiff's claim and then will be established over again by calling the same witnesses and introducing the same documents in the state court so that an affirmative judgment may be obtained for the balance over and above what was used defensively in the federal court. Some state courts will probably hold that this procedure, if permitted, would lead to the splitting of a single cause of action, and that the state court action could not be maintained.[61] The result would be that the defendant must choose between allowing the plaintiff to recover against him or filing the counterclaim and extinguishing his claim against the plaintiff. This is unfair to the defendant.[62] Even in a jurisdiction which did not take this view against dividing up the claim of the federal-court defendant the result of using the same claim in two actions is undesirable. Expense is increased, additional time is consumed, and unnecessary effort is required.

Even where the counterclaim seeks an injunction or a declaratory judgment or any form of relief other than damages, it may be more convenient to try the defendant's claim in the plaintiff's action. The objections to requiring the defendant to sue in the state court are not as great, but the counterclaim is a part of the action and where plaintiff's claim is within the jurisdiction of the federal court the entire action should be entertained.

Although it has been said that if a plaintiff wishes to assert an additional claim the better practice is for him to amend his complaint,[63] it is fairly clear that he may state the claim as a counterclaim,[64] so far as procedure is concerned. From a jurisdictional standpoint the counterclaim should be allowed even in those instances in which the plaintiff could not have included it originally in the complaint in the federal court or added it by amendment. It should be allowed first, because jurisdiction of the action gives jurisdiction of the counterclaim which is part of the action, and second, because

60. When the plaintiff's claim is unliquidated, the only way to ascertain the balance is through a special verdict or interrogatories to the jury. This might be necessary even in some cases of liquidated claims as where the defendant has filed both a denial and a counterclaim.

61. Riddle v. McLester-Van Hoose Co., 145 Ala. 307, 40 So. 101 (1905); 2 FREEMAN, JUDGMENTS § 792 (5th ed. 1925). *Contra:* RESTATEMENT, JUDGMENTS § 57 (1942).

62. RESTATEMENT, JUDGMENTS § 57, comment *a* (1942).

63. Bethlehem Fabricators, Inc. v. John Bowen Co., 1 F.R.D. 274 (D. Mass. 1940); *cf.* Cornell v. Chase Brass & Copper Co., 48 F. Supp. 979 (S.D.N.Y. 1943).

64. Bethlehem Fabricators, Inc. v. John Bowen Co., 1 F.R.D. 274 (D. Mass. 1940); Warren v. Indian Refining Co., 30 F. Supp. 281 (N.D. Ind. 1939). Professor Moore answers his own objection when he cites Rule 8(d). 3 MOORE, FEDERAL PRACTICE 23 (2d ed. 1948).

a counterclaim can be filed only in response when an opposing party has pleaded a claim[65] and thus differs from claims in the complaint. The same reasoning applies to jurisdiction of counterclaims against cross-claimants or intervenors or third-party plaintiffs or by third-party defendants against the original plaintiff. The latter claims are limited to those arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and have been held not to require independent grounds of jurisdiction.[66]

As to whether the amount of the defendant's counterclaim may be added to the amount claimed by the plaintiff to determine the value of the matter in controversy, the authorities are in conflict.[67]

If removal is sought under Section 1441(a) of a case involving a counterclaim, problems are encountered similar to those discussed above in connection with original jurisdiction. If removal is based on Section 1441(c), is plaintiff's claim "joined with" the counterclaim so as to come within the provisions of the subsection? A district court case gives a negative answer but the reasons for its decision are not clearly stated.[68]

CROSS-CLAIMS

A cross-claim may consist of any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action, or of a counterclaim therein or relating to any property that is the subject matter of the original action.[69] If the cross-claim arises out of the subject matter of the original action, independent grounds of jurisdiction are probably unnecessary.[70] *Moore v. New York Cotton Exchange* appears to be sufficiently similar to furnish a case in point. If the cross-claim arises out of the subject matter of a permissive counterclaim which

65. FED. R. CIV. P. 13; Morris, Wheeler & Co. v. Rust Engineering Co., 4 F.R.D. 307 (D. Del. 1945).

66. Bernstein v. N. V. Nederlandsche-Amerikaansche, 9 F.R.D. 557 (S.D.N.Y. 1949).

67. Kirby v. American Soda Fountain Co., 194 U.S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911 (1904); Central Commercial Co. v. Jones-Dusenbury Co., 251 Fed. 13 (7th Cir. 1918); McKown v. Kansas & T. Coal Co., 105 Fed. 657 (C.C.W.D. Ark. 1901). *Compare* DOBIE, FEDERAL JURISDICTION AND PROCEDURE 144-50 (1928), *with* 3 MOORE, FEDERAL PRACTICE 58 (2d ed. 1948). See also 38 VA. L. REV. 108 (1952).

