YALE LAW JOURNAL

VOLUME XLV

JANUARY, 1936

NUMBER 3

SOME JURISDICTIONAL LIMITATIONS ON FEDERAL PROCEDURE

HARRY SHULMAN† AND EDWARD C. JAEGERMAN‡

MODERN reform in judicial procedure is characterized by extreme liberality in permitting parties to present in one action all the matters of legal controversy between them. Convenience for the parties, efficiency and economy in judicial administration are the objectives; and it is thought that they can best be attained by permitting great freedom of joinder to the parties and giving the court a large measure of discretion to order the trials in such a manner as to achieve efficiency and convenience consistent with just administration.¹ The same objectives are, of course, sought also in the reform of federal practice. But the area within which they may be attained is not coincident with that of the state courts. For, federal procedure must contend with the limitations on federal jurisdiction derived, not from notions as to efficient judicial administration, but rather from the theories and necessities of our federal form of government.² The extent to which a federal court may permit various claims to be presented in an action is determined, therefore, not merely by considerations of convenience but also by notions as to the proper functions of the federal courts and their relation to the courts of the states.

The distribution of judicial powers between the states and nation is a problem in our federalism which only yesterday seemed to be politically as explosive as the division of legislative powers. Article III of the Constitution, and particularly the provisions empowering Congress to create federal courts inferior to the Supreme Courts, were debated issues both in the convention to draft and the conventions to ratify the

† Associate Professor of Law, Yale University.

‡ Member of Connecticut and New York Bars.

1. Clark and Moore, *A New Federal Civil Procedure—II, Pleadings and Parties* (1935) 44 YALE L. J. 1291; Medina, *Shall New York Surrender Leadership in Procedural Reform?* (1929) 29 COL. L. REV. 158; see Chafee, *Bills of Peace With Multiple Parties* (1932) 45 HARV. L. REV. 1297.

2. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499.

Constitution.³ Number one bill of the first Senate under the Constitution was the First Judiciary Act of 1789, providing for the organization and jurisdiction of the federal judicial system.⁴ The parting effort of the Federalists before surrendering power to the Jeffersonian party was to enact the Judiciary Bill of 1801 as a bulwark against depredations by the latter.⁵ And among the first acts of the Jeffersonians upon assuming power was the demolition of the judicial fortress erected by the Federalists.⁶

At frequent intervals thereafter the subject recurred for debate and action by Congress. At times the concern was with measures to enlarge or contract the federal jurisdiction with reference to that of the state courts. At other times attention centered on the functioning of the federal courts within their defined jurisdiction.⁷ Not until 1875 (except for the short lived act of 1801) were the federal courts given cognizance of that class of cases which now constitutes one of the primary sources of federal jurisdiction, cases arising under the Constitution, laws or treaties of the United States.⁸ And at no time has Congress granted to

3. Article III, § 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." Article I, § 8: "The Congress shall have power. . . . To constitute tribunals inferior to the Supreme Court:" The opposition in the Constitutional Convention to the creation of any inferior federal courts was met with the reply that in unforeseen emergencies inferior federal courts might be essential and that the proposal was merely to authorize their creation by Congress, not to require it. See 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 125. This authority and the scope of jurisdiction conferred upon the national courts was spiritedly attacked in the state conventions. 2 ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* (2d ed. 1866) 489 et seq. (Pa.); 3 id. at 521 et seq., and at 563 (Va.); 4 id. at 136 et seq. (N. C.). See HAMILTON, *THE FEDERALIST*, No. 82. For a comprehensive discussion, see Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483. With inferior courts absent, federal review could still be assured, of course, in the Supreme Court, although even that type of federal interference has had its share of opposition. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States* (1913) 47 AM. L. REV. 1, 161; H. R. REP. (Committee Judiciary) No. 43, 21st Cong., 2d Sess. (1831), reprinted in 2 MOORE, *WORKS OF JAMES BUCHANAN* (1908) 56, and in part in FRANKFURTER AND KATZ, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* (1931) 608.

4. Act of September 24, 1789, 1 STAT. 73.

5. Act of February 13, 1801, 2 STAT. 89. This act constructed a new hierarchy of federal courts, and conferred upon them almost the full scope of jurisdiction authorized by the Constitution. After specifying several types of cases, it concluded with the omnibus clause "and also of all . . . matters . . . cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof, where the matter in dispute shall amount to four hundred dollars." Id. at 92.

6. Act of March 8, 1802, 2 STAT. 132. The story of these two acts, as "part and parcel of a fierce party strife" is told in FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 21 et seq.; 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (Rev. ed. 1928) 185 et seq.

7. Frankfurter, loc. cit. *supra* note 2.

8. Act of March 3, 1875, 18 STAT. 470.

the federal courts the full measure of power which it was authorized to grant, in its discretion, by Article III of the Constitution.⁹

Despite several significant restrictions,¹⁰ the scope of federal jurisdiction today is largely that of 1875. But attempts to revise it have been numerous. For many years, there has been a standing committee of the American Bar Association instructed to guard federal jurisdiction against Congressional limitation.¹¹ Just before the current depression concentrated all energies upon efforts to retrieve prosperity, the scope of the federal courts' authority was again a major legislative issue. The proposal of Senator Norris to remove from the cognizance of the federal courts cases based on diversity of citizenship,¹² one of the grounds of jurisdiction most frequently employed since 1789, evoked in some legal and business circles, what might be termed consternation, were it not for the character of recent reactions to some New Deal measures.¹³

9. Some familiar limitations, not required by the Constitution, on the present federal jurisdiction are: the \$3,000 jurisdictional amount requirement [see *Healy v. Ratta*, 292 U. S. 263 (1934)]; the restriction of the removal privilege in diversity of citizenship cases to the non-resident defendant only [(JUDICIAL CODE § 28, 28 U. S. C. A. § 71). Under the Act of 1875, both the plaintiff and the defendant had the removal privilege (see *Frankfurter*, *supra* note 2, at 512 et seq.)]; the requirement that the federal question appear in the plaintiff's cause of action as an element in its affirmative statement and not as a defense or as a reply to a defense [see *White v. Sparkill Realty Corp.*, 280 U. S. 500 (1930); *American Well Works Co. v. Layne*, 241 U. S. 257 (1916); *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149 (1908); *Joy v. St. Louis*, 201 U. S. 332 (1906); *Tenn. v. Union and Planters' Bank*, 152 U. S. 454 (1894)]. Even the Act of 1801 contained a jurisdictional amount limitation. 2 STAT. 89, see *supra*, note 5.

10. *Infra*, notes 16, 39; *Frankfurter*, *supra* note 2 at 509-515.

11. The Committee on Jurisprudence and Law Reform. This Committee examines all bills before Congress relating to federal jurisdiction. In 1932 a dissent was recorded to the Committee's uniform opposition to all measures restrictive of the federal jurisdiction. Dean Charles E. Clark and Joseph F. O'Connell, then members of the Committee, refused to sign a report opposing the Attorney General's Bill, *infra* note 14, preferring "to present both sides without trying to maintain that there is only a single side." 57 A. B. A. REP. 511 (1932). The 1934 resolution of the Association is typical: "*Be it Resolved*, That the American Bar Association does hereby again announce and declare that it is opposed to the enactment of any law which will divest or substantially abridge the jurisdiction of the federal courts in controversies arising under the Constitution and Laws of the United States." 59 A. B. A. REP. 73 (1934).

12. S. 3151 and SEN. REP. No. 626, 70th Cong., 1st Sess. (1928); "In 1922 Senator Norris advocated the abolition of all the lower federal courts, retaining only the Supreme Court of the United States, and in substantially every Congress since Senator Norris has introduced bills to abolish the federal courts under the Supreme Court of the United States and other bills for the abolition of the Federal jurisdiction based upon diversity of citizenship." From *Report of Committee on Jurisprudence and Law Reform* (1934) 59 A. B. A. REP. at 488.

13. See Hearings on S. 3151, 70th Cong., 1st Sess. (1928), cited *supra* note 12. See also Parker, *The Federal Jurisdiction and Recent Attacks Upon It* (1932) 18 A. B. A. J. 433; Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?* (1932) 18 A. B. A. J. 499; Comment by Members of Chicago University Law

And it is probably only the preoccupation with pressing economic problems that is responsible for the subsidence, doubtless temporary, of the agitation of this proposal.¹⁴

It may be also this very same preoccupation with the paramount problems of economic maladjustment that presented the opportunity for the easy passage in 1934 of three more limited bills which had long been urged and consistently rebuffed:¹⁵ The Johnson Bill, curtailing federal jurisdiction in state public utility rate cases,¹⁶ the Federal Declaratory Judgment Bill,¹⁷ and the bill giving to the Supreme Court power to promulgate rules of practice and procedure for the federal district courts.¹⁸ These three enactments, passed with little notice during great excitement over other matters, illustrate the widely divergent problems with which federal judiciary legislation deals. The Johnson Act is surely not an attempt merely to reallocate judicial business. It is not the product of lawyers' concern and lawyers' skill to improve judicial administration. It is rather an attempt to readjust the relations between state and nation on a matter of high political and popular import. The Declaratory Judgment and Rules of Practice acts, on the other hand, are primarily lawyers' attempts to improve judicial administration, to simplify and make more efficient the functioning of the courts in their appointed jurisdiction. But the paradox of law generally is also

Faculty, *Limiting Jurisdiction of Federal Courts—Pending Bills* (1932) 31 MICH. L. REV. 59; Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts* (1933) 19 A. B. A. J. 499.

14. For a discussion of some efforts at major restrictions prior to the Norris Bill, see FRANKFURTER AND LANDIS, *op. cit. supra*, note 6 at 89 et seq., 136 et seq. After the Norris Bill was introduced, a more limited restriction of diversity jurisdiction, [i.e. foreign corporation doing business within a state and controversies arising out of that business] was proposed in The Attorney General's Bill, so called because it had the support of Attorney-General Mitchell and President Hoover. SENATE BILL No. 937, 72 Cong. 1st Sess., H. R. REP. 16344 (1931).

15. See Jaffin, *Federal Procedural Revision* (1935) 21 VA. L. REV. 504; Doble, *Recent Developments in Federal Procedure* (1935) 21 VA. L. REV. 876.

