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## NOTES

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### JURISDICTION OF THE FEDERAL COURTS IN MULTIPLE QUESTION CASES

Since the provisions of the Federal Constitution<sup>1</sup> marking out the limits on the judicial power of the lower federal courts do not prescribe how much of that power shall be exercised by the courts, each suitor in federal court must point to some specific jurisdictional provision covering his particular suit.<sup>2</sup> One

<sup>1</sup> Article III, Section Two.

<sup>2</sup> "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it." *The Mayor v. Cooper*, 6 Wall. (U.S.) 247, 252, 18 L. Ed. 851 (1867). See also *Sheldon v. Sill*, 8 How. (U.S.) 441, 12 L. Ed. 1147 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 Sup. Ct. 79, 67 L. Ed. 226 (1922).

such provision, first enacted in 1875, gives the federal judiciary jurisdiction over "all suits of a civil nature, at common law or in equity . . . where the matter in controversy . . . arises under the Constitution or laws of the United States."<sup>3</sup> This "federal question" jurisdiction today represents a substantial part of the business of the lower federal courts.

The vagueness inherent in several terms in the statute gives rise to this difficulty: When a proceeding is brought presenting a number of questions, some federal in character, and others non-federal, should the federal courts have jurisdiction of such a proceeding in its entirety?

At an early date one line of authority arose which stated dogmatically that if a substantial<sup>4</sup> federal question was raised, the jurisdiction of the federal courts extended to all matters in issue,<sup>5</sup> even though the decision ignored the federal question<sup>6</sup> or decided it adversely to the plaintiff.<sup>7</sup> This statement was made in two major groups of cases: (1) corporations chartered by act of Congress wished to sue in federal court because of that fact,<sup>8</sup> (2) residents of a state wished to enjoin the action of state administrative boards or officials on the ground such action will violate some provision of the Federal Constitution, and will also contravene a state statute or constitution.<sup>9</sup>

<sup>3</sup> 18 Stat. 470, 28 U.S.C. § 41 (1) (Judicial Code, § 24, as amended).

<sup>4</sup> *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (1913); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062 (1933); *Ex parte Poresky*, 54 Sup. Ct. 3, 78 L. Ed. 49 (1933); *Central Transfer Co. v. Commercial Oil Co.*, 45 F. (2d) 400 (D.C.E.D.Mo. 1930). The federal question must not be too remote: *Joy v. City of St. Louis*, 201 U.S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776 (1906).

<sup>5</sup> See especially the language of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. (U.S.) 738, 823, 6 L. Ed. 204 (1824): "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."

<sup>6</sup> *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753 (1909); *Davis v. Wallace*, 257 U.S. 478, 42 Sup. Ct. 164, 66 L. Ed. 325 (1922); *Bohler v. Callaway*, 267 U.S. 479, 45 Sup. Ct. 431, 69 L. Ed. 745 (1925); *Chicago Great Western Railway Co. v. Kendall*, 266 U.S. 94, 45 Sup. Ct. 55, 69 L. Ed. 183 (1924); *Conn v. Ringer*, 32 F. (2d) 639 (C.C.A. 6th, 1929).

<sup>7</sup> *People's Savings Bank v. Layman*, 134 Fed. 635 (C.C.S.D.Ia., 1905).

<sup>8</sup> *Osborn v. Bank of United States*, 9 Wheat. (U.S.) 738, 6 L. Ed. 204 (1824); cf. also *Pacific Railroad Removal Cases*, 115 U.S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1885). This jurisdiction has now been abolished by specific legislative mandate (43 Stat. 936, 28 U.S.C. § 42).

<sup>9</sup> *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753 (1908); *Michigan Central R.R. v. Powers*, 201 U.S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744 (1906); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510 (1913); *Louisville & Nashville R.R. Co. v. Garrett*, 231 U.S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229 (1913); *Ohio Tax Cases*, 232 U.S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737 (1914); *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280 (1917); *Louisville & Nashville R.R. Co. v. Greene*, 244 U.S. 522, 37 Sup. Ct. 683, 61 L. Ed.

Another line of authority took a somewhat narrower view of the scope of federal jurisdiction in situations apparently very similar, in which proceedings were brought to secure relief for infringement of patents, copyrights, or registered trademarks, and also for alleged unfair trade practices of the defendant.<sup>19</sup> Although the exact rule varied somewhat in each federal circuit,<sup>21</sup> in the main

1291 (1917); *Southern Railway Co. v. Watts*, 260 U.S. 519, 43 Sup. Ct. 192, 67 L. Ed. 375 (1923); *United Fuel Gas Co. v. R.R. Commission*, 278 U.S. 300, 49 Sup. Ct. 150, 73 L. Ed. 390 (1929); *Sterling v. Constantin*, 287 U.S. 378, 53 Sup. Ct. 190, 77 L. Ed. 254 (1932). The principle has become so well settled that many cases do not even discuss the question of jurisdiction: *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U.S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552 (1915); *Atlantic Coast Line R.R. Co. v. Daughton*, 262 U.S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051 (1922).

