where the parties have been in disparate positions. Perhaps the oldest manifestation of this tendency was the manner in which the chancellor looked behind an apparent conveyance of real property to declare a mortage and give an equity of redemption.[31] Among the most recent manifestations are rulings to the effect that a person included within the provisions of a workmen's compensation act cannot validly contract himself out of the statute,[32] and that a person working under a wages and hours statute cannot effectively release his statutory claims against his employer.[33] Equity especially has exhibited this tendency, particularly in respect to the assignment of mere expectancies. While in some jurisdictions such assignments have been enforced,[34] equity always looks to the transaction itself with extreme suspicion for several reasons: 1) the assignor of an expectancy was generally in desperate circumstances at the time of the assignment;[35] 2) he was generally greatly inferior in business experience;[36] 3) the difficulty in assessing the value of the expectancy usually results in a totally inadequate consideration.[37]

Since analogous considerations are applicable in the instant case, it would seem that the least equity could do is to refuse to enforce the assignment, leaving the parties to damages at law. This would probably lead to a settlement. However, in view of the gambling nature of the contract, the unequal position of the author, the general inadequacy of consideration and the constitutional policy involved, the only straightforward answer to the situation would be to declare assignments like that in the principal case invalid.

Federal Courts—Removal Jurisdiction of Suits "Arising under" Federal Statute—Fair Labor Standards Act—[Federal].—Plaintiff brought suit in a state court to recover unpaid minimum and overtime wages, and damages, under the Fair Labor Standards Act,[1] which provides that such a suit "may be maintained in any court of competent jurisdiction."[2] Defendant removed to the federal district court on the ground that the suit arose under a law regulating commerce, to which the requirement

[31] 5 Tiffany, Real Property § 1379 (3d ed. 1939). Cf. Tefft, The Myth of Strict Foreclosure, 4 Univ. Chi. L. Rev. 575 (1937).

[32] Wass v. Bracker Construction Co., 185 Minn. 70, 240 N.W. 464 (1931).

[33] Fleming v. Warshawsky & Co., 123 F. (2d) 622, 626 (C.C.A. 7th 1941); United States ex rel. Johnson v. Morley Construction Co., 98 F. (2d) 781, 789 (C.C.A. 2d 1938); Travis v. Ray, 41 F. Supp. 6, 8 (Ky. 1941); Hutchinson v. William C. Barry, Inc., 5 Wage and Hour Rep. 389 (D.C. Mass. 1942).

[34] In re Lind, [1915] 2 Ch. Div. 345. Contra: Gannon v. Graham, 211 Iowa 516, 231 N.W. 675 (1930). See McClure v. Raben, 125 Ind. 139, 25 N.E. 179 (1890); Donough v. Garland, 269 Ill. 565, 109 N.E. 1015 (1915).

[35] 3 Pomeroy, Equity Jurisprudence § 953 (Symons ed. 1941).

[36] Ames v. Ames, 46 Ind. App. 597, 91 N.E. 509 (1910); 2 Chafee and Simpson, Cases on Equity 1173–93, 1185 n. 5 (1934).

[37] Marks v. Gates, 154 Fed. 481 (C.C.A. 9th 1907).

[1] 52 Stat. 1062, 1063 (1938), as amended, 29 U.S.C.A. §§ 206, 207 (Supp. 1941).

[2] 52 Stat. 1069 (1938), 29 U.S.C.A. § 216 (Supp. 1941).

of jurisdictional amount did not apply.[3] On motion to remand to the state court, *held*, a suit does not "arise under a law of the United States" within the meaning of the removal statute unless the construction or effect of the law is in dispute. Since the provisions of the Fair Labor Standards Act are unmistakably clear, the suit must be remanded. *Phillips v. Pucci*.[4]

The court in the instant case based its decision upon the reiteration by the Supreme Court, in *Gully v. First Nat'l Bank in Meridian*,[5] of the language of an earlier case:[6] "A suit to enforce a right which takes its origin in the laws of the United States is not . . . . one arising under those laws . . . . unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." The same result has been reached in other Fair Labor Standards Act cases;[7] and similar results were reached in several cases under the Employers Liability Act,[8] before those suits were made non-removable by statute.[9] It has been said that if a dispute as to the construction or effect of a federal law has been decided by the Supreme Court, future cases involving the same dispute are not removable,[10] and at least one circuit court of appeals has recently approved the doctrine that no case presents a federal question if only issues of fact are involved.[11] The "established trend" of legislation towards limitation of the jurisdiction of the federal trial courts has been judicially recognized,[12] and the "disputed construction or

[3] 38 Stat. 219 (1913), 28 U.S.C.A. § 41 (8) (1927). 18 Stat. 470 (1875), as amended, 28 U.S.C.A. § 71 (1927) provides: "Any suit . . . . arising under the Constitution or laws of the United States, ... of which the district courts of the United States are given original jurisdiction, ... may be removed into the district court of the United States for the proper district. . . . ."