16. 48 STAT. 775, 28 U. S. C. A. § 41, amending § 24 of the Judicial Code. The bill provides that federal courts shall have no jurisdiction to restrain the enforcement of the orders of state or local administrative bodies concerning public utility rates, if such orders do not interfere with interstate commerce and are made after reasonable notice and hearing and the state courts afford a speedy and efficient remedy. For a discussion of this act and a collection of many similar bills which had previously been introduced but failed of enactment, see Comment (1934) 44 YALE L. J. 119, 125.

17. 48 STAT. 955, 28 U. S. C. A. § 400. See BORCHARD, *DECLARATORY JUDGMENTS* (1934) 244 et seq., 271 et seq., 629 et seq.; Borchard, *The Federal Declaratory Judgments Act* (1934) 21 VA. L. REV. 35.

18. 48 STAT. 1064, 28 U. S. C. A. §§ 723b, 723c. See Clark and Moore, *A New Federal Civil Procedure* (1935) 44 YALE L. J. 387, 1291; Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116; J. A. Wickes, *The New Rule-Making Power of the United States Supreme Court* (1934) 13 TEXAS L. REV. 1.

found here. Marching with the declaratory judgment, and laying on a restraining hand, is the fear of undue impediment to the freedom, the initiative, the discretion, or the functions of the executive and administrative branches of government.¹⁹ And alongside the rules of practice, interfering perhaps with the attainment of the theoretical maximum of efficiency in judicial administration, marches the caution against maldistribution of judicial powers between the courts of the states and the nation, against injuring by such distribution "the happy relation of states to nation" upon which federalism is built.

The attainment of a proper distribution of judicial power between states and nation has been a concern of the federal courts no less than of Congress. On a smaller scale than in the case of legislation, but just as surely, judgment on jurisdictional problems in individual cases is influenced by anxieties about that distribution.²⁰ And the task requires statesmanship of a similar order.

FEDERAL AND NON-FEDERAL LAW IN PLAINTIFF'S ACTION—JOINDER OF ACTIONS

A vast amount of legal scholarship has been expended on attempts to define a generalized concept of "cause of action."²¹ Apparently, the search has been vain,—or rather, successful in establishing that "a 'cause of action' may mean one thing for one purpose and something different for another."²² For the purpose of determining the extent to which a plaintiff may join in a single action in a court of general jurisdiction multiple claims that he may have against the defendant, rules as to causes of action are quite plainly marks or survivals of an over-technical, mechanical law. Orderly, understandable pleading and efficient trial without undue complication would seem to be the only pertinent desiderata. And these seem most easily attainable by absolute freedom of

19. Compare the action of Congress in the Revenue Act of 1935, PUBLIC ACT NO. 407, 74th Cong., Aug. 30, 1935, § 405 of which amended the Declaratory Judgment Act by adding the phrase "(except with respect to federal taxes)"; 28 U. S. C. A. § 400, as amended.

20. It may be preferable to say that the interpretation of the statutes in individual cases is influenced by the known Congressional anxieties about that distribution. See, e.g., *Healy v. Ratta*, 292 U. S. 263 (1934); *Gay v. Ruff*, 292 U. S. 25 (1934); *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491 (1923). And see note (1934) 43 YALE L. J. 1325.

21. See CLARK, CODE PLEADING (1928) 75 et seq.; Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 1291; McCaskill, *Actions and Causes of Actions* (1925) 34 YALE L. J. 614; McCaskill, *One Form of Civil Action But What Procedure for the Federal Courts* (1935) 30 ILL. L. REV. 415; Gavit, *A "Pragmatic Definition" of the "Cause of Action"?* (1933) 82 U. OF PA. L. REV. 129; Clark, *The Cause of Action* (1934) id. at 354; Gavit, *The Cause of Action, a Reply* (1934) id. at 695.

22. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67 (1933); Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215.

joinder of claims with a privilege in the parties to request, and a power in the court to grant, severance and separate trial of such matters as cannot conveniently be tried together. Even with respect to legal and equitable relief it would suffice to permit the parties to insist upon, and the court to grant, after joinder, the pertinent substantive rights as to trial and relief which the difference between law and equity involves. In any event, after a long experience with the limited joinder, the trend is now definitely in the direction of absolute freedom.²³

But a similar reform in federal procedure must take cognizance of the fact that the jurisdiction of the federal courts is limited by the Constitution, by Congressional enactment, by the necessities of our federalism. Where diversity of citizenship is the basis of jurisdiction, there is no obstacle to free joinder of claims²⁴ since the citizenship of the parties remains the same whatever the claims involved in the litigation. But when the basis of jurisdiction is that the case arises under the Constitution, laws or treaties of the United States, it is the nature of the issues which is the prerequisite to power. The question is then not simply whether a joinder of the claims is expedient, but also whether the court has power to adjudicate the joined issues. In the federal courts the problem is not coincident, at least genetically, with that of joinder of actions in the state courts. In the latter, the question in the main is to what extent may a plaintiff join in one action claims based on entirely separate sets of operative facts. But in the federal courts that question has been considered along with another, namely, to what extent may the court consider claims based on non-federal, rather than federal, law even with respect to a single set of operative facts.

Recently the Supreme Court undertook to resolve a long-standing conflict on these issues. The case was of a type frequently recurring in the federal courts. Plaintiff and defendant were citizens of the same state. Plaintiff's grievance was that he had two versions of a single play, one version copyrighted and the other uncopyrighted; that he submitted both versions to defendant for production by him, if agreement could be reached; that instead of producing plaintiff's play, the defendant altered his own play by incorporating in it the chief features of plaintiff's play and then produced his own play so altered. The complaint sought relief on three legal theories: (1) infringement of the copyright, (2) unfair competition with respect to the copyrighted version, and (3) unfair competition and wrongful appropriation with respect

23. See Clark and Moore, *supra* note 1 at 1320; cf. N. Y. CIVIL PRACTICE ACT § 258, added by L. 1935, 339: "The plaintiff may unite in the same complaint two or more causes of action whether they are such as were formerly denominated legal or equitable, provided that upon the application of any party, the court may in its discretion direct a severance of the action or separate trials whenever required in the interest of justice."

24. Except possibly the jurisdictional amount requirement, discussed *infra* p. 409.

to the uncopyrighted version. The alleged wrongful conduct of the defendant was, of course, the same under each of the theories. The District Court found that the copyright was not infringed and dismissed the other claims for want of jurisdiction. The Circuit Court of Appeals, Second Circuit, affirmed. On certiorari in the Supreme Court, Mr. Justice Brandeis and Mr. Justice Stone also voted to affirm. But the majority of the Supreme Court held that there was error in the dismissal for want of jurisdiction of the second claim—unfair competition with respect to the copyrighted version—but no error in the dismissal of the third claim—unfair competition with respect to the uncopyrighted version.²⁵ As to the latter, the Court found it “hardly necessary to say that a federal court is without the judicial power 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 its jurisdiction. . . . Since that claim did not rest upon any federal ground and was wholly independent of the claim of copyright infringement, the District Court was clearly right in dismissing it for want of jurisdiction.”²⁶

The decision on the claim of unfair competition with respect to the copyrighted version was equally easy:

“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*. The case at bar falls within the first category. The bill alleges the violation of a single right; namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action. Indeed, the claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances.”²⁷

Claim, right, ground, cause of action, even when duly emphasized by italics, do not, apparently, supply the true touchstone sought.²⁸ Why

25. *Hurn v. Oursler*, 289 U. S. 238 (1933).

26. *Id.* at 248.

27. *Id.* at 246.

28. The case is discussed in Notes (1933) 33 COL. L. REV. 296, 699; 46 HARV. L. REV. 1339; 32 MICH. L. REV. 412. In *Southern Pac. Co. v. Van Hoosear*, 72 F. (2d) 903 (C. C. A. 9th, 1934), a carrier sued to recover \$1,195.96 as freight charges on shipments alleged to be subject to an interstate tariff. The defendant denied that the shipments were subject to the interstate tariff and admitted an indebtedness of \$593.70 under the intrastate tariff alleged by him to be applicable. The Circuit Court of Appeals held that the interstate tariff was not applicable and that the District Court had jurisdiction to enter judgment on the

was the "single right" taken to be the protection of the *copyrighted* play rather than the protection of the *play*? Why were not the claims of common law plagiarism and unfair competition but other *grounds*, in addition to the copyright, to support the single cause of action for violation of the right to protection of the play? Suppose the case had involved a patent and the court had found the patent wholly invalid. Could the court still decide the claim of unfair competition on the ground that the bill alleged the violation of a single right, the right to protection of the patented device?²⁹ But these may be captious questions. The case presented a conflict between issues of political statesmanship and issues of convenience and economy in judicial administration. The Court made a compromise adjustment. To the extent that it adjudicated the claim of unfair competition, the decision is obviously calculated to economize on the expense and time of litigants and on the expense and time of courts. The considerations which moved Justices Brandeis and Stone to dissent are not plainly visible. But we get a hint in another case.

Argued on the same day as *Hurn v. Oursler*, and assumed to involve the same legal issue, was *Levering & Garrigues v. Morrin*,³⁰ again a case of a recurring type. The plaintiffs sued a labor union and a number of individual defendants to enjoin a labor boycott which was alleged to be in violation of (a) the federal anti-trust acts and (b) the common law. The District Court granted an injunction apparently on the latter ground only. The Circuit Court of Appeals, Second Circuit again, held that if the plaintiff's claim under the anti-trust acts raised a substantial federal question, it was to be decided on the merits against the plaintiff

intrastate tariff, although no federal question remained in the case after the determination with respect to the interstate tariff was made. The opinion cites, and relies on, *Hurn v. Oursler*. Circuit Judge Mack, who wrote the opinion was also the trial judge in the *Hurn* case. In the *Van Hoosear* case, he makes the following interesting statement: "This principle [that the existence of a substantial federal question gave the federal court 'the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them'] has been most recently reinterpreted in *Hurn v. Oursler*. . . . The writer of this opinion, sitting in New York as the trial judge in that case, found that the copyright had not been infringed, and on the binding authority of earlier cases in the Second Circuit, contrary to some cases in which the writer had participated in other circuits, held that there was no jurisdiction to consider the charge of unfair competition. This was affirmed by the Circuit Court of Appeals in a memorandum opinion citing its earlier cases, 61 F. (2d) 1031. The Supreme Court, however, held that there was jurisdiction on the principle of the *Siler* Case, 213 U. S. 175 (1909), to consider the matter of unfair competition, but held that the bill in that aspect too, should be dismissed upon the merits. . . . We must look to analogies for guidance, since the *Oursler* case seems to be the first in which the Supreme Court has applied the cause of action test to this jurisdictional problem."

