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FEDERAL COURTS — REMOVAL OF CAUSES — ACTION BY STATE TAX COLLECTOR AGAINST NATIONAL BANK TO RECOVER TAXES — FEDERAL QUESTION — The state of Mississippi passed a statute imposing a tax upon national banks, under authority of a federal statute permitting such legislation. The state assessed the tax upon defendant's predecessor, and defendant, in taking over its predecessor's assets, undertook to pay all of its obligations, including taxes due. The state tax collector started suit on the contract in the state court, but upon defendant's applicaion the cause was removed to the federal district court. On appeal it was *held* the case did not arise under the laws of the United States within the meaning of the removal statute because it was essentially an action on a state statute involving questions of local law, and because the possibility that a federal question would arise was too remote and conjectural to serve as a basis for original jurisdiction. *Gully v. First Nat. Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96 (1936).

The question whether a suti to enforce a state statute, where a state is permitted by a federal statute to do something otherwise prohibited to it by the Federal Constitution, is a case arising under the laws of the United States, within the meaning of the statute allowing for removal of such cases from a state court to a federal district court,[1] has not before arisen in the Supreme Court, so there is no direct precedent for this decision. There are analogous situations and broad generalizations in previous cases which would make a decision either way possible. It is well settled that the question of jurisdiction is to be determined from the allegations of the complaint, disregarding any anticipation and avoidance of defenses; [2] and, conversely, that where a good

[1] 28 U. S. C., § 71, incorporating by reference 28 U. S. C., § 41 (1).
[2] DOBIE, FEDERAL PROCEDURE 175 (1928); 17 L. R. A. (N. S.) 861 (1919);

faith claim of right is made under federal law, not merely colorable or frivolous, jurisdiction cannot be defeated because it subsequently turns out that the contention of the plaintiff is without merit.[3] The jurisdiction of the federal court is not defeated solely by the presence in the case of non-federal as well as federal questions.[4] The federal courts clearly have jurisdiction over suits where the cause of action is based directly and exclusively on substantive rights created by the Federal Constitution or laws.[5] Difficulty arises where, although the suit is not brought directly on the federal law, such law may or will affect the decision. Where this is the situation, the general rule would seem to be that a case arises under the Constitution or laws of the United States if the result may be made to depend upon the construction to be given either.[6] The instant case could perhaps be brought within this rule, but as was pointed out in the opinion, if there is any question of federal law, it is lurking in the background, and reasonableness indicates that a dispute so doubtful and conjectural should not be made the basis for taking jurisdiction away from the state court.[7] But even granting that an interpretation of a federal law would not be required in the suit, it is still arguable that in the absence of the federal statute there could be no such suit, and that the cause of action is therefore founded on the laws of the United States.[8] The Supreme Court has said that a case arises under the law that creates the cause of action.[9] The court once went so far as to hold

Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 38 S. Ct. 237 (1918); Taylor v. Anderson, 234 U. S. 74, 34 S. Ct. 724 (1914); Louisville & N. R. R. v. Mottley, 211 U. S. 149, 29 S. Ct. 42 (1908).

[3] The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 S. Ct. 410 (1913).

[4] DOBIE, FEDERAL PROCEDURE 173 (1928).

[5] ROSE, FEDERAL JURISDICTION AND PROCEDURE 232 (1931); So. Covington & C. St. Ry. v. City of Newport, 259 U. S. 97, 42 S. Ct. 418 (1922); Cooke v. Avery, 147 U. S. 375, 13 S. Ct. 340 (1893).

[6] Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243 (1920); Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. R., 192 U. S. 371, 24 S. Ct. 325 (1904); Northern Pacific Ry. v. Soderburg, 188 U. S. 526, 23 S. Ct. 365 (1902); Howard v. United States, 184 U. S. 676, 22 S. Ct. 543 (1902); St. Joseph & G. I. R. R. v. Steele, 167 U. S. 659, 17 S. Ct. 925 (1897).

[7] It might very well be argued that the question, if it arose at all, would arise by way of defense; but the court in the instant case conceded for the sake of argument that it could be considered a part of plaintiff's case as going to show breach, since there could be no breach if the tax were not valid.

[8] This was substantially the argument in the court below. Gully v. First Nat. Bank in Meridian, (C. C. A. 5th 1936) 81 F. (2d) 502.

[9] American Well Works Co. v. Layne & Bowler Co., 241 U. S. 257, 36 S. Ct. 585 (1916), per Holmes, J. This was the basis of the dissenting opinion by the same justice in Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243 (1920), a suit by stockholders in a corporation to enjoin the directors from buying bonds under a statute claimed to be unconstitutional. His argument was that the cause of action arose purely from state law, and the fact that the state law had seen fit to adopt the federal law as a criterion or test was decided not to bring a case within the jurisdiction of the federal courts in Miller's Exrs. v. Swann, 150 U. S. 132, 14 S. Ct. 52 (1893). It will be seen that the situation in these cases is essentially different from that in the principal case, though some of the language found in them might be con-

that if any part of the right to bring suit was dependent upon a federal law, the federal courts had jurisdiction,[10] but later decisions have steadily narrowed this doctrine. It is now settled that the fact that the right or duty to sue, as contrasted with substantive rights to be asserted, is derived from federal law is not enough if the determination of the suit rests upon an application of local law.[11] While the instant case is not within that category, the cases referred to show that it is not a reliable test to inquire what could have been done in the absence of the federal statute. It is also settled that the federal courts do not have jurisdiction over cases to try title to land merely because title is traceable back to federal grants,[12] and this is probably the closest analogy to the principal case, in that there, too, there could be no substantive right in the absence of a federal statute, while the controversy is primarily controllable by local law. As the instant case pointed out, "cause of action" is not a phrase which may be made the subject of a satisfactory abstract generalization. There would seem to be no reason for straining in the direction of giving the federal courts jurisdiction over suits in which federal questions are not likely to arise. Rather, a restricted use of "cause of action" is to be desired where, after all, the real purpose of the suit is to enforce a state right. *Malcolm L. Denise*

strued to exclude it. Compare Howard v. United States, 184 U. S. 676, 22 S. Ct. 543 (1902), where the Court held that the federal courts had jurisdiction over a suit against the obligors of a bond required to be given by a federal statute.

[10] Pacific Removal Cases, 115 U. S. 1, 5 S. Ct. 1113 (1885), where it was held enough to give federal courts jurisdiction that one of the parties had been incorporated under act of Congress. This rule has been changed by statute. 28 U. S. C., § 42.

[11] Shoshone Mining Co. v. Rutter, 177 U. S. 505, 20 S. Ct. 726 (1899), where an act of Congress required litigation of adverse claims as a condition precedent to the issuance of grants of mining claims; Puerto Rico v. Russell & Co., 288 U. S. 476, 53 S. Ct. 447 (1933), where Congress required that certain taxes imposed by Puerto Rico should be collected by suit at law rather than by summary administrative action, and also where the plaintiff owed its capacity to sue as a political entity to an act of Congress. The decision did not confine itself to a vertical distinction between substantive and procedural rights, but rather a horizontal distinction between the nature of the right to be established and the source of the authority to establish it; which makes it persuasive authority for the instant decision.

[12] Shultis v. McDougal, 225 U. S. 561, 32 S. Ct. 704 (1912).