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FEDERAL PRACTICE -JURISDICTION OVER NON-FEDERAL QUESTIONS - MEANING OF CAUSE OF ACTION

FEDERAL PRACTICE — JURISDICTION OVER NON-FEDERAL QUESTIONS — MEANING OF CAUSE OF ACTION — Petitioners brought suit in a federal court to enjoin the respondents from publicly producing a play, alleging that it infringed a copyrighted play of the petitioners and that it would also constitute unfair competition. The parties were citizens of the same State. After considering the claim of infringement on its merits, the court *held* that, although there was no infringement threatened, the jurisdiction acquired by reason of that fed-

eral question might be retained to consider the issue of unfair competition. *Hurn v. Oursler*, 289 U. S. 238, 53 Sup. Ct. 586 (1933).

The generally accepted principle is that when federal and non-federal questions arise in a case involving but one cause of action, jurisdiction acquired by a federal court by reason of the former is thereby acquired for consideration of the latter also,[1] but, as was said in the opinion in the principal case, "the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action." [2] Though the principle seems plain, the courts in cases involving infringement and unfair competition have reached widely divergent results;[3] a confusion caused, not by any failure to recognize the principle involved, but by failure to agree on just what constitutes a cause of action. The principal case represents a tendency toward a more liberal definition of that much-abused term, which it is hoped will make the decisions more predictable. Most courts have, in the past, tried to apply Pomeroy's definition of a cause of action as one primary right plus the delict or breach thereof,[4] which, however attractive logically, in application has led sometimes to undesirable results. Mr. Justice Cardozo, in his opinion in the recent case of *United States v. Memphis Cotton Oil Co.*,[5] warned against adherence to a single definition of a term used in such a wide variety of situations and concluded that that meaning should be used, in any particular situation, which best suited the procedural convenience of the case. In the principal case two primary rights were set up, one statutory (the right to freedom from infringement), the other based on common law principles (the right to be free from unfair competition). Though the language of the Court is strangely reminiscent of Pomeroy's definition, that test could not have been applied here. The emphasis rather is on the homogeneity of the facts upon which the claims are based, that is, in the words of the Court, "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." [6] This approaches very closely to a judicial adoption of Dean Clark's definition of a cause of action as, "an aggregate of operative facts giving

[1] DOBIE, FEDERAL PROCEDURE, sec. 60 (1928); ROSE, FEDERAL JURISDICTION AND PROCEDURE, 4th ed., sec. 230 (1931), and cases there cited.

[2] Hurn v. Oursler, 289 U. S. 238 at 245, 53 Sup. Ct. 586 at 589 (1933). See also, Kasch v. Cliett, (C. C. A. 5th, 1924) 297 Fed. 169.

[3] Many of the cases in which jurisdiction of the issue of unfair competition was denied, see Planten v. Gedney, (C. C. A. 2d, 1915) 224 Fed. 382; Recamier Mfg. Co. v. Harriet Hubbard Ayer, Inc., (D. C. S. D. N. Y. 1932) 59 F. (2d) 802; and United States Expansion Bolt Co. v. H. G. Kroncke Hdwe. Co., (C. C. A. 7th, 1916) 234 Fed. 862, are hardly distinguishable on their facts from some in which the court claimed jurisdiction of the issue, see Ludwigs v. Payson Mfg. Co., (C. C. A. 7th, 1913) 206 Fed. 60; W. F. Burns Co. v. Automatic Recording Safe Co., (C. C. A. 7th, 1916) 241 Fed. 472; and Payton v. Ideal Jewelry Mfg. Co., (C. C. A. 1st, 1925) 7 F. (2d) 113.

[4] POMEROY, CODE REMEDIES, 5th ed., secs. 346-356 (1928).

[5] 288 U. S. 62, 53 Sup. Ct. 278 (1933). This case is fully discussed in Arnold's article, "The Code 'Cause of Action' Clarified by the United States Supreme Court," 19 A. B. A. J. 215 (1933).

[6] Hurn v. Oursler, 289 U. S. 238 at 246, 53 Sup. Ct. 586 at 590 (1933).

rise to a right . . . or rights of action . . . , " the extent of which is to be determined pragmatically by the court with a view toward trial convenience.[7] It would seem, therefore, that the extent of federal jurisdiction in cases involving federal and non-federal questions is to depend on how broad a definition is given to the term "cause of action."

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[7] CLARK, CODE PLEADING, sec. 19 (1928). Dean Clark first proposed and explained his definition in "The Code Cause of Action," 33 YALE L. J. 817 (1924). See also McCaskill, "Actions and Causes of Action," 34 YALE L. J. 614 (1925); Clark, "Ancient Writs and Modern Causes of Action," 34 YALE L. J. 879 (1925).