29. Lower federal courts have quite uniformly held against jurisdiction; *infra*, p. 406.

30. 289 U. S. 103 (1933).

and that the court therefore lacked jurisdiction to consider the claim under the common law unless there was diversity of citizenship between the parties. Finding that diversity of citizenship did not affirmatively appear, the court reversed the decree with leave to the lower court to grant leave to the plaintiffs to amend so as to make the requisite diversity. The plaintiffs' contention that, since the court acquired jurisdiction by the assertion of a substantial federal claim, it had power also to pass on the non-federal claim was expressly rejected.³¹ The Supreme Court granted certiorari "limited to the question of federal jurisdiction other than questions relating to diversity of citizenship,"³² but it refused to decide the issue as it was posed by the Circuit Court of Appeals and by the petitioner. In an unanimous opinion, the Court held that the claim under the anti-trust acts was not sufficiently substantial to invoke federal jurisdiction. It therefore affirmed the decision against the plaintiffs, but on a new ground which the Circuit Court of Appeals had assumed in favor of the plaintiffs. Since jurisdiction was thus not acquired on the federal question basis, it was unnecessary to decide the issue raised by the petition for certiorari, that is, whether the District Court would have had power to decide the common law claim if the claim under the anti-trust acts had been substantial and had been decided against the plaintiff on the merits.³³ Were the two claims in this case but two distinct *grounds* in support of a single cause of action, or were they two separate and distinct causes of action?

Had the Supreme Court answered the question in favor of federal jurisdiction, as in the *Hurn* case, a countervailing policy and the basis of a dissent would have been readily discernible. The boycott alleged in the bill was probably legal under the decisions of the New York Court of Appeals.³⁴ It was probably illegal under the decisions of the Supreme

31. The opinion by Judge Swan is an excellent and full discussion of the jurisdictional problems with respect to both diversity of citizenship and federal question. The pertinent cases are ably analyzed and classified. *Levering & Garrigues v. Morrin*, 61 F. (2d) 115 (C. C. A. 2d, 1932).

32. 287 U. S. 590 (1932).

33. The subsequent judicial history of this case is interesting. The District Court permitted an amendment to correct the lack of diversity by striking from the bill a number of defendants and then ordered an injunction. The Circuit Court of Appeals reversed because the relief granted was in violation of the Norris-LaGuardia Act, 47 STAT. 70-73, 29 U. S. C. A. §§ 101-115 (1932), *infra*, note 39, limiting jurisdiction of United States courts to issue injunctions in labor disputes. This Act had been passed by Congress after the issuance of the original injunction [see *In re Starrett*, 45 F. (2d) 399 (S. D. N. Y. 1930)], but before the Circuit Court of Appeals decision. *Levering and Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 595 (1934).

34. *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97 (1919); *Exchange Bakery and Restaurant v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1926); *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928). It appears from the Brief for the Respondents in the Supreme Court in the *Morrin* case that the plaintiffs had

Court³⁵ exercising an independent judgment on matters of common law pursuant to the doctrine of *Swift v. Tyson*.³⁶ In the *Hurn* case there

brought their action first in a New York State court where a preliminary injunction was denied. Thereupon, "the identical bill, in substance, was filed in the Southern District of New York." Brief, p. 11.

35. Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Bedford Cut Stone Co. v. Stonecutters' Ass'n, 274 U. S. 37 (1927).

36. 41 U. S. 1 (1842). It is difficult to prove the effects of this doctrine, that the federal courts are free, except on appeal from state courts, to find what the state law is in matters of "commercial law" or "general jurisprudence" independently of, and contrary to, the courts of the state. That it is an incessant source of argument and friction is attested by the extensive and growing literature centering on it, the legislative attempts made to recall it, and the divisions in the Supreme Court which it has evoked even in recent years. See FRANKFURTER AND KATZ, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1931) 158 n. 1; DOBIE, CASES ON FEDERAL PROCEDURE (1935) 405, n. 6, et seq.; S. 4333, 70th Cong. 1st Sess., 69 Cong. Rec. 7989, May 3, 1928; Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U. S. 518 (1928) and comments on that case by a Kentucky state judge, Dawson, *Conflict of Decisions Between State and Federal Courts in Kentucky and the Remedy* (1931) 20 Ky. L. J. 3 and by Senator Logan of Kentucky, who was counsel in the case, in the Senate on February 9, 1934, 73d Cong. 2d Sess., 78 Cong. Rec. 2284.

The objection is not simply to the anomalous theory of the law built on *Swift v. Tyson* or to the differences in the results reached in individual cases in state and federal courts. Modernistic distinctions between cases and even traditional legal technique can reconcile and harmonize a good deal that seems irreconcilable. See Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869, 881 n. 23. Of perhaps greater significance is the fact that attempts at reconciliation are deemed unnecessary, that state decisions are openly and expressly rejected as unauthoritative and that the freedom of the federal courts to differ with state decisions is expressly avowed and consciously exercised. It is the notoriety of the infidelity rather than the fact of infidelity that may be the more troublesome. Amendment of § 34 of the Judicial Code (28 U. S. C. A. § 725) so as to include the decisions of state courts within the "laws of the several states" which must be "regarded as rules of decision in trials . . . in the courts of the United States in cases where they apply" may not insure actual fidelity but it will at least "preserve appearances."

The defense of the law around *Swift v. Tyson* has rested largely on its alleged tendency to produce uniformity of law throughout the country. See Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions* (1934) 9 TUL. L. REV. 64; cf. Fordham, *Swift v. Tyson and the Construction of State Statutes*, (1935) 41 W. VA. L. Q. 131. The argument assumes, of course, what may not be so, that uniformity of decisions throughout the country in "matters of general jurisprudence and commercial law" is desirable and worthy of strife to attain it. The argument assumes also that a measure of uniformity may be attained by this means. It is doubtful whether it will ever be possible to demonstrate to the man from Missouri that the law around *Swift v. Tyson* does or does not tend to produce such uniformity. But it is beyond doubt that in many instances state courts have expressly refused to follow federal decisions just as federal courts have expressly refused to follow state decisions. See Notes (1930) 43 HARV. L. REV. 926; Frankfurter, *supra* note 2, at 529 n. 150. (Whether or not the rejected decisions were apposite, cf. Yntema and Jaffin, *supra*, is beside the point. The fact of significance is that the court deemed them apposite and rejected them nevertheless.) The probability of uniformity is reduced, of course, by the lessened frequency of the Supreme

was no known conflict in the state and federal interpretations of the applicable state law. In the *Morrin* case, the conflict was obvious, well known and probably the basis for the preferment of the federal forum in that very litigation.³⁷ The *Hurn* case was a private, business dispute between two individuals. The class of litigation of which it is a type involves individual disputes of no great popular or political concern; in their adjustment convenience of the parties and economy of judicial administration are weighty considerations. The *Morrin* case involved a very serious labor dispute between well organized groups of employers and employees. The granting or denial of an injunction in such a case affects at one time a large number of persons who are directly involved and a still larger number of actively interested sympathizers indirectly involved. The issue is highly explosive, popularly and politically. Judicial interposition in such disputes always rouses high feeling, even when jurisdiction is undenied. The dangers of federal interference on entirely non-federal grounds are obviously serious. And their seriousness is immeasurably multiplied when the federal court's versions of the state law is contrary to that of the state courts. The fears here are not "imaginary horrors." Few activities of the federal courts in their long history have roused more resentment than their activities in labor disputes.³⁸ From few sources was their prestige and power more seriously threatened. And it was doubtless because of avoidable excess in encountering both the dangers just mentioned that the Norris-LaGuardia Act was passed to curtail federal jurisdiction in this special sphere.³⁹ Perhaps the dissent in the *Hurn* case had the *Morrin* case in mind and feared the effects of establishing a general precedent authorizing the federal courts to consider claims not based on federal law. Must the

Court's participation in cases involving only matters of general, non-federal law. Cf. *Cole v. Penn. R. R.*, 43 F. (2d) 953, 956-7 (C. C. A. 2d, 1930). Moreover, the opinions of the Supreme Court itself display a variety of attitudes toward the law around *Swift v. Tyson*. While the result in a case is determined by the vote of at least five Justices, the form and content of the opinion is largely dependent upon the Justice who is designated to write it; and the comments in the opinions about the law around *Swift v. Tyson* are almost as different as the Justices who write them. Cf. with the *Black and White Taxicab* case, *supra*, *Mutual Life Insurance Co. v. Johnson*, 293 U. S. 328 (1934) and the note in (1935) 44 YALE L. J. 1113; see also *infra*, note 58. Whatever may be the attitude toward it, the law built on *Swift v. Tyson* colors most problems of federal jurisdiction and no examination of these problems or of federal jurisdiction generally can properly fail to take it into account.

37. See note 34 *supra*.

38. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932) 111-133; Frankfurter and Greene, *Congressional Power over the Labor Injunction* (1931) 31 COL. L. REV. 385; Nelles, *A Strike and Its Legal Consequences* (1930) 40 YALE L. J. 507; FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 5, et seq.; 199, et seq.

39. 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115. See Note (1935) 45 YALE L. J. 372.

undecided question in the *Morrin* case be answered in favor of federal jurisdiction, particularly in view of the *Hurn* case?

The fountain head for discussions of this issue is Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*.⁴⁰ The action was brought by the Bank to enjoin the Auditor of the State of Ohio from enforcing a prohibitive annual tax levied pursuant to a statute expressly directed against the Bank and declared unconstitutional in that action. The case was thus of the familiar type clearly within the present scope of federal cognizance. But the case was brought and decided before the Judiciary Act of 1875, at a time when the federal courts were not given jurisdiction generally in cases involving a federal question.⁴¹ The Act creating the Bank conferred on it, however, power "to sue and be sued, . . . in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."⁴² Objection to the jurisdiction of the Circuit Court in which the Bank sued was made on the grounds (a) that Congress did not grant the jurisdiction and (b) that Congress had no power to grant it. The contention on the second point was that some suits by the Bank might raise no questions of federal law and would therefore not arise under the Constitution or laws of the United States.