[4] 43 F. Supp. 253 (Mo. 1942).

[5] 299 U.S. 109, 114 (1936), holding that a suit to collect state taxes on a national bank pursuant to a state tax statute did not "arise under" the federal statute permitting such taxation, since the federal statute was not the basis of the plaintiff's cause of action. See text accompanying note 20 infra.

[6] Shulthis v. McDougal, 225 U.S. 561, 569 (1912), rephrasing similar language in Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877).

[7] Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (Neb. 1942); Kuligowski v. Hart, 43 F. Supp. 207 (Ohio 1941); Garrity v. Iowa-Nebraska Light & Power Co., unreported (Neb. 1941); Wingate v. Gen'l Auto Parts Co., 40 F. Supp. 364 (Mo. 1941), noted in 55 Harv. L. Rev. 541 (1942), and 26 Minn. L. Rev. 134 (1941); Stewart v. Hickman, 36 F. Supp. 861 (Mo. 1941), noted in 6 Mo. L. Rev. 519 (1941). Contra: Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (S.C. 1942); see Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (N.J. 1940).

[8] Nelson v. Southern R. Co., 172 Fed. 478 (C.C. Ga. 1909); Liggett v. Great Northern R. Co., 180 Fed. 314 (C.C. Minn. 1910); cf. Myrtle v. Nevada C. & O. R. Co., 137 Fed. 193 (C.C. Nev. 1905) (Safety Appliances Act).

[9] 36 Stat. 291 (1911), 45 U.S.C.A. § 56 (1928).

[10] Postal Tel. Cable Co. v. Nolan, 240 Fed. 754 (D.C. Mont. 1917); Myrtle v. Nevada C. & O. R. Co., 137 Fed. 193 (C.C. Nev. 1905).

[11] Marshall v. Desert Properties Co., 103 F. (2d) 551, 552 (C.C.A. 9th 1939), cert. den. 308 U.S. 563 (1939); see Armstrong v. Alliance Trust Co., 126 F. (2d) 164 (C.C.A. 5th 1942). For an earlier expression of the same view, see Fitzgerald v. Missouri Pacific R. Co., 45 Fed. 812 (C.C. Neb. 1891).

[12] Gay v. Ruff, 292 U.S. 25, 35 (1934).

effect" rule has had wide application. But its use in cases where, as in the instant case, the suit "arises under a law of the United States" in the sense that the right sued upon was directly created by that law, so that if the law had not been enacted, no such suit could have been brought, has been severely criticized.[13] It may be suggested that an analysis of the situations in which the rule has commonly been applied indicates that it should not be applied in this situation.

The "disputed construction or effect" rule originated in suits involving rights in lands which originally had been held by the Federal Government, and had passed to private owners in accordance with the public land laws.[14] It was argued that because title had been derived from the Federal Government, the suit arose under a law of the United States. But while *title* was derived from the United States, the *rights* asserted in these suits arose under local or general property law, and the provisions of the federal laws were not in dispute. In setting up the "disputed construction" test to show that such suits did not arise under the laws of the United States, the Court was aware that otherwise "every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws."[15] Where the terms of the title granted by the Federal Government are actually in dispute, federal jurisdiction obtains.[16]

The "disputed construction" rule has been applied in several situations in addition to the land cases, in which the right actually at issue was not granted by a federal law. Thus, a suit to prevent a municipality from altering the rights granted by a previous ordinance does not arise under a law of the United States because it is alleged that the change will impair the obligation of contracts; fundamentally, the suit is based on the contract between the municipality and plaintiff—and the breach thereof—not upon the Constitution.[17] A suit to enforce a contract based upon, or framed in accordance with, a federal law, does not present a federal question, since it is the contract, not the law, which is the basis of the suit.[18] And a suit to enforce a state law does not arise

[13] Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 21 (C.C.A. 5th 1916); Hartford Fire Ins. Co. v. Kansas City, Mexico & Orient R. Co., 251 Fed. 332 (D.C. Tex. 1918); McGoon v. Northern Pacific R. Co., 204 Fed. 998 (D.C.N.D. 1913); Toledo, Ann Arbor & Northern Michigan R. Co. v. Pennsylvania Co., 54 Fed. 730, 732 (C.C. Ohio 1893).