<sup>19</sup> This view has evolved mainly through the persuasive force of several broad dicta of the Supreme Court in *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365 (1901); *Leschen Rope Co. v. Broderick*, 201 U.S. 166, 26 Sup. Ct. 407, 50 L. Ed. 710 (1906); and *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U.S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536 (1911).

<sup>21</sup> The Second Circuit cases restricted federal jurisdiction to the greatest extent; the majority of them agreed that the federal courts were without power to hear the claim of unfair competition, no matter how closely related it was to the claim of infringement. *Keasby & Mattison Co. v. Philip Carey Mfg. Co.*, 113 Fed. 432 (C.C.S.D.N.Y. 1901); *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42 (C.C.A. 2nd, 1908), appeal dismissed 217 U.S. 457, 30 Sup. Ct. 613, 54 L. Ed. 838 (1910); *National Casket Co. v. New York & Brooklyn Casket Co.*, 185 Fed. 533 (C.C.S.D.N.Y. 1911); *Vose v. Roebuck Weather Strip & Wire Screen Co.*, 210 Fed. 687 (D.C.E.D.N.Y. 1914); *Planten v. Gedney*, 224 Fed. 382 (C.C.A. 2nd, 1915); *Craig Demagnetizer & Ink Dryer Corp. v. Static Control Co.*, 295 Fed. 72 (C.C.A. 2nd, 1923); *Hunyadi Janos Corp. v. Stoeger*, 10 F. (2d) 26 (C.C.A. 2nd, 1925); *Ingrassia v. A. C. W. Mfg. Corp.*, 24 F. (2d) 703 (C.C.A. 2nd, 1928), certiorari denied 277 U.S. 602, 48 Sup. Ct. 562, 72 L. Ed. 1010 (1928); *Recamier Mfg. Co. v. Harriet Hubbard Ayer, Inc.*, 59 F. (2d) 802 (D.C.S.D.N.Y. 1932). The same view is expressed in *Cushman v. Atlantis Fountain Pen Co.*, 164 Fed. 94 (C.C.D.Mass. 1908), and *Mecky v. Grabowski*, 177 Fed. 591 (C.C.E.D.Pa. 1910).

On the other hand, at least one case in the Second Circuit adopted the rule of the "constitutional" cases in its entirety: *Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.*, 182 Fed. 832 (C.C.N.D.N.Y. 1910). This position is also adopted by *Vogue Co. v. Vogue Hat Co.*, 12 F. (2d) 991 (C.C.A. 6th, 1926), certiorari denied 273 U.S. 706, 47 Sup. Ct. 98, 71 L. Ed. 850 (1926).

Some decisions seem to take the view that the court has jurisdiction, at least where the non-federal questions are "intertwined" with the federal question, but can, in its discretion, refuse to exercise that jurisdiction: *Mallinson v. Ryan*, 242 Fed. 951 (D.C.S.D.N.Y. 1917); *Pinaud, Inc. v. Huebschman*, 27 F. (2d) 531 (D.C.E.D.N.Y., 1928).

A fourth line of cases would refuse jurisdiction of the claim for unfair competition on the theory it presented a "separate cause of action," although it is not always clear that was true: *U.S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co.*, 234 Fed. 868 (C.C.A. 7th, 1916); *Unit Construction Co. v. Huskey Mfg. Co.*, 241 Fed. 129 (D.C.E.D.Pa. 1917); *General Baking Co. v. Shults Bread Co.*, 288 Fed. 954 (D.C.E.D.N.Y., 1923), affd. 293 Fed. 1018 (C.C.A. 2nd, 1923); *Kasch v. Cliett*, 297 Fed. 169 (C.C.A. 5th, 1924). For a recent decision applying this theory effectively and correctly, see *General Motors Corp. v. Rubsam Corp.*, 65 F. (2d) 217 (C.C.A. 6th, 1933), certiorari denied 54 Sup. Ct. 123, 78 L. Ed. 115 (1933).

A further variation is presented by a group of cases which would permit proof of unfair

it was agreed that the fact that there was an alleged violation of the plaintiff's "federal right" did not of its own weight entitle him to the entire relief sought by his bill.