68. Collins v. Faucett, 87 F. Supp. 254, 255 (N.D. Fla. 1949).

69. FED. R. CIV. P. 13(g).

70. Collier v. Harvey, 179 F.2d 664 (10th Cir. 1949); Mathis v. Ligon, 39 F.2d 455 (10th Cir.), *cert. denied*, 282 U.S. 846 (1930); United States F. & G. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); Ames Realty Co. v. Big Indian Mining Co., 146 Fed. 166 (C.C.D. Mont. 1906); Almacanes Fernandez, S.A. v. Golodetz, 8 FED. RULES SERV. 14a.21, Case 1 (N.Y. 1944). *Contra:* Magnolia Petroleum Co. v. Suits, 40 F.2d 161 (10th Cir.), *cert. denied*, 282 U.S. 861 (1930). See Galveston, Harrisburg & San Antonio Ry. v. Hall, 70 F.2d 608, 610 (5th Cir. 1934).

involves no federal question or other grounds of jurisdiction (assuming that the grounds of jurisdiction in the plaintiff's claim would enable the court to take jurisdiction of the counterclaim), we have less pyramiding of subject matter, based on the jurisdiction of the main claim, than would sometimes occur in the filing of a counterclaim to a counterclaim. Nevertheless, some may think that taking jurisdiction of the cross-claim is allowing the tail to wag the dog. The present writer believes that the logic of treating the cross-claim as a part of the "action," "case or controversy" and the desirability of settling the parties' disputes in one action justify an interpretation allowing the cross-claim.

IMPLEADER

Rule 14 of the Federal Rules of Civil Procedure provides that a defendant may file a third-party complaint against a person who is or may be liable to him for all or part of the plaintiff's claim. When the basis for entertaining the plaintiff's claim is diversity of citizenship the court can entertain a third-party complaint against a person who is a citizen of the same state as the original plaintiff because there is diversity between the third-party plaintiff and such person (third-party defendant).[71] Even when the defendant and the third-party defendant are citizens of the same state the court has the power to deal with the dispute between them if there is diversity of citizenship between plaintiff and defendant and plaintiff's claim involves the required amount. This is true because the third-party proceedings are said to be ancillary.[72] Consequently, when jurisdiction is based on a federal question in plaintiff's case the federal district court will have jurisdiction of an accompanying third-party complaint arising under state law and between citizens of the same state.[73]

The decided cases have usually held that the plaintiff can assert a claim against the third-party defendant only if there are independent grounds of federal jurisdiction over the claim.[74] The reason

71. Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71 (2d Cir. 1949); Sheppard v. Atlantic States Gas Co., 167 F.2d 841 (3d Cir. 1948); Williams v. Keyes, 125 F.2d 208 (5th Cir. 1942).

72. 3 MOORE, FEDERAL PRACTICE ¶ 14.26, at p.496 (2d ed. 1948). *Cf.* United States v. Hogansburg Milk Co., 8 FED. RULES SERV. 14a.11, Case 4 (N.D.N.Y. 1944). The ancillary concept also takes care of the jurisdictional amount. The third-party complaint need involve no particular amount. Schram v. Roney, 30 F. Supp. 458 (E.D. Mich. 1939).

73. Metzger v. Breeze Corporations, 37 F. Supp. 693 (D.N.J. 1941); United States v. Pryor, 2 F.R.D. 382 (N.D. Ill. 1940).