[14] Shulthis v. McDougal, 225 U.S. 561 (1912); Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877); Joy v. St. Louis, 201 U.S. 332 (1906); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 510 (1900); Devine v. Los Angeles, 202 U.S. 313 (1906); McFadden v. Robinson, 22 Fed. 10 (C.C. Cal. 1884). It should be noted that Marshall v. Desert Properties Co., 103 F. (2d) 551 (C.C.A. 9th 1931), cert. den. 308 U.S. 563 (1939), note 11 supra, falls within this category.

[15] Shulthis v. McDougal, 225 U.S. 561, 569 (1912), note 6 supra, immediately following the previous quotation.

[16] Hopkins v. Walker, 244 U.S. 486 (1917); Ter Haar v. Kettleman North Dome Ass'n, 34 F. Supp. 823 (Cal. 1940); Hills v. Homton, Fed. Cas. No. 6,508 (C.C. Cal. 1877).

[17] Denver v. New York Trust Co., 229 U.S. 123 (1913); Defiance Water Co. v. Defiance, 191 U.S. 184 (1903); New Orleans v. Benjamin, 153 U.S. 411 (1894); cf. Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

[18] State Automobile Ins. Ass'n v. Parry, 123 F. (2d) 243, 246 (C.C.A. 8th 1941) (suit on insurance policy covering liability "as required by the Motor Carriers Act"); Teague v. Brotherhood of Locomotive Firemen, 127 F. (2d) 53 (C.C.A. 6th 1942) (suit to set aside collective agreement under Railway Labor Act); Bernhart v. Western Maryland R. Co., 41 F. Supp. 898

under a law of the United States, because a federal law affects the validity of, or creates a defense to, the state law.[19] In none of these situations, except that involving the public lands, is plaintiff's right to sue dependent upon the existence of the federal law. In many of these cases, in fact, the federal question did not properly appear in the complaint, being matter of defense or reply; thus there was no original federal jurisdiction, apart from any question of "disputed construction."[20] In the land cases, the federal law is necessary only because of the formal allegation of "title" as prerequisite to standing to sue. If it be assumed that in the absence of a federal grant—i.e., if the land involved had never been public land—plaintiff would have acquired title from the then appropriate source, the public land cases also fall within this category.[21]

Where the suit may be brought regardless of the existence of the federal law, it might fairly be said that the suit did not "arise" under that law.[22] Where, however, the right which the suit is brought to enforce is given exclusively by a federal law, so that in the absence of that law there would be nothing upon which to base the suit, it would seem that the suit does "arise" under that law, in the usual sense of the term. The Supreme Court has indicated that the "disputed construction" rule should not be applied in such cases.[23] Thus, a suit for infringement of a patent is held to present a federal question regardless of whether the terms of the patent are in dispute;[24] similarly, a suit arising under the regulations of the Federal Reserve Board.[25] As was pointed out in cases under the Employers Liability Act, to hold that a federal question is presented only if the construction of the statute is disputed, is in effect to hold that there is fed-

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(Md. 1941) (suit on wage agreement negotiated under non-compulsory terms of Transportation Act of 1920); cf. Louisville & Nashville R. Co. v. Mottley, 271 U.S. 749 (1908) (free transportation agreement made in settlement of injury claim interfered with by anti-pass provisions of Hepburn Act).

[19] Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936); Starin v. New York, 115 U.S. 248, 257 (1885) (suit to enforce exclusive ferrying franchise granted by state, claimed to conflict with federal coasting license); Georgia v. Southern R. Co., 25 F. Supp. 630 (Ga. 1938) (suit to enjoin discontinuance of portion of line, discontinuance authorized by ICC).

[20] The existence of a federal question must be determined by the statements in the complaint which are necessary to the plaintiff's cause of action, unaided by the answer or the petition for removal. Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 113 (1936); American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916); In re Winn, 213 U.S. 458 (1909); see Great Northern R. Co. v. Alexander, 246 U.S. 276, 281–82 (1918). See note 27 infra.