In a few sentences Marshall announced the opinion of the Court that Congress did grant to the federal courts jurisdiction of suits by or against the Bank. In many more paragraphs he advanced the Court's reasons for finding the grant within Congressional competence under Article III of the Constitution, and uttered the oft repeated sentences: "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. . . ."⁴³ On the opposite construction, the judicial power never can be extended to the whole case, as expressed by the Constitution, but to those parts of cases only which present the particular questions involving the construction of the Constitution or the law."⁴⁴

The opinion was an achievement characteristic of Marshall. If the Act did permit the Bank to sue in the courts of the United States, the specific case before the Court was clearly one arising under the Constitution because the plaintiff invoked a constitutional right which was alleged to have been violated by the defendant. No more had to be decided to dispose of the actual case. But Marshall was apparently anxious to establish the validity of a grant of federal jurisdiction in *any* suits by or against the Bank on ordinary commercial transactions. This

40. 22 U. S. 738 (1824).

41. *Supra*, note 8.

42. 3 STAT. 266, 269 (1816).

43. 22 U. S. 738, 823 (1824).

44. *Id.* at 822.

concern is easily understandable. The Government was interested as an owner in the Bank and the Bank was performing governmental service. Moreover, the Bank was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation.⁴⁵ The doctrinal channel leading to that haven was quite obvious, once discovered. Whatever the claim it made, a suit by the Bank raised a federal question; for *in any suit*, the capacity of the Bank to sue, its capacity to contract or to own property, was an issue to be decided or assumed in the Bank's favor. These ever-present federal questions were sufficient to sustain constitutionality, once it was decided that Congress did grant jurisdiction of that scope. They were sufficient to tinge any case by the Bank with federal color so as to enable a federal court to deal with all its "questions of fact or law."

In the *Pacific Railroad Removal Cases*,⁴⁶ decided in 1885, the Court applied the doctrine to what may seem to be a similar situation abstractly, but certainly not practically. The suits were ordinary actions for personal injuries against a railroad incorporated under a federal act. The railroad was permitted to invoke federal jurisdiction, by removal, because, as in the *Osborn* case, the federal act giving the railroad legal life and capacities was at the foundation of any suit by or against it. The railroad was owned privately. It was performing no governmental functions. There was no comparable need of a federal forum. The issue was not whether under the Constitution Congress was authorized to grant federal jurisdiction to a federal corporation by a special act which was taken to have granted it. The issue was, rather, whether in a general grant of federal jurisdiction, by the Act of 1875, in cases arising under the laws of the United States, Congress included the special case of litigation by federal corporations actually involving no disputed federal claim.⁴⁷ The decision in these Cases in favor of federal jurisdic-

45. Similar need for the protection of federal agents and federal claims has several times led to special extensions by Congress of federal jurisdiction. See e.g. the "FORCE BILL" of 1833, 4 STAT. 632, § 3; the CIVIL WAR REMOVAL ACTS, FRANKFURTER AND LANDIS, *op. cit. supra* note 6 at 61 et seq.; the PROHIBITION ACT, 41 STAT. 316 (1919), 27 U. S. C. A. § 45 (1936) [see *Maryland v. Soper*, 270 U. S. 9 (1927)]; and the present provisions with respect to revenue officers, 39 STAT. 532 (1916), 28 U. S. C. A. § 76 (1926).

46. 115 U. S. 1 (1885).

47. Article III of the Constitution extends federal jurisdiction to "all cases . . . arising under this Constitution, the Laws of the United States and Treaties made . . . under their authority." The Act of 1875 extended federal jurisdiction to "all suits . . . arising under the Constitution or laws of the United States or treaties made . . . under their authority." 18 STAT. 470. The substantial identity of the words does not, of course, require, on that score alone, an identical interpretation. The differences in the functions of the two enactments, in the circumstances surrounding their adoption and in their further provisions justify inquiry as to whether their meaning is different. Cf. *Gay v. Ruff*, 292 U. S. 25 (1934); *King Mfg. Co. v. Augusta*, 277 U. S. 100 (1928); *Ex parte Collins*, 277 U. S. 565 (1928).

The present grant of jurisdiction is: "Of all suits of a civil nature . . . brought by the

tion—a triumph of mechanical logic, rather than statesmanship as in the *Osborn* case—diverted a large stream of non-federal litigation to the federal courts and excited strong local opposition.⁴⁸ Thirty years later, Congress overturned the decision with respect to railroads⁴⁹ and ten years thereafter, with respect to other federal corporations.⁵⁰

In the patent, trademark and copyright cases where claims of unfair competition were joined with claims of infringement, the argument of the *Osborn* case is easily distinguished, not simply because in that case the federal question was at the foundation of *any* claim, but also because, in that case, but a single cause of action was involved on any definition of that term. But there was at least room for a reasonable difference of opinion as to whether infringement and unfair competition constituted a single cause of action. It was, therefore, held quite commonly, prior to the *Hurn* case, that, absent diversity of citizenship, there was no jurisdiction of the claim of unfair competition unless it was pleaded merely as aggravation of the damage caused by the infringement.⁵¹

United States . . . ; or, where the matter in controversy . . . arises under the Constitution or laws of the United States, or treaties made . . . under their authority." JUDICIAL CODE § 24, 28 U. S. C. A. § 41. It is quite obvious that the problems discussed in this article are not to be solved by logomachy. The Supreme Court's decision in the *Hurn* case had no more support in the words of the statute than the decisions of the lower courts. If it is granted, as urged by Chief Justice Marshall, that the jurisdiction of a federal court must extend to "a whole case" rather than to "parts of cases" or "to a single question" or "insulated point" in a case [*Osborn v. Bank of United States*, 22 U. S. 738, 822 (1824); cf. the scope of Supreme Court review of decisions of state courts: *Murdock v. Memphis*, 87 U. S. 590 (1875); *Whitney v. California*, 274 U. S. 357, 378-80 (1927); *Missouri ex rel. Wabash Ry. Co. v. Public Service Comm.*, 273 U. S. 126 (1927); *Clark v. Williard*, 294 U. S. 211 (1934)], the question still remains: What and how much is "a whole case"? The question is hardly a matter simply of docket numbers and titles.

48. See 2 WARREN, op. cit. *supra* note 6 at 685 et seq.

49. 38 STAT. 804 (1915).

50. 43 STAT. 941 (1925), 28 U. S. C. A. 42 except where the United States owns more than one half of the capital stock of the corporation.

51. *Taylor v. Bostick*, 299 Fed. 232 (C. C. A. 3d, 1924); *Detroit Showcase Co. v. Kanneer Mfg. Co.*, 250 Fed. 234 (C. C. A. 6th, 1918); *K. W. Ignition Co. v. Temco Electric Motor Co.*, 243 Fed. 588 (C. C. A. 6th, 1917); *W. F. Burns Co. v. Automatic Recording Safe Co.*, 241 Fed. 472 (C. C. A. 7th, 1916); *Schiebel Toy & Novelty Co. v. Clark*, 217 Fed. 760 (C. C. A. 6th, 1914); *Ludwigs v. Paysons Mfg. Co.*, 206 Fed. 60 (C. C. A. 7th, 1913); *Diederich v. W. Schneider Wholesale Wine & Liquor Co.*, 195 Fed. 35 (C. C. A. 8th, 1912); *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42 (C. C. A. 2d, 1908); *Bernstein v. Danwitz*, 190 Fed. 604 (C. C. S. D. N. Y. 1911); *Mecky v. Grabowski*, 177 Fed. 591 (C. C. E. D. Pa. 1910); *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770 (C. C. N. D. Pa. 1909); *Cushman v. Fountain Pen Co.*, 164 Fed. 94 (C. C. Mass. 1908); *King v. Inlander*, 133 Fed. 416 (C. C. N. D. Ill. 1902); *Larrowe-Loisette v. O'Lughlin*, 88 Fed. 896 (C. C. S. D. N. Y. 1898); *L. E. Waterman Co. v. Gordon*, 8 F. Supp. 351 (S. D. N. Y. 1934); *Badger v. E. B. Badger and Sons Co.*, 288 Fed. 419 (D. Mass. 1923); *Unit Const. Co. v. Huskey Mfg. Co.*, 241 Fed. 129 (D. C. E. D. Pa. 1917); *Burt v. Smith*, 71 Fed. 160 (D. Colo. 1895). See *Stark Bros. Co. v. Stark*, 255 U. S. 50 (1921); *Standard Paint Co.*

But another line of cases has been taken to be in conflict with this holding: suits in the federal courts to enjoin the enforcement of state taxes or the orders of state administrative tribunals on the ground that the enforcement of the taxes or orders would violate some constitutional guarantee.⁵² In these cases, generally, and in the *Hurn* case, the doctrine announced in *Siler v. Louisville & Nashville R. R.*⁵³ has received acceptance; the doctrine that, in view of the substantial federal questions raised, the court has "the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only," as, for example, interpretations of the state statutes or constitutions.⁵⁴ In these situations, cautions against excessive federal interference combine with considerations of convenience and economy to support the practice. Conflict between state and federal interpretations of state law is, at least theoretically, not probable here because *Swift v. Tyson* is said not to apply to the interpretation of state statutes.⁵⁵ And a decision adverse to the state action on federal grounds

v. Trinidad Asphalt Mfg. Co., 220 U. S. 446 (1910); *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U. S. 166 (1906); *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665 (1901). Compare *Vogue Co. v. Vogue Hat Co.*, 12 F. (2d) 991 (C. C. A. 6th, 1926) [making a basis for distinction, the validity or non-validity of the patent]; *Farmers Handy Wagon Co. v. Beaver Silo & Box Mfg. Co.*, 236 Fed. 731 (C. C. A. 7th, 1916); *Holeproof Hosiery Co. v. Wallach Bros.*, 190 Fed. 606 (C. C. S. D. N. Y. 1911); *Onondaga Indiana Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.*, 182 Fed. 832 (C. C. N. D. N. Y. 1910). See also note in *Hurn v. Oursler*, 289 U. S. 238 at 241, and Notes (1933), 33 COL. L. REV. 296; (1926) 40 HARV. L. REV. 298.