74. *E.g.*, Friend v. Middle Atlantic Transp. Co., 153 F.2d 778 (2d Cir.), *cert. denied sub nom.* Friend v. Friend, 328 U.S. 865 (1946); Southwest Lime Co. v. Lindley, 12 F.R.D. 484 (W.D. Ark. 1952); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E.D.N.Y. 1941). *Contra:* Sklar v. Hayes, 1 F.R.D. 594 (E.D. Pa. 1941).

given is the inability of the plaintiff to add to his complaint a non-federal claim against a citizen of the plaintiff's state. The grounds supporting the main claim are insufficient for a second claim against a different defendant added to the complaint by amendment even when both claims arise out of the same transaction. Before finally accepting this reasoning the courts should weigh the fact that the plaintiff cannot assert a claim against a third-party defendant as such until he is brought into the case by the defendant. It is arguable that this is sufficient to distinguish between claims against ordinary defendants and those against third-party defendants.[75]

INTERPLEADER

A specific section of the Judicial Code authorizes the district courts to take jurisdiction of an action of interpleader in which there are two or more adverse claimants of diverse citizenship as defined in Section 1332 of the Code who claimed money or property or certain benefits from the plaintiff of the value of $500.00 or more.[76] The present section is broader than the one in force prior to 1948 because the earlier provision required the claimants to be citizens of different states whereas under the new provision one of the claimants can be an alien if the other is a citizen of a state. Indeed, the claimants may have any citizenship covered by the combinations described in Section 1332[77] and the citizenship of the plaintiff may be the same as that of one of the claimants.[78] The value of the matter in controversy need not exceed $500.00.

Prior to the enactment of a specific statutory provision the federal courts could entertain a bill of interpleader if the federal and equity jurisdictional prerequisites were satisfied. They can still exercise this power, it seems, and thereby take jurisdiction of a case which does not satisfy the requirements of the interpleader statute.[79] Thus a district court may adjudicate an interpleader action in which the plaintiff is incorporated in one state and the claimants are citizens of another, provided the value of the matter in controversy exceeds

75. *See* Malkin v. Arundel Corp., 36 F. Supp. 948, 950 (D. Md. 1941).
76. 28 U.S.C.A. § 1335 (1950).
77. *Ibid.*
78. Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 Sup. Ct. 44, 84 L. Ed. 85 (1939). The opinion assumes that the plaintiff has no interest in the controversy. This is not always true. *Compare* John Hancock Mut. Life Ins. Co. v. Kegan, 22 F. Supp. 326 (D. Md. 1938), *with* Boice v. Boice, 135 F.2d 919 (3d Cir. 1943).
79. The lower federal courts which have passed on the question have almost unanimously reached this result. See Note, 172 A.L.R. 823 (1948). The *Treinies* case said: "We do not determine whether the ruling here is inconsistent with the conclusion in those cases where jurisdiction was rested on diversity of citizenship between the applicant and co-citizens who are claimants." 308 U.S. at 73 n.17.

$3000.00.[80] Likewise an alien corporation can interplead claimants who are all citizens of a single state, if the usual jurisdictional amount is present.[81] Hence, the interpleader statute has the effect of conferring or confirming[82] jurisdiction but not limiting it.

A striking difference occurs as to the application of the doctrine of *Strawbridge v. Curtiss.* If jurisdiction is asserted on the ground of diversity of citizenship between the plaintiff and the claimants, diversity must be complete because reliance is placed on the general provision for jurisdiction (Section 1332).[83] On the other hand, if the specific interpleader statute (Section 1335) is relied on, complete diversity between the claimants is not necessary. It is sufficient if there is diversity between two adverse claimants even though another claimant is a citizen of the same state as an opposing claimant.[84]

There have been few reported cases of attempted removal of an interpleader action from a state to a federal court[85] but there seems to be no reason why such actions should not be covered by the provision that any civil action of which the district courts have original jurisdiction may be removed.[86]

CLASS ACTIONS

The true class action, which is provided for in Rule 23(a)(1), is not within the scope of our subject because such an action involves a single common claim of many persons. Each of the actions provided for in Rule 23(a)(2) and (3), by definition, is made up of several claims. They therefore pertain to the subject of this article. If jurisdiction is based on diversity, only the citizenship of the persons named in the complaint as parties is considered. The citizenship of the other members of the class will not defeat the jurisdiction.[87] Furthermore, members of the class can intervene in the action and the common citizenship of the intervenors and parties on the other side will not defeat the jurisdiction.[88]