[21] The effect of this assumption is merely to place land descended from the public domain on the same footing as land descended from private owners. Particularly where the present owners are remote grantees from the government, there is no reason why this should not be done.

[22] Cases cited note 18 supra. But cf. Young & Jones v. Hiawatha Gin & Mfg. Co., 17 F. (2d) 193 (D.C. Miss. 1927).

[23] See Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933); Swafford v. Templeton, 185 U.S. 487, 493 (1902); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 510 (1900).

[24] The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913); see McGoon v. Northern Pacific R. Co., 204 Fed. 998, 1000, 1004 (D.C. N.D. 1913).

[25] Federal Reserve Bank v. Atlanta Trust Co., 91 F. (2d) 283, 285 (C.C.A. 5th 1937), cert. den. 302 U.S. 738 (1937); cf. Wichita Royalty Co. v. City Nat'l Bank, 95 F. (2d) 671 (C.C.A. 5th 1938), aff'd 306 U.S. 103 (1939) (suit to wind up affairs of national bank).

eral jurisdiction if the parties do not agree that the suit arises under the Act; but not, if they agree that it does.[26] As a practical matter, federal jurisdiction would never obtain, because it is impossible to ascertain from the complaint whether defendant will dispute the construction of the law, or merely contest the facts alleged.[27] The result would be to "nullify the language of the removal statute by a process of reasoning which professes to ascertain its meaning."[28]

It is now clear that the federal courts have original jurisdiction of suits to enforce provisions of the Fair Labor Standards Act,[29] as was admitted by the court in the instant case. There is no apparent reason for differentiating between "arising under a law of the United States" as used in reference to the original and to the removal jurisdictions.[30] In denying removal of suits arising under the Fair Labor Standards Act, federal courts have been motivated in part by a desire to avoid encumbering their dockets with large numbers of small claims,[31] and in part by a desire to give the employee the choice of forums. It is argued that the employee should not be put to the greater expense of suing in the federal court if he does not wish to do so;[32] and that by using the word "maintained" instead of "commenced," or a similar word, in Section 216 of the Fair Labor Standards Act, Congress intended to make suits brought under it non-removable.[33] But the force of the first of these arguments is weakened by the provision in Section 216 for the recovery of costs and attorney's fees; and "maintained" has been used in so many senses that it does not seem a reliable indication of Congressional intention, particularly in view of the clear expressions thereof enacted in regard to the Employers Liability Act. Rather, the absence of any similar language in the Fair Labor Standards Act seems to indicate that Congress did not intend to make these suits non-removable.[34]

[26] Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 21 (C.C.A. 5th 1916); Hartford Fire Ins. Co. v. Kansas City, Mexico & Orient R. Co., 251 Fed. 332, 334 (D.C. Tex. 1918). For an example of a dispute as to the applicability of the FLSA, see Stucker v. Roselle, 37 F. Supp. 864 (Ky. 1941).

[27] Allegations in the complaint as to the nature of the defense are treated as surplusage for jurisdictional purposes, nor can the complaint be supplemented by the petition for removal; see Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 113 (1936); note 20 supra.

[28] McGoon v. Northern Pacific R. Co., 204 Fed. 998, 1004 (D.C. N.D. 1913).

[29] Robertson v. Argus Hosiery Mills, 121 F. (2d) 285 (1941), cert. den. 314 U.S. 681 (1941); Tolliver v. Cudahy, 39 F. Supp. 337 (Tenn. 1941); Lengel v. Newark Newsdealers' Supply Co., 32 F. Supp. 567 (N.J. 1940); Campbell v. Superior Decalcominia Co., 31 F. Supp. 663 (Tex. 1940).

[30] Joy v. St. Louis, 201 U.S. 332 (1906); Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 21 (C.C.A. 5th 1916).

[31] Frankly admitted in Wingate v. Gen'l Auto Parts Co., 40 F. Supp. 364, 366 (Mo. 1941).

[32] Ibid., at 365.

[33] Ibid.; Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (Neb. 1942); Kuligowski v. Hart, 43 F. Supp. 207 (Ohio, 1941).

[34] Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (S.C. 1942); see Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (N.J. 1940). But see Booth v. Montgomery Ward & Co., 44 F. Supp. 451, 456 (Neb. 1942).