On principle it is hard to justify the discrepancy between the two lines of authority.<sup>12</sup> It should be noticed, however, that prior to the promulgation of Equity Rule 26 in 1912 there was some doubt as to whether it was proper, as a

competition as an element in the damages plaintiff had suffered through the infringement: *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770 (C.C.M.D.Pa. 1909); *Ludwigs v. Payson Mfg. Co.*, 206 Fed. 60 (C.C.A. 7th, 1913); *Shrauger & Johnson v. Phillip Bernard Co.*, 240 Fed. 131 (D.C.N.D.Ia. 1917); *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 Fed. 472 (C.C.A. 7th, 1916); *K-W Ignition Co. v. Temco Electric Motor Co.*, 243 Fed. 588 (C.C.A. 6th, 1917); *Badger v. E. B. Badger & Sons Co.*, 288 Fed. 419 (D.C.D.Mass. 1923); *Payton v. Ideal Jewelry Mfg. Co.*, 7 F. (2d) 113 (C.C.A. 1st, 1925); *Wensel v. Gold Hill Hardware Mfg. Co.*, 21 F. (2d) 974 (D.C.S.D.Cal. 1927); cf. *N. O. Nelson Mfg. Co. v. F. E. Myers & Bro. Co.*, 25 F. (2d) 659 (C.C.A. 6th, 1928), *affd.* 29 F. (2d) 968 (C.C.A. 6th, 1929).

Two other types of cases adopted a rule very similar to this theory of "aggravation of damages." In one the court stressed primarily the presence of an actual infringement of a valid patent; if infringement was not found, no relief would be given for unfair competition, even though a valid patent was proved: *Sprigg v. Fisher*, 222 Fed. 964 (D.C.D.Md. 1915); *Detroit Showcase Co. v. Kawneer Mfg. Co.*, 250 Fed. 234 (C.C.A. 2nd, 1918); *Taylor v. Bostick*, 299 Fed. 232 (C.C.A. 3rd, 1924). In the other the court emphasized the validity of the patent; if no valid patent was proved, no relief for unfair competition would be given: *Schiebel Toy & Novelty Co. v. Clark*, 217 Fed. 760 (C.C.A. 6th, 1914); *certiorari denied* 235 U.S. 707, 35 Sup. Ct. 283, 59 L. Ed. 434 (1914); *Gerrard v. Cary*, 9 F. (2d) 949 (D.C.E.D.N.Y., 1924), *affd.* 9 F. (2d) 957 (C.C.A. 2nd, 1925). The distinction between the last three types of cases is apparently only a matter of emphasis; courts adopting one view as contrasted with the other two will simply stress certain factors, common to each view, more strongly.

<sup>12</sup> Compare the rules which have been worked out in related branches of federal jurisdiction. Proceeding under the Urgent Deficiencies Act of Oct. 22, 1913 (28 U.S.C. § 47) plaintiff joined in one suit a claim properly cognizable by a three-judge court, and one not so cognizable. Held, the three judge court had no jurisdiction to hear the second claim. *Pittsburgh & W.Va. Ry. v. U.S.*, 281 U.S. 479, 50 Sup. Ct. 378, 74 L. Ed. 980 (1930).

Plaintiff sues in a state court, joining a claim raising a federal question with a claim raising only non-federal questions. Can the entire proceeding, or the part of it raising the federal question, be removed to a federal court? Three rules have evolved: (1) Since the federal court would have no jurisdiction of one part of the suit, it should remand the entire suit to state court: *Tullar & Tullar v. I.C. R. Co.*, 213 Fed. 280 (D.C.N.D. Ia. 1914). (2) Since the federal court has jurisdiction of one of the claims, the entire suit is removable: *Hoge v. Canton Insurance Office*, 103 Fed. 513 (C.C.D. Wash. 1900); *Givens v. Wright*, 247 Fed. 233 (D.C.N.D.Tex. 1918). (3) The federal court has jurisdiction only of the claim raising a federal question; the remainder of the suit should be remanded to state court: *Tillman v. Russo-Asiatic Bank*, 51 F. (2d) 1023 (C.C.A. 2nd, 1931); *certiorari denied* 285 U.S. 539, 52 Sup. Ct. 312, 76 L. Ed. 932 (1932); and see *Barney v. Latham*, 103 U.S. 205, 214, 26 L. Ed. 514 (1880).

Plaintiff's complaint raises a federal question, and defendant files a counterclaim presenting only non-federal questions. Should the federal courts have jurisdiction of the counterclaim? See *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593, 46 Sup. Ct. 367, 70 L. Ed. 743 (1925); *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377 (D.C.D.N.J., 1914); *Dickinson Tire & Machine Co. v. Dickinson*, 29 F. (2d) 493 (C.C.A. 2nd, 1928); cf. *Frankart, Inc. v. Metal Lamp Corp.*, 32 F. (2d) 920 (D.C.E.D.N.Y. 1929).