52. *Sterling v. Constantin*, 287 U. S. 378, 393-4 (1932); *Chicago G. W. Ry. v. Kendall*, 266 U. S. 94, 97-98 (1924); *Davis v. Wallace*, 257 U. S. 478, 482 (1922); *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256 (1919); *Louisville & W. R. Co. v. Greene*, 244 U. S. 522, 527 (1917); *Greene v. Louisville and Interurban R. Co.*, 244 U. S. 499, 508 (1917); *Ohio Tax Cases*, 232 U. S. 576, 586-587 (1914); *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 303 (1913); *Doherty v. McAuliffe*, 74 F. (2d) 800, 802 (C. C. A. 1st, 1935).

53. 213 U. S. 175 (1909).

54. *Id.* at 191.

55. See *Marine National Exchange Bank v. Kalt-Zimmers Mfg. Co.*, 293 U. S. 357 (1934); *Burns Mortgage Co. v. Fried*, 292 U. S. 487 (1934); Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423. In diversity of citizenship cases, the federal courts have at times refused to follow even state decisions construing state statutes, in the line of cases beginning with *Gelpcke v. Dubuque*, 68 U. S. 175 (1863). But such departures have been sanctioned only for situations in which the state courts have changed a construction of statute that existed (or is supposed to have existed) at the time of the transaction involved in the federal court. The freedom of the federal courts under the doctrine of this case is, in any event, much more limited than that under the doctrine of *Swift v. Tyson*. See *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) and Note (1933) 42 YALE L. J. 779. Cf. *Fox v. Standard Oil Co. of New Jersey*, 294 U. S. 87, 96-97 (1935), where, in considering a state statute which had not yet been before the state courts, the Court said:

is certainly more coercive and perhaps more irritating than a similar decision on state grounds which are subject to remedy by the state.⁵⁶ Moreover, interpretation of the state statute is a necessary prerequisite to a determination of whether there has been state action violative of federal law, and when made might as well be acted on.⁵⁷

What, then, is the law? When diversity of citizenship exists, any claims may be joined and decided. Where a federal question is the sole ground of jurisdiction there are considerable limitations. If one does not flinch from talking of jurisdiction in terms of discretion, the limitations are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system.⁵⁸ In terms of the *Hurn* case, however, claims may be joined when they are but different phases of a single cause of action and not otherwise.⁵⁹ How, then, is

"Reinforcing this token is the contemporaneous interpretation of the statute by the tax commissioner of the state, the administrative agent charged with its enforcement. *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378. We give to such construction 'respectful consideration,' although we have power to disregard it. *United States v. Moore*, 95 U. S. 760, 763; *Fawcus Machine Co. v. United States*, *supra*. The complainant was at liberty to maintain a suit in the State courts, where the meaning of the statute could have been determined with finality. It chose to have recourse to the courts of the nation. In such circumstances we are charged with a duty of independent judgment (*Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 194; *Hurn v. Oursler*, 289 U. S. 238, 243), but in default of other tests, we lean to an agreement with the agents of the State."

56. Cf. *Glenn v. Field Packing Co.*, 290 U. S. 177 (1933): In a suit to enjoin a Kentucky tax on the ground that it violated both the state and the federal constitutions, the federal three-judge court did not decide the issue under the federal constitution, but granted an injunction on the ground that the tax violated the state constitution, although the state courts had not yet passed on the validity of the tax. The Supreme Court modified the injunction by providing that the state tax commissioner could apply to the court below for a dissolution of the injunction decree if the statute were subsequently sustained under the state constitution by the state court. See Note (1934) 43 YALE L. J. 669.

57. See *Levering and Garrigues v. Morrin*, 61 F. (2d) 115, 119 (C. C. A. 2d, 1932); *Fox v. Standard Oil Co. of New Jersey*, 294 U. S. 87, 95 (1935) But cf. Note (1933) 33 COL. L. REV. 304. When a state statute is attacked as in the *Glenn* case, 290 U. S. 177 (1933), decision of the state ground is not a prerequisite to decision on the federal ground. But the Supreme Court's modification of the decree in the *Glenn* case and the attitude expressed in the *Fox* case, *supra*, are sufficient guards against undue interference by the federal courts.

58. Cf. *Mutual Insurance Co. v. Johnson*, 293 U. S. 328, 339 (1934): "The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance."

59. The similarity between the problem here discussed and the old problem with respect to the granting of legal relief in equity is quite apparent. See CLARK, CODE PLEADING (1928) 69-71; I CLARK, CASES ON PLEADING AND PROCEDURE (1930), 547 et seq.; Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1. The differences between the underlying considerations of policy in the two situations are, however, equally apparent.

the unanswered question in the *Morrin* case to be answered? And in the absence of diversity of citizenship may a claim under federal law for personal injuries be joined in the alternative with a claim under state law for the same injury? Our predilection is for a denial of jurisdiction over the non-federal claims in both situations; in the first for reasons already given, in the second, because personal injury suits have little place in the federal courts and such a holding would tend to divert them to the state courts.

The *Hurn* case may doubtless be made the basis for a contrary holding. But it does not at all require such a result. The singleness or independence of the several claims, which is made the measure of jurisdiction, is an issue posed for judgment in each case. But the measure is admittedly elastic. And, be it remembered, it is a measure supposedly determined by statute. It would be at least injudicious to suppose that the elasticity of the measure is not to be responsive to the pressures of considerations of politics with respect to the place of the federal courts in our federal system which are at the heart of the statute. While it may not be simply a matter of taste whether in particular situations jurisdiction over non-federal claims is to be asserted because of the singleness of the cause of action, or denied on the ground of separate causes of action, as in the *Hurn* case, or on the ground of unsubstantialness of the federal claim, as in the *Morrin* case, the concepts do involve taste and judgment and leave wide latitude for choice and discretion.

Two subordinate problems may be mentioned. Assuming that the plaintiff has properly joined in one action two claims which are deemed to be separate causes of action, must the jurisdictional amount requisite to federal jurisdiction be satisfied with respect to each claim separately or may the claims be aggregated? Here no constitutional issue can be raised; for the Constitution provides no jurisdictional amount requirement. The issue is entirely one of statutory interpretation.⁶⁰ The decisions have been that the amounts of the separate claims of a single plaintiff against a single defendant may be aggregated for purposes of jurisdiction, that the requirement refers to the total amount of the matters in controversy in the suit.⁶¹

Assuming, again, a proper joinder of separate causes of action in one suit, must the venue requirements be satisfied with respect to each cause independently or is it sufficient that the venue for one of the causes is proper? Again, the question involves only statutory interpretation.⁶²

60. 36 STAT. 1091 (1911), 28 U. S. C. A. § 41(1). The amount originally fixed was at \$500 exclusive of costs. 1 STAT. 78 (1789). As noted earlier, there has been agitation to again increase the amount, to \$7500 or to \$10,000.

61. *B. & O. Southwestern R. R. Co. v. United States*, 220 U. S. 94, 106 (1911); *Kimel v. Mo. State Life Ins. Co.*, 71 F. (2d) 921, 924 and n. 6 (C. C. A. 10th, 1934); *Yates v. Whyel Coke Co.*, 221 Fed. 603, 606 (C. C. A. 6th, 1915).

62. Some of the principal venue statutes are: 43 STAT. 1264 (1925), 28 U. S. C. A. § 112

No case exactly in point has been found. But analogies to be discussed later point to the probability that the defendant is privileged to insist that the venue requirements for each cause be considered independently of the other.⁶³

COUNTERCLAIMS

As in the case of joinder of actions, long experience with a practice which limited the kind of matters that a defendant could plead by way of cross-claim against the plaintiff has resulted in a definite trend toward absolute freedom in the defendant to plead any claim that he may have against the plaintiff with power in the court to order separate trials of matters that cannot conveniently be tried together. Trial convenience and administrative efficiency, it is thought, are more easily attained by the latter practice.⁶⁴ But, again, adoption of the newer practice in the federal courts encounters objections based on the limited nature of their jurisdiction, though Federal Equity Rule 30⁶⁵ is procedurally the most advanced of the various counterclaim rules. That rule provides (1) that the defendant *must* plead those claims that he may have against the plaintiff which arise "out of the transaction which is the subject matter of the suit" and (2) that he *may* plead *any* claim that he may have against the plaintiff which would be the subject of an independent bill in equity. Three questions, peculiar to the federal system will be considered: (a) Must the counterclaim be supported independently of the main action by the constitutional grounds of jurisdiction, federal question or diversity of citizenship? (b) Must the counterclaim, independently

[Diversity, Federal Question]; 36 STAT. 1102 (1911), 28 U. S. C. A. §§ 115, 116 [Suits of a local nature, property of a fixed character]; 36 STAT. 1100 (1911), 28 U. S. C. A. § 109 (1926) [patent cases]; 35 STAT. 1084 (1909), 17 U. S. C. A. § 35 [copyright cases]; 38 STAT. 731 (1914), 15 U. S. C. A. § 15 [anti-trust act]; 28 STAT. 280 (1894), 6 U. S. C. A. § 10 [against surety company].

63. Compare Dobie, *Venue in Civil Cases in the United States District Court* (1925) 35 YALE L. J. 129; Dobie, *Venue in the United States District Courts* (1914) 2 VA. L. REV. 1; Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217; Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment* (1930) 44 HARV. L. REV. 41; Blair, *The Doctrine of Forum Non-Conveniens in Anglo American Law* (1929) 29 COL. L. REV. 1.

64. Clark and Moore, loc. cit. *supra* note 1; Blume, *A Rational Theory for Joinder of Causes of Action and Defenses and for the Use of Counterclaims* (1927) 26 MICH. L. REV. 1; Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action," and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims* (1932-33) 18 CORN. L. Q. 20, 232.

65. Uniform Equity Rules of 1912 as amended May 4, 1925, 268 U. S. 710; HOPKINS, FEDERAL EQUITY RULES (8th ed., 1933) 209.

The Equity Rules of 1912 did not attempt by rule to settle or decide federal jurisdictional problems. It seems probable that the uniform rules for civil procedure which the United States Supreme Court has been authorized to promulgate, *supra* note 18, likewise will not attempt to deal with federal jurisdictional limitations, the subject matter of this article.

of the main action, involve the statutory jurisdictional amount? (c) Does the plaintiff have any venue privilege with respect to the counterclaim?