The amount of the claim of each original plaintiff of record must

80. Rossetti v. Hill, 162 F.2d 892, 172 A.L.R. 821 (9th Cir. 1947).
81. Security Trust & Savings Bank of San Diego v. Walsh, 91 F.2d 481 (9th Cir. 1937).
82. See First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969 (C.C.D. Conn. 1902).
83. Girard Trust Co. v. Vance, 5 F.R.D. 109 (E.D. Pa. 1946).
84. *Ibid.*
85. Von Herberg v. Seattle, 27 F.2d 457 (9th Cir.), *cert. denied sub nom.* Puget Sound Power & Light Co. v. Von Herberg, 278 U.S. 644 (1928); First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969 (C.C.D. Conn. 1902); Bailey v. The New York Savings Bank, 2 Fed. 14 (C.C.S.D.N.Y. 1880).
86. 28 U.S.C.A. § 1441(a) (1950). Subdivision (b) would be a limitation on the right of removal in some instances. Could an interpleader action ever be removed under (c)?
87. Stewart v. Dunham, 115 U.S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329 (1885).
88. Shipley v. Pittsburgh & L.E.R.R., 70 F. Supp. 870 (W.D. Pa. 1947).

be more than $3000.00; since the claims of several cannot be added together to make the value of the matter in controversy.[89]

Intervention

Intervention presents another variation of the multiple-claim situation. An attempt by a person who is an indispensable party and who is a citizen of the same state as a party on the other side, to intervene in a diversity-of-citizenship case will inform the court that actually diversity is not complete and will result in a dismissal of the entire case.[90] If a person is not indispensable the court will have jurisdiction of the original action without regard to his citizenship;[91] he may become a party later if his intervention is ancillary. Unless the intervenor's claim can be considered ancillary it must involve diversity of citizenship or other grounds of jurisdiction.[92] Whether a particular proceeding of this type is incidental and therefore auxiliary is left in considerable doubt and confusion. The authorities are in conflict.[93] It would seem appropriate to treat an intervention as ancillary whenever the intervenor's presence will aid in the disposition of the main action.[94] However, some courts have made the existence of custody or control by the court of property or a fund the test.[95] In a class action a member of the class is permitted to intervene even though the district court could not entertain his claim in a separate action.[96]

The Constitution

The difference regarding multiple-claim cases between original and removal jurisdiction was described above. Obviously the Constitution does not mention removal of cases from state courts. It would seem that removed cases would have to fall within the judicial power described in Article III, Section 2. Thus the fundamental law applicable to federal judicial power over cases filed originally in the district courts of the United States is the same as that applicable

89. Lion Bonding & Surety Co. v. Karatz, 262 U.S. 77, 43 Sup. Ct. 485, 67 L. Ed. 865 (1923); Scott v. Frazier, 253 U.S. 243, 40 Sup. Ct. 503, 64 L. Ed. 883 (1920); Russell v. Stansell, 105 U.S. 303, 26 L. Ed. 989 (1881).
90. Charleston Nat. Bank v. Oberreich, 34 F. Supp. 329 (E.D. Ky. 1940).
91. A. R. Barnes & Co. v. Berry, 156 Fed. 72 (C.C.S.D. Ohio 1907).
92. Hoffman v. McClelland, 264 U.S. 552, 44 Sup. Ct. 407, 68 L. Ed. 845 (1924).
93. 4 Moore, Federal Practice 139, 140-46 (2d ed. 1950).
94. Note, 55 Harv. L. Rev. 264 (1941).
95. Fulton Nat. Bank v. Hozier, 267 U.S. 276, 45 Sup. Ct. 261, 69 L. Ed. 609 (1925); see the circuit court opinion quoted in Forest Oil Co. v. Crawford, 101 Fed. 849, 850 (3d Cir. 1900). See Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191, 197 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952).
96. Stewart v. Dunham, 115 U.S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329 (1885); 4 Moore, Federal Practice 137, 146 (2d ed. 1950).

to removed cases, but Congress, acting within the framework of the fundamental (constitutional) law, has enacted separate provisions for original and removal jurisdiction. The federal courts other than the Supreme Court do not derive their power directly from the Constitution but can exercise only so much of the constitutional judicial power as is conferred on them by statute.[97] The difference between original and removal jurisdiction results from the fact that Congress conferred more of the constitutional jurisdiction when providing for removal. The Supreme Court has not expressly decided how Article III, Section 2, applies to cases or controversies involving multiple-claims, but as pointed out above the Court seems to assume, in the decisions on separable controversies that jurisdiction over two or more causes of action may be based on the diversity of citizenship in one (the separable controversy).