matter of pleading, to seek relief in the same proceeding for both unfair competition and infringement,<sup>13</sup> and this doubt may have affected the later decisions. Also, the relief sought in cases of the "constitutional" type was typically single—the enjoining of a certain set of acts—however different the reasons for the injunction might be; while in the "infringement" cases if relief was given for unfair competition the normal result was to enlarge the quantum of recovery otherwise obtainable.<sup>14</sup>

The lack of harmony in the two lines of decisions was rarely noticed by the courts or called to their attention by counsel until a fairly recent date, when attempts,<sup>15</sup> largely unsuccessful, were made to reconcile the two rules. Realizing the inconsistencies in the two lines of decisions, the Supreme Court, in the recent case of *Hurn v. Oursler*,<sup>16</sup> examined the two situations carefully and

<sup>13</sup> Note the language in *Ball & Socket Fastener Co. v. Cohn*, 90 Fed. 664 (C.C.S.D.N.Y., 1898); *New Departure Mfg. Co. v. Sargent & Co.*, 127 Fed. 152 (C.C.A. 2nd, 1903); *George Frost Co. v. Kora Co.*, 136 Fed. 487 (C.C.S.D.N.Y. 1904). Compare, however, *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U.S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536 (1911).

<sup>14</sup> See note, 40 Harv. L. Rev. 298 (1926).

<sup>15</sup> The most persuasive attempt to rationalize the "infringement" and "constitutional" cases was made in *Levering & Garrigues Co. v. Morrin*, 61 F. (2d) 115 (C.C.A. 2nd, 1932), *affd.* on another ground in 289 U.S. 103, 53 Sup. Ct. 549, 77 L. Ed. 741 (1933). The theory there advanced was that, in a case of the "constitutional" type, questions of local law *underlie* the federal claim asserted, and hence are necessarily involved in examining the federal claim; whereas in cases involving infringement the non-federal questions were independent of the federal questions. As a general proposition it would seem this is not true.

1 Hughes, *Federal Practice, Jurisdiction and Procedure* (1931) § 653, p. 501, suggests that in all cases of the "constitutional" type the basis of federal jurisdiction, the Fourteenth Amendment, is always present; whereas in the "infringement" cases it is first decided that no valid patent exists, hence the basis for federal jurisdiction is gone. This overlooks a multitude of cases in which the patent is declared valid, but no relief is given for unfair competition.

A note, 27 Ill. L. Rev. 816 (1933), suggests that the distinction is between a case arising under the Federal Constitution and one arising under a law of the United States; in the latter case federal jurisdiction is confined to the federal claim. This view fails to consider the "infringement" cases in which relief for unfair competition is granted.

Nims, *Unfair Competition & Trademarks* (3rd ed., 1929), § 306, treats the patent problem as one of joinder and not of jurisdiction. The courts, however, say it is a question of jurisdiction and not procedure; see *Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 238 U.S. 254, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295 (1915). See also 33 Col. L. Rev. 296, 699 (1933).

<sup>16</sup> 289 U.S. 238, 53 Sup. Ct. 586, 77 L. Ed. 756 (1933). Plaintiff sued for an injunction, for damages, and for an accounting, alleging (1) defendant had infringed a copyrighted play of plaintiff's; (2) defendant's acts also constituted unfair competition against plaintiff; (3) defendant's acts further constituted unfair competition with respect to a revised, uncopyrighted version of the copyrighted play. The Supreme Court held that the lower federal court had jurisdiction over plaintiff's second claim, regardless of what disposal was made of the first claim; but that the third claim was an independent "cause of action," and hence the lower federal court had no jurisdiction thereover. It appeared that plaintiff was complaining that defendant had violated three of plaintiff's "rights" by means of a single set of acts, unlike the usual infringement case in which additional facts must be shown to make out a case of unfair competition.

concluded that the sounder rule was the one enunciated broadly and without exception in the "constitutional" cases.<sup>17</sup> The general principle governing all multiple question cases is stated as follows:

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* (p. 246).<sup>18</sup>

The distinction between a "ground" and a "cause" of action is an exceedingly difficult one to draw, however.<sup>19</sup> The two terms fluctuate in meaning with the situation under analysis<sup>20</sup> and the particular analyst;<sup>21</sup> as a result, it is not impossible that in some situations the lower federal courts will simply continue to follow the present lines of authority.

On the other hand, the Supreme Court apparently intended to lay down a fairly definite rule covering the entire field. Although the exact application of that rule is somewhat difficult to gather from the opinion in the *Hurn* case, in

<sup>17</sup> The case has been criticized from the constitutional standpoint in 46 Harv. L. Rev. 1339 (1933). It should be noted that there is at least one limit on the general applicability of the rule in the "constitutional" type of case—a limit dictated by expedience: *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 49 Sup. Ct. 282, 73 L. Ed. 652 (1929).