Venue. After considerable conflict in the decisions of the lower federal courts,⁶⁶ the Supreme Court recently held that a plaintiff has no privilege of venue with respect to any counterclaim which his defendant is permitted to plead under Rule 30.⁶⁷ The stated ground is that the institution of suit by a plaintiff constitutes a waiver, imposed by law as a condition of the suit, of the venue privilege that he would have had with respect to any counterclaim had it been the subject of an original suit against him.⁶⁸ With respect to venue, the plaintiff is thus in the same position in the federal court that he would occupy in a state court if he had brought his action there. He will not be encouraged, therefore, in cases of coordinate jurisdiction, to choose the federal court in order to avoid a counterclaim.

Jurisdiction. 1. In the problem previously discussed, "cause of action" is the elastic measure by which the jurisdiction of the court is determined. In the case of counterclaims, the measure, equally elastic, is "transaction" and "subject matter." If the counterclaim arises "out of the transaction which is the subject matter" of the plaintiff's suit,⁶⁹ the jurisdiction over the suit is sufficient also for the counterclaim, so that the counterclaim may be pleaded even though, had it been prosecuted as an independent action, it would not have been cognizable in the federal courts.⁷⁰ And in such a case, the court may retain the counterclaim and award affirmative relief to the defendant even though the plaintiff's claim is denied on the merits.⁷¹

The issue as to constitutional grounds of jurisdiction⁷² arises only in

66. *Rhodes-Hochriem Mfg. Co. v. International Ticket Scale Corporation*, 57 F. (2d) 713 (D. Del. 1932); *Victor Talking Machine Co. v. Brunswick-Balke-Collender Co.*, 279 Fed. 758 (D. Del. 1922); *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 Fed. 200 (E. D. Mich. 1917); *United States Expansion Ball Co. v. H. G. Kroncke Hardware Co.*, 234 Fed. 868 (C. C. A. 7th, 1916), *Durabilt Steel Locker Co. v. Berger Mfg. Co.*, 21 F. (2d) 139 (N. D. Ohio 1927); *Parker Pen Co. v. Rex Mfg. Co.*, 11 F. (2d) 533 (D. R. I. 1926).

67. *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430 (1932), Note (1933) 31 MICH. L. REV. 1185; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U. S. 448 (1932).

68. At the present term of Court a similar decision was rendered with respect to a counterclaim against a creditor who filed a claim in a receivership proceeding. *Alexander v. Hillman*, 56 Sup. Ct. 204 (1935). But a plaintiff may insist on his privilege of venue with respect to a claim against him by an intervener. *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 56 Sup. Ct. 6 (1935).

69. Equity Rule 30, 268 U. S. 710.

70. *Moore v. N. Y. Cotton Exchange*, 270 U. S. 593 (1926).

71. *Id.* at 610.

72. As distinguished from equity or admiralty jurisdiction or jurisdictional amount. For example, in *The Kearney*, 14 F. (2d) 949 (C. C. A. 3d, 1926), it is intimated that a non-maritime counterclaim may not be pleaded in an admiralty suit, although they both arise out of the "same transaction and subject matter."

"federal question" cases. If jurisdiction in the plaintiff's action depends on diversity of citizenship, the issue does not arise because the citizenship is the same whether the suit or the counterclaim be regarded.⁷³ But it is, of course, not necessarily true that when the plaintiff's action rests on a federal question, the counterclaim arising out of that transaction or subject matter also involves a federal question. The contrary was the case in *Moore v. N. Y. Cotton Exchange*,⁷⁴ where the rule as to counterclaims was enunciated by the Supreme Court. Federal jurisdiction in that case was invoked solely on the "federal question" ground. The plaintiff attacked as illegal under the Sherman Anti-Trust Law an arrangement between the New York Cotton Exchange and Western Union under which the plaintiff was refused ticker service for the quotations of the Exchange; and he prayed an injunction compelling the defendants to furnish the service. The defendants admitted the refusal to convey the quotations to the plaintiff and attempted to justify it. They also filed a counterclaim alleging that the plaintiff was "purloining or otherwise illegally obtaining" the quotations and asked that the plaintiff be enjoined from that practice. In the counterclaim no federal question was involved. The illegality of the plaintiff's conduct was rested entirely on "general law," the law of the state. The Court decided against the plaintiff on his claim and also enjoined the plaintiff as prayed in the counterclaim. The term "transaction which is the subject matter of the action" thus refers to the facts—the acts or occurrences—not to the law invoked.

A question similar to that raised in *Hurn v. Oursler* may, therefore, be asked here. Certain facts, a "transaction," when coupled with a legal theory involving federal law, give rise to a federal claim of which the court has jurisdiction. If, in the same case, a different legal theory not involving any federal law when coupled with approximately the same facts also gives rise to a claim for relief, may the court decide the latter claim, even after deciding adversely to the former? In one aspect the case here is even stronger against jurisdiction; for the two claims are here made by different parties, while in the *Hurn* case they were made by the same party. In both cases the Court answers the question similarly; but while it attempts in the *Hurn* case to support its answer with reasons, it assumes the answer in the *Moore* case and inquires only whether the "transaction" is the "same" in the claim and the counterclaim. In the course of the latter inquiry, however, the Court states that "the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant [plaintiff] from continuing to obtain by stealthy appropriation what the court held it could not have by judicial com-

73. Except in the possible case of change of citizenship in the interval between the complaint and the counterclaim.

74. 270 U. S. 593 (1926).

pulsion.”⁷⁵ Obviously the Court did not mean complete “relief” for the plaintiff. The plaintiff did not even seek to be thrown out; much less did he seek to be thrown out and also maimed. But if the Court meant complete “relief” to the defendant, the statement does not help in determining whether the Court had power to grant the defendant *any* relief. Dismissal of the plaintiff’s bill is, of course, vernacularly a relief to the defendant, but the Court could hardly have meant that. Likewise, the fact that Rule 30 requires the defendant to plead, on the pain of forfeiture, a counterclaim arising out of the transaction is of no aid in determining the question of jurisdiction. The Rule does not require, so it has been held, the pleading of such a counterclaim if it is of a legal rather than an equitable character.⁷⁶ It obviously does not, and cannot, require the pleading of a counterclaim of which the court does not have jurisdiction. But perhaps the transaction is a flask which is thrown into the court’s lap by the institution of suit. Having possession of the flask, the court can quench the thirst of either (or in part both) of the litigants. The defendant is relieved when the plaintiff is denied a drink; the supply is still there. But his “relief” is not complete until he gets the drink.

The reasons for the rule of the *Moore* case, apart from considerations of convenience and efficiency, which presumably have nothing to do with the question of power, are apparently to be found in the adumbrations of ancillary or auxiliary jurisdiction, of the equity doctrine of complete relief and of the doctrine that a court which has acquired possession of property has, by that possession, jurisdiction to adjudicate claims against that property.⁷⁷ If the rule unduly extends opportunities for federal determination of non-federal law, the “transaction” concept is an adjustable vise by which they may be at least considerably contracted.

It is implicit in the *Moore* case that if the plaintiff’s action is dismissed for want of jurisdiction, the counterclaim must also be dismissed, at least if there is no jurisdictional basis for the counterclaim independent of the main action. But if an independent basis does exist, the counterclaim may be retained and determined. The only objections to such retention would be lack of service of process on the plaintiff in the rôle of defendant and possibly improper venue. But both objections are lost by an appearance. The plaintiff’s institution of suit constitutes a waiver of these objections where his suit is within the jurisdiction of the court; and there seems to be no reason for holding otherwise when

75. *Id.* at 610.

76. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 366 (1922); *Stephens v. Howells Sales Co.*, 16 F. (2d) 805 (S. D. N. Y. 1926). But a defendant setting up a legal cause of action as a counterclaim “waives” objections to the equitable jurisdiction and “waives” his right to a trial by jury. *American Mills Co. v. American Surety Co.*, *supra*; *Pierce v. Union Nat’l Bank*, 33 F. (2d) 997 (N. D. Ohio 1929).

77. Cases cited *infra*, notes 92, 93, 94.

jurisdiction is subsequently denied. The condition is attached to the plaintiff's acts; and these are the same in both situations.

2. Having found that the counterclaim in the *Moore* case was one "arising out of the transaction which is the subject matter of the suit," the Court deemed it unnecessary to "consider the point that, under the second branch [of Rule 30 with reference to counterclaims not so arising] federal jurisdiction must appear, as was held in *Cleveland Engineering Co. v. Galion D. M. Truck Co.*, 243 Fed. 405, 407."⁷⁸ Whether this statement was meant to approve the holding of the *Engineering* case or leave the question open the Court has never explained. But lower federal courts have held in accord with the *Engineering* case.⁷⁹ And there is persuasive analogy to support these holdings. The decisions that venue or personal jurisdiction objections to a counterclaim are lost as a consequence of the institution of suit⁸⁰ seem to indicate that objection to jurisdiction over the subject matter, which is not a privilege of a party, is not so lost. Likewise, the holding in *Hurn v. Oursler* that, in the absence of diversity of citizenship, a federal court has no jurisdiction to adjudicate a non-federal cause of action which is joined by the plaintiff with a separate federal cause of action seems to require a like holding, in the absence of diversity of citizenship, with respect to a non-federal counterclaim which is entirely independent of the transaction that is the subject matter of the main action.

If the counterclaim seeks relief entirely independent of the success or failure of plaintiff's claim, as, for example, in the extreme case of a counterclaim to remove a cloud from title to real estate pleaded in an action for patent infringement, denial of jurisdiction over the counterclaim when it is not supported by grounds independent of those in the main action seems to be satisfactory enough. Conscience would, perhaps, not be disturbed in any case where the counterclaim seeks affirmative relief and jurisdiction is denied only with respect to so much of the counterclaim as goes beyond extinguishing or reducing the plaintiff's recovery. But if it is held that in an action for money, the

78. 270 U. S. 593, 609 (1926).

79. *Noma Electric Corp. v. Rainbow Electric Mfg. Corp.*, 12 F. Supp. 229 (S. D. N. Y. 1928); *Tennessee Products Corp. v. Warner*, 39 F. (2d) 200 (D. Tenn. 1929); *Frankart v. Metal Lamp Corp.*, 32 F. (2d) 920 (S. D. N. Y. 1929); *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377 (D. N. J. 1914); and see *Kaumagraph Co. v. General Trade Mark Corp.*, 12 F. Supp. 230 (S. D. N. Y. 1935).