In *Texas Employers Insurance Association v. Felt*,[98] the Court of Appeals for the Fifth Circuit explained the authority to deal with a whole case, removed on the ground that it contained a separable controversy, by saying that such a case was within the ancillary jurisdiction. A simpler explanation is that an act of Congress conferred jurisdiction of the case involving the separable controversy and the language of the Constitution is broad enough to justify the power exercised by Congress. The pertinent language of Article III, Section 2 is:

> "The judicial power of the United States shall extend . . . to controversies . . . between citizens of different states."

If these words have their ordinary meaning the controversy is between citizens of different states whenever one of the parties is a citizen of one state and a party on the other side is from a different state. A literal reading of the Constitution does not require that all the parties from the same state be on one side of the case. Mr. Justice Bradley while on circuit said:

> "Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. *It certainly would not under the constitution.* The case would still be a controversy between citizens of different states. But the strict construction put by the courts

97. United States v. Delaware and Hudson Co., 213 U.S. 366, 408, 29 Sup. Ct. 527, 536, 53 L. Ed. 837 (1909); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753 (1909).

98. 150 F.2d 227, 234 (5th Cir. 1945). The suggestion has been made that the power of Congress is derived from the necessary and proper clause. Hoffman v. Lynch, 23 F.2d 518, 522 (N.D. Ga. 1928).

> upon the judiciary act is decisive against the jurisdiction; and I am bound by it."[99]

Thus the judicial power described in the Constitution extends to an action by a citizen of State 1 against a citizen of State 2 and a citizen of State 1. *Barney v. Latham,* the separable controversy case, seems to be based on this conclusion although the Supreme Court does not say so. *Strawbridge v. Curtiss* found in an act of Congress the requirement of complete diversity for cases begun in the federal district court by the plaintiff. The opinion clearly says that the *statute* is being interpreted.[100] The situation would not arise in admiralty so far as removal jurisdiction is concerned but in connection with original jurisdiction a problem similar to the one involving federal-question jurisdiction is presented and also a problem peculiar to admiralty.[101] Perhaps the most doubtful clause is the one relating to aliens. It certainly is arguable that a case in which one cause of action is between a citizen of a state and an alien and the other cause of action is between the plaintiff and another citizen of the same state and arises under state law, is not a controversy between citizens of a state and foreign citizens or subjects.

Like the provision relating to citizens of different states, the clause, "controversies to which the United States shall be a party," seems perfectly clear. Just as an action containing a cause of action between citizens of different states is still a controversy between citizens of different states within the meaning of the Constitution even when it contains additional causes of action which are not between such citizens, so the entire suit by the United States as an individual or corporation is a controversy to which the United States is a party although the claim by the other plaintiff is a separate cause of action.[102] The federal-question provision, has been thought by some to be ambiguous.[103] Chief Justice Marshall, however, interpreted the

99. Lockhart v. Horn, 15 Fed. Cas. 751, 753, No. 8445 (C.C.S.D. Ala. 1871) (italics added). *Accord,* Whelan v. New York, L.E. & W.R.R., 35 Fed. 849, 859 (C.C.N.D. Ohio 1888). The word "controversy" in Article III means a civil case. Muskrat v. United States, 219 U.S. 346, 356, 357, 31 Sup. Ct. 250, 55 L. Ed. 246 (1911); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239, 57 Sup. Ct. 461, 81 L. Ed. 617 (1937). Mr. Justice Bradley is saying that the Constitution does not require each party to the case to be a citizen of a different state from every party in the other side. It seems that the diversity clause of Article III does not even require all parties to the case to be citizens of states. This may be the theory upon which Congress adopted 28 U.S.C.A. § 1332(a)(3) (1949).

100. 3 Cranch 267, 2 L. Ed. 435 (U.S. 1806). See also Treinies v. Sunshine Mining Co., 308 U.S. 66, 71, 60 Sup. Ct. 44, 84 L. Ed. 85 (1939).

101. See notes 12, 13 and 14 *supra.*

102. *Cf.* Erickson v. United States, 264 U.S. 246, 249, 44 Sup. Ct. 310, 68 L. Ed. 661 (1924). Jurisdiction over actions against the United States is not based on the judicial power described in Article III. Williams v. United States, 289 U.S. 553, 53 Sup. Ct. 751, 77 L. Ed. 1372 (1933); but see United States v. Union Pacific R.R., 98 U.S. 569, 603, 25 L. Ed. 143 (1879).