Compare with the instant case the language used in *Stark Bros. Co. v. Stark*, 255 U.S. 50, 41 Sup. Ct. 221, 65 L. Ed. 496 (1921); *Geneva Furniture Co. v. Karpen*, 238 U.S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295 (1915).

<sup>18</sup> Compare, however, *Brown v. Guarantee Trust Co.*, 128 U.S. 403, 412, 9 Sup. Ct. 127, 32 L. Ed. 468 (1888): "To support the objection of multifariousness, because the bill contains different causes of suit against the same person . . . the grounds of suit must be different. . . ."

<sup>19</sup> In *U.S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co.*, 234 Fed. 868 (C.C.A. 7th, 1916), the court enunciated substantially the same rule as laid down in the *Hurn* case; however, in applying it to a very similar set of facts, the court reached the opposite conclusion to that reached by the Supreme Court, and refused to take jurisdiction of the unfair competition claim.

<sup>20</sup> This the Supreme court recognizes in the *Hurn* case; it says, for purposes of federal jurisdiction, "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result . . . is the violation of but one right by a single legal wrong" (quoting from *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 321, 47 Sup. Ct. 600, 71 L. Ed. 1069 (1927)). This, however, does not help greatly in distinguishing a "ground" from a "cause" of action. See, also, *U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62, 53 Sup. Ct. 278, 77 L. Ed. 291 (1933), pointing out that at times a "cause of action" is identified with the infringement of a right, or violation of a duty; at other times it is a concept of the law of remedies, dependent on the form of action; and at other times it refers to a group of operative facts from which a legal grievance has developed.

<sup>21</sup> See, *Clark Code Pleading* (1928), c. 2, p. 75; *Pomeroy, Code Remedies* (4th ed., 1904), § 347 ff.; *Phillips, Code Pleading* (2nd ed., 1932), c. XI.

the main it seems to be based on pragmatic considerations, such as facilitating trial procedure and eliminating needless litigation.<sup>22</sup>

The scope of the rule can best be appreciated in connection with concrete cases. In the main, four classes of controversies presenting multiple questions arise. In the first, plaintiff relies on one set of operative facts and one legal theory of recovery involving a number of issues,<sup>23</sup> some presenting federal questions, the others involving only non-federal questions.<sup>24</sup> It is almost unthinkable that the federal courts would deny themselves jurisdiction over a proceeding of this type, or, having taken jurisdiction because of the presence of a federal question, abandon it because of an adverse holding on that question. Such a result would deprive both the jurisdictional statute and the constitutional provision of much of their intended scope.<sup>25</sup> Although no reference was made in the *Hurn* decision to cases of this type, it seems certain the Supreme Court had no thought of limiting this well-accepted field of federal jurisdiction. "Issue" is apparently not the equivalent of "cause of action."

In the second class of cases plaintiff relies on one set of operative facts and two legal theories of recovery; theory *A* involving an issue raising a federal question, and theory *B* presenting only non-federal questions.<sup>26</sup> Pragmatic considerations favor complete federal jurisdiction. If the plaintiff proves a certain set of facts in an effort to invoke theory *A*, but fails to meet the requirements of that theory, it seems reasonable to permit him to recover on theory *B* in federal court, rather than send him to state court, to obtain the same relief by proving the same facts. This the Supreme Court recognized in the *Hurn* case, in which the first and second "counts" alleged identical facts, but relied on different legal theories. The court held that these two counts involved but one "cause of action" although separate "grounds."

The weakest argument for complete federal jurisdiction is presented in the

<sup>22</sup> Multiple question suits are practically always equitable proceedings; hence, the desire of equity to give complete relief once it has taken jurisdiction clashes sharply with the theory that the federal courts, though not inferior in any sense, are limited in jurisdiction (see *McCormick v. Sullivan*, 10 Wheat. (U.S.) 192, 6 L. Ed. 300 (1825); *Geneva Furniture Co. v. Karpen*, 238 U.S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295 (1915)).

<sup>23</sup> "Issues" is here used in the sense of controverted propositions of fact and of law.

<sup>24</sup> *Osborn v. Bank of United States*, 9 Wheat. (U.S.) 738, 6 L. Ed. 204 (1824) is typical of this class. The federal question is the existence and extent of the federal charter; other questions, such as the acceptance of a given offer, are normally non-federal.

<sup>25</sup> It is hard to conceive of a case involving only issues presenting federal questions; hence if the presence of non-federal issues bars federal jurisdiction, the jurisdictional statute, broad and sweeping in language, has little, if any, effect. Nor would it be possible for the federal court to have jurisdiction to adjudicate the federal issue, and then send the remainder of the suit to state court; the federal court has no type of judgment adapted to that situation.