80. *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430 (1932), and *Leman v. Krentler, Arnold Co.*, 284 U. S. 448 (1932). It is stated in *Alexander v. Hillman*, 56 Sup. Ct. 204 (1935) at 210 that § 51 of the Judicial Code (venue) "applies only where a suit is 'brought . . . by any original process or proceeding.'" This could hardly have been meant to assert that the plaintiff has no venue privilege at all with respect to a counterclaim; for the *General Electric* and *Leman* cases as well as the *Alexander* case clearly indicate that there is a privilege which is in some cases lost by the plaintiff's conduct.

defendant may not set off against the plaintiff's claim a separate claim for money against the plaintiff, conscience may be troubled a little. *Hurn v. Oursler* is not altogether in point. There the plaintiff is at most only inconvenienced by being required to bring two actions instead of one. Here the defendant would not merely be inconvenienced in a like manner, but would be ordered to pay out monies to the plaintiff which, otherwise, would constitute most effective security for his own claim against the plaintiff. Such a sacrifice may be required by the politics of federalism, enacted in statute or the Constitution. But its harshness may be alleviated. The remedy for equitable set-off might be afforded as an exercise of ancillary jurisdiction in some cases.⁸¹ And, perhaps, in any case, the court would have power to stay execution of the plaintiff's judgment until the defendant's claim was adjudicated in a state court.

With respect to a plaintiff's attempt to join several claims in his action, one's conscience can generally be appeased by the thought that the plaintiff is not required to sue in a federal court and may bring his action in a state court where the limitations discussed would not exist. Likewise, when the defendant is sued in a state court and removes the suit to the federal court, he, like a plaintiff, may with clear conscience be made to pay for his choice the penalties of a limited jurisdiction. But this solace is not available with respect to the claims of a defendant who is haled into the federal court; he has no choice. A wise discretion in the use of the suggested remedies, stay of execution and equitable set-off, may be the means of reconciling the dictates of justice or conscience with the political expediency of limiting the federal jurisdiction.⁸²

Jurisdictional Amount. Assuming that a counterclaim satisfies the grounds of jurisdiction mentioned above, must it also, independently of the main action, involve the amount which would be required if the counterclaim were prosecuted as an original action? The silence of the courts on this point is probably the result of an unquestioned assumption that independent jurisdictional amount is not required. There are three

81. See STORY, EQUITY JURISPRUDENCE (12th ed. 1877) 681 et seq.; CLARK, CODE PLEADING (1928) 438.

82. Cf. *United States v. The Thelka*, 266 U. S. 328 (1924), where the issue related to the jurisdiction over a counterclaim against as sovereign pleaded in a suit brought by the sovereign. Circuit Judge Mack, in the trial court, said (286 Fed. 188, 192-3): "The right of counterclaim and set-off having been first introduced as a part of our procedural law, halting recognition is just beginning to be given to the fact that the right as between litigants is something more than a procedural convenience and is really a requirement of substantive justice. . . . If the right of set-off and counterclaim be regarded as a mere matter of procedure, there would seem to be no reason why a right against a sovereign state should be recognized by set-off or counterclaim, which could not be set up in an independent suit. On the other hand, if the right of set-off or counterclaim is to be regarded as affecting the substantive relations between the litigants, the question presented assumes an entirely different aspect."

lines of analogy which seem to prove the correctness of that answer: First, while there has been some conflict in earlier cases, it is now generally held that when a plaintiff institutes an action in a federal court on a claim which involves less than the required jurisdictional amount, the defect is cured if the defendant pleads a counterclaim which does involve that amount.⁸³ This is exactly the situation assumed in our question, except for the difference in the designation of the parties. Second, when a non-resident plaintiff sues a resident defendant in a state court on a claim which involves less than the jurisdictional amount requisite for federal jurisdiction and the defendant pleads a counterclaim which does involve that amount, it has been held that the plaintiff, *qua* defendant to the counterclaim, may remove the whole suit.⁸⁴ Here again we have the situation assumed in our question, except for the difference in the designation of the parties. Third, if the plaintiff joins in an original suit several separate causes of action, permissible under the joinder practice, the jurisdictional amount requirement is satisfied if the *aggregate* of the claims equals that amount even though each individually does not.⁸⁵ The common view in all these cases seems to be that the statutory jurisdictional amount requirement is satisfied if the total amount in controversy in all the matters as to which the court is otherwise empowered to grant relief is of the required size.

The conclusion that the jurisdictional amount requirement is not applicable to a counterclaim, otherwise within federal jurisdiction, is limited to the cases in which the plaintiff's claim is itself in all respects within federal jurisdiction. The merits of such a rule are obvious; and it has no serious demerits. Resort to the federal courts is not thereby encouraged. When the action is brought originally in the federal court, it is the plaintiff and not the defendant who makes the choice. It is true that a contrary rule would tend to discourage defendants from removing to the federal courts actions begun against them in state courts. But this tendency would be offset by the incentive thereby afforded to the plaintiff to initiate his suit in the federal court in order to avoid the counterclaim. The statutory jurisdictional amount requirement is in large part a rule to relieve the federal courts from undue pressure of litigation. It is not so closely associated with political considerations as

83. *Ginsberg v. Pacific Mutual Life Ins. Co.*, 69 F. (2d) 97 (C. C. A. 2d, 1934) and cases cited. See *Home Life Ins. Co. v. Sipp*, 11 F. (2d) 474 (C. C. A. 3d, 1926). And see Dobie, *Jurisdictional Amount in the United States District Court* (1925) 38 HARV. L. REV. 733, 744.

84. *San Antonio Farms v. Shandy*, 29 F. (2d) 579 (D. C. Kan. 1928); *Pierce v. Desmond*, 11 F. (2d) 327 (D. C. Minn. 1926) and cases cited.

85. *B. & O. S. W. R. R. v. United States*, 220 U. S. 94 (1911); *Kimmel v. Missouri State Life Ins. Co.*, 71 F. (2d) 921, 924 (C. C. A. 10th, 1934); *Mass. Protective Ass'n v. Kittles*, 2 F. (2d) 211 (C. C. A. 5th 1924); *Armstrong v. Ettlesohn*, 36 Fed. 209 (N. D. Ill. 1888).

the questions of jurisdiction previously discussed. The statute may, therefore, be interpreted as not requiring a rule as to counterclaims which has little bearing on problems of federalism, which would not have any tendency to limit the business of the federal courts and which would be plainly harsh on parties defendant.

But these considerations do not apply, with equal force at least, to cases in which neither the plaintiff's action nor the defendant's counterclaim involves by itself the requisite jurisdictional amount. In such a case jurisdiction of the plaintiff's action, as well as of the counterclaim, is in question. It is commonly said that the amounts of the two may be added to make the jurisdictional amount. This rule obviously brings to the federal courts business which otherwise could not reach them. There are, therefore, some contrary holdings and some limitations upon the rule.⁸⁶

THIRD PARTIES AND CROSS CLAIMS

The preceding discussion has been concerned with claims between plaintiffs and defendants as originally aligned. There are more complicated situations with multiple parties where there is a considerable scrambling in the alignment of their claims and where third persons may be sought to be introduced in the suits. But the problems raised in these situations and the lines of argument for their solution are similar to those previously considered. The further discussion may therefore be brief.

A defendant may wish to present in the suit against him, one or more of a variety of claims other than a counterclaim against a plaintiff or plaintiffs alone. The defendant's claim may be: (1) against the plaintiff and a third person who is not yet a party to the action; (2) against one or more of his co-defendants; (3) against the plaintiff and a co-defendant; (4) against a co-defendant and a third person; (5) against a third person alone. Obvious considerations of convenience impose some limits upon the freedom of a defendant to complicate a litigation by the introduction of such claims, though an enlightened procedure would hardly restrict that freedom beyond the limits of convenience and efficiency. Even in the absence of jurisdictional limitations, however, the procedure with reference to such claims is still in the developing stage. Third party impleader is in some aspects a modern innovation not yet generally adopted in state practice.⁸⁷ In 1925 Equity Rule 30

86. See Dobie, *supra* note 83; *Home Life Ins. Co. v. Sipp*, 11 F. (2d) 474 (C. C. A. 3d, 1926).

87. For more general discussions of third-party practice, see Bennett, *Bringing in Third Parties by the Defendant* (1935) 19 MINN. L. REV. 163; Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action* (1933) 47 HARV. L. REV. 209; Gregory, *Tort Contribution Practice in New York* (1935) 20 CORN. L. Q. 269; Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties* (1933) 33 COL. L. REV. 1147.

was amended to provide that when a third person is necessary for the determination of a counterclaim against a plaintiff, the third person may be brought in if he is subject to the court's jurisdiction. Limited kinds of crossbills by a defendant against a co-defendant are traditionally permissible in equity practice.⁸⁸ A liberal procedure with respect to all the situations mentioned will probably soon develop. But there may be limits upon its scope, though not on its liberality, in the federal courts.

1. Consider first the case of a third person sought to be joined with a plaintiff in a counterclaim. Where lack of federal question or diversity of citizenship is an objection available to the plaintiff if the claim is made against him alone, it is doubtless equally available to the third person. The defect is not cured by joining the third person. But, as previously pointed out, a plaintiff's objection on this score in some cases is overcome by a holding that the counterclaim arises out of the transaction which is the subject matter of the plaintiff's action. May the third person's objection be similarly met? In view of the practice which permits one of several joint obligors to be sued alone when jurisdiction cannot be acquired over the others,⁸⁹ the defendant would not be completely rebuffed if his counterclaim were confined to the plaintiff, but he would suffer some inconvenience and relitigation would not be avoided. It would be desirable, therefore, to place the third person's objection on a par with the plaintiff's. Theory justifies this treatment. For the jurisdiction involved is not a privilege of the party to demand or forsake voluntarily or otherwise. Since the jurisdiction of the court over a counterclaim against the plaintiff is, therefore, not referable to the conduct or character of the plaintiff, but rather to its cognizance of the "transaction," there is no basis on which to differentiate between the plaintiff and third persons interested in the transaction.⁹⁰

A different problem, however, is involved in the question of personal jurisdiction. In every real sense the third person is in the position of a defendant in a suit. He must be served with process or its equivalent in the same manner as a defendant and he must be subject to suit in the district in which the plaintiff's action is pending. These requirements are privileges given to persons against whom suit is brought. The plaintiff is not given these privileges with reference to a counterclaim against him because it is reasonable to require him to litigate in the court in which he chose to institute his action against the defendant all the matters in controversy between them and not simply those which he

88. See *Shields v. Barrow*, 58 U. S. 130 (1854); *Cross v. DeValle*, 68 U. S. 5 (1863); *R. R. Co. v. Chamberlain*, 73 U. S. 748 (1867); *Rubber Co. v. Goodyear*, 76 U. S. 807 (1869).