103. "What do we mean by the words, *arising under the Constitution?*

clause authoritatively at an early day. Although the case, *Osborn v. Bank of the United States*,[104] did not involve more than one claim, the views expressed in the opinion are applicable to the multiple-claim situation. The Chief Justice said:

> "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 questions of fact or of law may be involved in it."[105]

Earlier in the opinion he said of the contrary interpretation:

> "On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law."[106]

Reading the two quotations together leads to the conclusion that by "cause" Marshall meant "case." Although cause is sometimes used by lawyers as a shortened expression for cause of action,[107] more often cause means case, action or suit.[108] The context shows that the latter meaning was intended in the *Osborn* case. It follows that *Osborn v. Bank* can be read so as to support the theory that the Constitution does not prevent a federal court from entertaining all the claims or causes of action in a case when one of them arises under a law of the United States. *Hurn v. Oursler* can be reconciled with this theory by limiting the decision to an interpretation and application of the statute. This is consistent with the language of the opinion and the practice of the Supreme Court to avoid the decision of constitutional questions when the case can be decided by the construction of a statute.[109] Therefore the constitutional language "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," permits federal courts to receive authority to entertain multiple-claim cases which include causes of action that would not be within the jurisdiction if sued on alone.[110]

What do they relate to? I conceive this to be very ambiguous." Edmund Randolph, 2 ELLIOT'S DEBATES 417, 419 (1828).

104. 9 Wheat. 738, 6 L. Ed. 204 (U.S. 1824).

105. *Id.* at 823.

106. *Id.* at 822.

107. *E.g.*, CLARK, CODE PLEADING 132 (2d ed. 1947).

108. Blyew v. United States, 13 Wall. 581, 595, 20 L. Ed. 638 (U.S. 1871); 6 WORDS AND PHRASES 332-38 (1940); BOUVIER, LAW DICTIONARY 156 (2d ed., Baldwin, 1946).

109. Cases cited note 97 *supra*.

110. See 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1646 at p.486 (3d ed. 1858).

Did Congress adopt this view of its authority under the diversity clause, the federal-question clause, and the other clauses of Article III, Section 2, when it passed Section 1441(c)[111] as a part of the revised Title 28, United States Code, or did it merely adopt the theory of the court of appeals in the *Felt* case, that the jurisdiction over the otherwise nonremovable cause of action is ancillary?

Conclusion

The Supreme Court seldom has found it necessary to interpret the provisions of the Constitution relating to the judicial power. The few pronouncements of the Court on the subject show a much more liberal attitude toward the Constitution than toward the statutory provisions. It has been said that the power to settle controversies between a state and citizens of another state is remedial and, therefore, to be construed liberally.[112] Because all the power described in Article III, Section 2, is granted so that the federal courts may settle controversies, the opinion was saying in effect that the judicial power is remedial and to be construed liberally. On the other hand, the Court holds that the statutes conferring jurisdiction are to be strictly construed.[113] This results in practically the same language receiving different interpretations but the Court has recognized that identical words may have different meaning in a statute from that which they have in the Constitution.[114]

The application of the principles of federal jurisdiction to multiple-claim cases is in a state of development. The ancillary concept has been used to sustain the addition of nonfederal claims to suits over which the court had previously acquired jurisdiction.[115] In some of these cases the concept seems to be strained. A similar result could be reached by thinking of the interjected claims as parts of the original action and the jurisdiction as unaffected by changes in the action after it is begun.[116]

Many of the questions remain undecided. For authoritative answers it is necessary to await the future.

111. Quoted in text at note 21 *supra*.
112. Chisholm v. Georgia, 2 Dall. 419, 476, 1 L. Ed. 440 (U.S. 1793).
113. Healy v. Ratta, 292 U.S. 263, 270, 54 Sup. Ct. 700, 78 L. Ed. 1248 (1934).
114. Lamar v. United States, 240 U.S. 60, 36 Sup. Ct. 255, 60 L. Ed. 526 (1916).
115. But it has not been considered applicable to joinder in the complaint except on removal nor to permissive counterclaims.
116. See note 53 *supra*.