<sup>26</sup> *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753 (1908) is a typical case of this class.

third class of cases, in which the plaintiff relies on two sets of operative facts and two legal theories.<sup>27</sup> If the sets of facts present no important common issues, but are substantially independent of each other, no litigation will be saved by permitting the federal courts jurisdiction of the entire suit; instead, the trial may be hampered by the presence of too many issues. The first and third "counts" of the *Hurn* case presented exactly this situation, and the Supreme court refused jurisdiction of the third "count."

As more and more common issues of fact appear in the two sets of facts, however, the balance of convenience swings toward complete federal jurisdiction. Since the federal courts are limited in jurisdiction,<sup>28</sup> it would seem proper to require that the common issues substantially outweigh the non-common issues before the entire case should be heard. Although the *Hurn* case gives no exact statement of the position of the Supreme Court on this type of proceeding, emphasis placed on the word "right"<sup>29</sup> in the decision indicates that the Court believes that a single "right" can be violated by different acts, and yet only one "cause of action" will arise. Also, the court states that it is assimilating the normal case of the "infringement" type to the doctrines of the "constitutional" decisions,<sup>30</sup> including complete federal jurisdiction, and the normal "infringement" case does allege two different sets of facts.

The fourth class of cases is a hybrid variety in which plaintiff relies most heavily on one set of facts and one theory of recovery raising a federal question, and, incidental or ancillary thereto, seeks to increase the quantum of his relief by alleging certain closely related damage raising no federal question.<sup>31</sup> The convenience of permitting complete federal jurisdiction is somewhat stronger than in the third class, and weaker than in the second class. Inasmuch as plaintiff can only recover for such damage by first establishing his main set of facts,<sup>32</sup> the principle that equity, having taken jurisdiction, will give complete relief operates strongly. The federal courts should have jurisdiction over the entire suit if the important common issues raised by the main and the incidental sets of facts are substantially equal to or greater than the non-common issues. The *Hurn* case contains no real clue as to the future of this type of controversy.<sup>33</sup>

<sup>27</sup> See *General Motors Corp. v. Rubsam Corp.*, 65 F. (2d) 217 (C.C.A. 6th, 1933), certiorari denied 54 Sup. Ct. 123, 78 L. Ed. 115 (1933).

<sup>28</sup> See note 22 *supra*.      <sup>29</sup> See 289 U.S. at page 246.      <sup>30</sup> See 289 U.S. at page 245.

<sup>31</sup> See note 11 *supra*, especially *Ludwigs v. Payson Mfg. Co.*, 206 Fed. 60 (C.C.A. 7th, 1913); *Payton v. Ideal Jewelry Mfg. Co.*, 7 F. (2d) 113 (C.C.A. 1st, 1925).

<sup>32</sup> The courts reason such incidental relief has no independent existence, but can only add to other relief resulting from injury to a "federal right": *Shrauger & Johnson v. Phillip Bernard Co.*, 240 Fed. 131 (D.C.N.D.Ia. 1917); *K-W Ignition Co. v. Temco Electric Motor Co.*, 243 Fed. 588 (C.C.A. 6th, 1917).

<sup>33</sup> It is somewhat questionable whether this hybrid type of case will survive the *Hurn* decision. It is true that the federal courts exercise a so-called "ancillary jurisdiction" in many



The opinion in the *Hurn* case should, very definitely, mark the opening of a new era in the settlement of multiple question proceedings. The rule enunciated, if intelligently applied by the lower federal courts, should go far to remedy the chaos previously existing in this difficult field.

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### DISCHARGE IN BANKRUPTCY AND THE ASSIGNMENT OF FUTURE WAGES

May a creditor who holds an assignment of the future earnings of his debtor under an existing contract of employment enforce that assignment as the wages accrue, even after the debtor has been discharged in bankruptcy? This question has become one of great importance during the present period of depression,<sup>1</sup> but there has been a sharp difference of opinion among the courts as to the correct answer:

The courts have usually analyzed the problem by inquiring as to the existence of a "lien."<sup>2</sup> Analogous problems have arisen in connection with the

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cases (see 28 U.S.C. § 41 (1), note 911 and following), and the language in the "infringement" cases can be construed as an adaptation of that jurisdictional concept to a new use. On the other hand, it seems probable that this class of case was invented by the lower federal courts to evade the effect of Supreme Court decisions prior to the *Hurn* case, in such instances as the merits of the case appealed strongly to the court. If so, the same result can now be reached by following the language of the *Hurn* case, without speaking of "aggravating damage."

<sup>1</sup> For a careful study of the wage assignment question in Chicago, in recent years, see Fortas, *Wage Assignments in Chicago—State Street Furniture Co. v. Armour & Co.*, 42 *Yale L. Jour.* 536 (1933).