89. JUDICIAL CODE § 50, 28 U. S. C. A. § 111; Equity Rule 39; see *Camp v. Grass*, 250 U. S. 308 (1919).

90. Cases cited *infra*, notes 92, 93, 94.

chooses to present. No such justification is available with reference to the third party who is summoned to defend a claim against him and who asks for the usual privileges of a defendant.

(" While joining a third person with the plaintiff in a counterclaim against them does not cure a defect in jurisdiction which would have existed had the counterclaim been pleaded against the plaintiff alone, the joinder may cause a defect which otherwise would not have existed. If there is diversity of citizenship between the plaintiff and defendant and the latter pleads a counterclaim entirely unrelated to the plaintiff's action, federal jurisdiction over the counterclaim nevertheless exists. But suppose that the defendant joins in the counterclaim a third person who is a citizen of the same state as the defendant, the counterclaim then does not satisfy the jurisdictional requirements and both the plaintiff and the third person may raise the objection.⁹¹)

2. Cross-claims between co-defendants are familiar in equity practice. Doubtless they have a place in law actions or in a procedure which unites law and equity. From the standpoint of convenience alone, there seems to be no reason for permitting such cross claims unless they bear some relation to the main action. If for some unknown reason, they should be permitted despite total irrelevance to the main action, they would properly be subject to all the jurisdictional requirements which would be applicable were they prosecuted as independent actions.

In the old equity practice, cross-bills between co-defendants were permitted when they related to property or funds within the court's possession,⁹² when they were "auxiliary to the original suit and a graft and a dependency upon it,"⁹³ when they were necessary to enable the court to grant "complete" relief and prevent its decree from effecting an "injustice."⁹⁴ With these guides for the determination of the scope of

91. Cf. *Olsen v. Jacklowitz*, 74 F. (2d) 718 (C. C. A. 2d, 1935); *Dollar S. S. Lines v. Merz*, 68 F. (2d) 594 (C. C. A. 9th, 1934); *Devost v. Twin State Gas & El. Co.*, 250 Fed. 349 (C. C. A. 1st, 1918).

92. *Osborne & Co. v. Barge*, 30 Fed. 805 (C. C. N. D. Iowa 1887) [chattel]; *Morgan's Co. v. Texas Central Ry.*, 137 U. S. 171 (1890) [realty]; *1st Nat'l Bank v. Salem Capital Flour Mills Co.*, 31 Fed. 580 (C. C. Ore. 1887); *Park v. N. Y. L. E. & W. R. Co.*, 70 Fed. 641 (C. C. S. D. N. Y. 1895). See *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 70 Fed. 518 (C. C. Colo. 1895); *Ulman v. Jaeger's Adm'r*, 155 Fed. 1011 (C. C. S. D. W. Va. 1907); *Republic Nat'l Bank & Trust Co. v. Mass. Bond & Ins. Co.*, 68 F. (2d) 445 (C. C. A. 5th, 1934). But see *Newton v. Gage*, 155 Fed. 598 (C. C. S. D. Cal. 1907).

93. *Rubber Co. v. Goodyear*, 76 U. S. 789 (1869); *Federal M. & S. Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 187 Fed. 474 (C. C. Idaho 1909). See *Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co.*, 46 Fed. 851 (C. C. W. D. Pa. 1891).

94. *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258 (1910); *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166 (C. C. Montana 1906); *Craig v. Dorr*, 145 Fed. 307, (C. C. A. 4th, 1906); *Barrett v. Mayes*, 43 F. (2d) 521 (C. C. A. 10th, 1930). See *Mathis v. Ligon*, 39 F. (2d) 455 (C. C. A. 10th, 1930), cert. denied 282 U. S. 846 (1930).

equity jurisdiction and procedure, questions as to the scope of federal jurisdiction were, as foreshadowed by the preceding discussion, automatically answered. The jurisdiction over the main bill gave jurisdiction over the dependent cross-claims.⁹⁵ But in a more liberalized equity practice and in actions at law there develops a divergence between relevance for purposes of convenient procedure only and relevance for purposes of jurisdiction.⁹⁶ Thus, in an action against two defendants on a joint liability to the plaintiff, may one of the defendants plead against his co-defendant a claim for contribution or indemnity in the absence of diversity of citizenship between them and in the absence of any foundation in federal law for the claim? It is unquestionably related to and in a manner dependent upon the main action. Is the relation or dependency close enough for federal jurisdiction?⁹⁷

3. When a defendant seeks to join his co-defendant with a third person in a claim against them, the situation is analogous to that in which the third person is joined with the plaintiff in a counterclaim. If, despite the lack of independent jurisdictional support for the cross-claim, the relationship between it and the main action is sufficiently close to warrant its assertion against the co-defendant alone, it may also be asserted against the third person, subject, however, to the personal privileges of service and venue which the third person enjoys in common with other defendants. If, on the other hand, the cross-claim against the co-defendant alone would require independent jurisdictional support, it requires such support also when the third person is joined; and, as in the case of counterclaims, the joinder may defeat jurisdiction.⁹⁸

The increasing number of states which require contribution between tortfeasors and the general development of third party practice⁹⁹ has increased these jurisdictional problems. In the small number of reported

95. Because the defendants against whom cross-claims were filed were already parties to the action and the cross-claims were ex hypothesi dependent upon the action, no venue problems were raised. Compare the different situation of a third party sought to be joined, *supra*, p. 418.

96. See *Magnolia Petroleum Products Co. v. Suits*, 40 F. (2d) 161 (C. C. A. 10th, 1930): A gave an oil and gas lease on his land to P. Later, A executed a conveyance of the fee in part of that land to D for church purposes, to be terminated when the land ceased to be used for church purposes, and subject to a clause prohibiting D from drilling for oil and gas. D then made an oil and gas lease to S who thereafter drilled for oil. P sued to enjoin the drilling and made parties defendant S, D and A. A filed a cross-bill against S and D asking that his title to the land, subject to P's lease, be quieted and that he recover a judgment against S and D for the royalties on the oil produced by them from the premises. The court granted P's prayers but dismissed the cross-claim for want of jurisdiction because A, S and D were citizens of the same state.

97. Cf. *Prince v. Childs Co.*, 23 F. (2d) 605 (C. C. A. 2d, 1928); *Craig v. Dorr*, 145 Fed. 307 (C. C. A. 4th, 1906); and see cases cited *infra* note 100.

98. *Supra*, p. 419.

99. See Bennett, Gregory, and Cohen, all *supra*, note 87.

cases that have thus far dealt with the impleader of third persons to answer a claim of indemnity or contribution by a defendant, it has been uniformly held that the impleader is not available unless grounds for jurisdiction, independent of the main action, support the claim against the third person.¹⁰⁰ Such holdings obviously sacrifice a good deal of convenience and economy. In view of the close connection between the impleader claim and the main action, it probably may not be said that the Constitution requires the sacrifice. But in view also of the many subtle considerations of governmental policy involved, it may be wise to await a legislative determination.

We have not exhausted the brain-twisting combinations and permutations of the situations which we have discussed. And we have left some related situations untouched: interpleader,¹⁰¹ intervention, the joinder and substitution of parties,¹⁰² and the effect of failure to raise objections to the jurisdiction over the subject matter.¹⁰³ But we have indicated the nature of the problems, the dialectics they evoke and the deeper considerations of policy involved. Specific rules for special types of cases may be stated, with perhaps few qualifications; but generalization can be made only in terms of conflicting interests and differing values.

100. *Wilson v. United American Lines*, 21 F. (2d) 872 (S. D. N. Y. 1927); *Sperry v. Keeler Transportation Lines*, 28 F. (2d) 897 (S. D. N. Y. 1928); *Lowry & Co. v. Nat'l City Bank of N. Y.*, 28 F. (2d) 895 (S. D. N. Y. 1928); *Franklin v. Meredith Co.*, 63 F. (2d) 109 (C. C. A. 2d, 1933); *Osthaus v. Button*, 70 F. (2d) 392 (C. C. A. 3d, 1934); *Galveston, Harrisburg & San Antonio Ry. Co. v. Hall*, 70 F. (2d) 608 (C. C. A. 5th, 1934); *Grobel v. Miller*, 71 F. (2d) 503 (C. C. A. 3d, 1934). Whether an issue impleaded in a suit begun in a state court "would be removable at all, either as a separable controversy taking the whole suit into the Federal court, or as a separate one, taking only the cross-action" was questioned but not decided in *City of Waco, Texas v. United States Fid. & Guar. Co.*, 76 F. (2d) 470 (C. C. A. 5th, 1935). For the earlier phases of this case, see 293 U. S. 140 (1934) and 67 F. (2d) 785 (C. C. A. 5th, 1933).

101. See *Klaber v. Maryland Casualty Co.*, 69 F. (2d) 934 (C. C. A. 8th, 1934); *Republic National Bank & Trust Co. v. Mass. Bonding & Ins. Co.*, 68 F. (2d) 445 (C. C. A. 5th, 1934); *Turman Oil Co. v. Lathrop*, 8 F. Supp. 870 (N. D. Okla. 1934); Note (1935) 48 HARV. L. REV. 854; *N. Y. Life Ins. Co. v. Cross*, 7 F. Supp. 130 (S. D. N. Y. 1934); Chaffee, *Interpleader in the United States Courts* (1932) 41 YALE L. J. 1134.

102. *Salem Co. v. Manufacturers Co.*, 264 U. S. 182 (1924); *Porto Rico v. Ramos*, 232 U. S. 627 (1927); *Hardenbergh v. Ray*, 151 U. S. 112 (1893); *Hawes v. First National Bank*, 229 Fed. 51 (C. C. A. 8th, 1915); *Hadden v. Fidelity & Deposit Co.*, 34 F. (2d) 580 (D. Idaho 1929); *Cohen v. Maryland Casualty Co.*, 4 F. (2d) 564 (E. D. S. C. 1925); *Clark and Moore*, *supra* note 1 at 1317 et seq.

103. Cf. JUDICIAL CODE § 37 (1911), 28 U. S. C. A. § 80.