<sup>2</sup> In re *West*, 128 Fed. 205, 11 Am. B.R. 782 (D.C. Ore. 1904); In re *Karns*, 148 Fed. 143, 16 Am. B.R. 841 (D.C.S.D. Ohio 1905); In re *Home Discount Co.*, 147 Fed. 538, Am. B.R. 168 (D.C.N.D. Ala. 1906); In re *Ludeke*, 171 Fed. 292, 22 Am. B.R. 267 (D.C.E.D.N.Y. 1909); In re *Lineberry*, 183 Fed. 338, 25 Am. B.R. 164 (D.C.N.D. Ala. 1910); In re *Gillespie*, 209 Fed. 1003, 32 Am. B.R. 434 (D.C.E.D.N.Y. 1913); In re *Green*, 213 Fed. 542, 32 Am. B.R. 433 (D.C.E.D.N.Y. 1914); In re *Voorhees*, 41 F. (2d) 81, 15 Am. B.R. (N.S.) 666 (D.C.N.D. Ohio 1930); In re *Fellows*, 43 F. (2d) 122, 16 Am. B.R. (N.S.) 355 (D.C. Okla. 1930); *Seaboard Small Loan Co. v. Ottinger*, 50 F. (2d) 856, 18 Am. B.R. (N.S.) 500 (C.C.A. 4th 1931); In re *Potts*, 54 F. (2d) 144, 18 Am. B.R. (N.S.) 436 (D.C. Idaho 1931); *Levi v. Loevenhart*, 138 Ky. 133, 127 S.W. 748, 137 Am. St. Rep. 377, 30 L.R.A. (N.S.) 375 (1910); *Leitch v. No. Pac. Ry. Co.*, 95 Minn. 35, 103 N.W. 704 (1905); *Rate v. Amer. Smelting & Ref. Co.*, 56 Mont. 277, 184 Pac. 478 (1919); *Hupp v. Union Pac. R. Co.*, 99 Neb. 654, 157 N.W. 343 (1916); *Public Finance Co. v. Rowe*, 123 Ohio St. 206, 174 N.E. 738 (1931). All of the above cases held that no lien existed. The following held that there was a lien: *Mallin v. Wenham*, 209 Ill. 252, 70 N.E. 564, 65 L.R.A. 602 (1904); *Monarch Discount Co. v. C. & O. R. R. Co.*, 285 Ill. 233, 120 N.E. 743 (1918); *Dumont, Roberts & Co. v. McDougall*, 200 Ill. App. 583 (1916); *Citizens Loan Assn. v. B. & M. R. R. Co.*, 196 Mass. 528, 82 N.E. 696 (1907); *Raulines v. Levi*, 232 Mass. 42, 121 N.E. 500 (1919); and perhaps *Leslie v. Roberts*, 32 S.W. (2d) 873 (Tex. Civ. App. 1930).

assignment of future crops on the assignor's land;<sup>3</sup> the assignment of an expectancy—an estate which the assignor has a mere possibility of acquiring by will or inheritance;<sup>4</sup> the assignment of future book accounts;<sup>5</sup> and other similar transactions. The federal district and appellate courts are in almost unanimous accord that the wage assignments are not enforceable after bankruptcy, but the state courts are divided with a strong minority view held in Illinois and Massachusetts particularly favoring enforcement. The other types of cases, arising in the state courts, reveal the same dispute with the tendency being to allow enforcement.

This dispute presents the fundamental question as to whether or not the equitable right conferred by such an assignment of future property is a right *in rem* or only *in personam*. Mr. Justice Story said that the assignee of future property "has not, strictly speaking, a *jus ad rem*, any more than a *jus in re*. It is not an interest in the property, but a mere right under the contract."<sup>6</sup> Professor Pomeroy, however, concluded that the assignee's right was an "equitable ownership of property in abeyance, . . . which finally changed into an absolute property upon the happening of a future event."<sup>7</sup> He also calls the transaction an "assignment of the present possibility."<sup>8</sup>

The courts generally have not examined this issue, but most of those denying the existence of a right surviving bankruptcy have stressed the impossibility of owning a thing not yet in existence. They adopt the theory that equity for the purpose of effecting justice treats the purported present assignment as a contract to assign, the lien coming into existence as soon as the assignor becomes the actual owner of the property.<sup>9</sup>

The courts reaching the opposite conclusion usually assume that a lien comes into existence immediately upon the execution of the assignment,<sup>10</sup> or else rest upon the authority of Professor Pomeroy.<sup>11</sup> Another view is that of the Eng-

<sup>3</sup> No lien existed: *Butler Cotton Oil Co. v. Collins*, 200 Ala. 217, 75 So. 795 (1917). Lien did exist: *Thompson Yards v. Richardson*, 51 N.D. 241, 199 N.W. 863 (1924); *Union Nat. Bank of Minot v. Lenton*, 54 N.D. 262, 209 N.W. 350 (1926); *Waters v. B. F. Ellington & Co.*, 289 S.W. 417 (Tex. Civ. App. 1926).

<sup>4</sup> No lien existed: *Gannon v. Graham*, 211 Ia. 516, 231 N.W. 675 (1930). Lien did exist: *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149 (1912). See also, *In re Lind*, [1915] 1 Ch. 744, [1915] 2 Ch. 344, 8 Br. Rul. Cas. 242.

<sup>5</sup> *Taylor v. Barton-Child Co.*, 228 Mass. 126, 117 N.E. 43 (1918) is sometimes cited as applicable here, but is readily distinguishable on its facts.

<sup>6</sup> 2 Story, Eq. Jur., § 1040c.

<sup>7</sup> 3 Pomeroy, Eq. Jur. (3rd ed. 1905), § 1271.

<sup>8</sup> *Ibid.*, § 1288. See also authorities cited in *Taylor v. Swafford*, 122 Tenn. 303, 123 S.W. 350 (1909); and on the related problem of the nature of the right of a cestui que trust, the illuminating articles by Scott, in 17 Col. L. Rev. 269 (1917) and Stone, in 17 *ibid.* 467.

<sup>9</sup> See particularly, *In re West*, *In re Home Discount Co.*, and *Seaboard Small Loan Co. v. Ottinger*, *supra*, note 2; and *Gannon v. Graham*, *supra*, note 4.

<sup>10</sup> See particularly, *Mallin v. Wenham*, *supra*, note 2, upon which most of the later decisions rely.

<sup>11</sup> See *Bridge v. Kedon*, *supra*, note 4, a leading case.

lish case, *In re Lind*,<sup>12</sup> in which the court found an equitable charge. The court emphasized particularly the intent and understanding of the parties that a right of security against the property itself was being conferred upon the assignee. The "potentiality doctrine" is sometimes invoked to show that something exists to which a lien may presently attach.<sup>13</sup> This theory, however, if defensible at all, would seem applicable only to such cases as those of wage and crop assignments, and not to those of bare possibilities, such as expectancies and future book accounts. This distinction, however, is expressly repudiated in one of the leading cases on the question.<sup>14</sup>

If the view be taken, however, that no lien exists, but only a personal contract of assignment, it becomes difficult to explain why the obligation of that contract, since it was not itself provable under the Act or merged in the debt at the time of bankruptcy,<sup>15</sup> should be held barred by the discharge along with the debt. It might well be regarded as an independent contract, simply originating from the debtor-creditor relationship and not otherwise connected with the debt. Here again the courts merely state the conclusion that the debt and the assignment are so closely bound together that when the debt becomes unenforceable, the collateral contract must fall with it.<sup>16</sup> The same conclusion appears in a considerable number of cases (though probably a minority) in which it was sought to claim a mortgage on after acquired property when the statute of limitations has run against the debt. It is to be noted that the Illinois courts hold strongly to this opinion.<sup>17</sup>

Professor Williston asserts the theory that an assignment gives the assignee "authority or power to collect and an implied agreement on the assignor's part not to revoke this power," which is not discharged by bankruptcy.<sup>18</sup> It is his belief that the hardship to the wage earner has been the deciding factor in the cases which refuse to recognize a lien on future wages. That explanation probably would account for the difference found by some writers in the attitude of the state courts toward the assignments of future earnings and toward the assignments of expectancies, future crops, et cetera.<sup>19</sup> On the other hand, it has been pointed out that the refusal to recognize a lien on future earnings would practically deprive the wage-worker of the benefit of prospective wages, since nobody would lend on such security.<sup>20</sup>

<sup>12</sup> *Supra*, note 4. Also see note in 29 Mich. L. Rev. 915 (1931).

<sup>13</sup> *Citizens Loan Ass'n. v. B. & M. R. R. Co.*, *supra*, note 2. And see note in 27 Ill. L. Rev. 60 (1932).

<sup>14</sup> *Bridge v. Kedon*, *supra*, note 4.

<sup>15</sup> See 1 Remington, *Bankruptcy* (2nd ed.), 387, § 451.

<sup>16</sup> *In re Voorhees*, *supra*, note 2.

<sup>17</sup> *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259 (1861); *McMillan v. McCormick*, 117 Ill. 79, 7 N.E. 132 (1886). See 25 Cyc. 1001-2.

<sup>18</sup> 1 Williston, *Contracts* (1921), 769, § 414. See also note in 21 Harv. L. Rev. 275 (1908).

<sup>19</sup> See note in 27 Ill. L. Rev. 60 (1932).

<sup>20</sup> Memorandum by Barnes, Dist. J., in unreported case of *Matter of Custin*, D.C., N.D. Ill., Case No. 52,720 (1933).