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## SOME PROBLEMS IN FEDERAL QUESTION JURISDICTION

George B. Fraser, Jr.\*

CONGRESS has given the federal district courts original and removal jurisdiction of all civil actions arising under the Constitution or laws of the United States,<sup>1</sup> but the power of these courts to hear such cases has been restricted by the Supreme Court of the United States. The Supreme Court holds that the district courts have jurisdiction of a case if a federal question is raised in the complaint,<sup>2</sup> but jurisdiction cannot be based on a federal question in the answer.<sup>3</sup> This means that the district courts are closed to many cases that involve a substantial federal issue, while many cases that contain no real federal issue may be tried in a district court. This anomalous situation has been criticized in several articles,<sup>4</sup> but it was recently defended in an article in this *Review* entitled "Reappraisal of Federal Question Jurisdiction."<sup>5</sup> Insofar as it upholds the rule that federal jurisdiction should exist if the complaint raises a federal question this article is correct, but it is wrong in approving the rule that the district courts should not have jurisdiction of cases that contain a federal question in the answer. Therefore, this paper will make a further appraisal of the power of district courts to hear such cases.

In addition to the above limitation on the jurisdiction of the district courts the Supreme Court holds that if a case is within the exclusive jurisdiction of the federal courts it cannot be removed from a state court to a federal court.<sup>6</sup> The case must be dismissed so that it can be brought originally in a federal court. This holding will also be discussed in this paper because it is believed to be erroneous.

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<sup>1</sup> 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) §§1331 and 1441(a). Also the matter in controversy must exceed the value of \$3,000.

<sup>2</sup> *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1936).

<sup>3</sup> *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894); *Met-calf v. Watertown*, 128 U.S. 586, 9 S.Ct. 173 (1888).

<sup>4</sup> Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 (1942); comment, 40 ILL. L. REV. 387 (1945).

<sup>5</sup> Bergman, "Reappraisal of Federal Question Jurisdiction," 46 MICH. L. REV. 17 (1947).

<sup>6</sup> *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

## I

*The Federal Issue Test*

The Constitution of the United States provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."<sup>7</sup> In construing this clause the Supreme Court has held that a case arises under the Constitution or a law of the United States if a construction or interpretation of the Constitution or a federal law is required in order to determine the case.<sup>8</sup> In *Cohens v. Virginia*, which was removed to the Supreme Court of the United States from the highest court of Virginia by writ of error, Chief Justice Marshall stated: "A case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."<sup>9</sup> Thus, if federal issues are involved in a case, the case is within the judicial power of the United States. To determine if federal issues are involved the pleadings of both parties must be considered; the pleading of one party will show only what issues could be raised.

In 1875 Congress passed the first general act giving the inferior federal courts the power to hear federal question cases. It provided that the circuit courts should have "original cognizance . . . of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority."<sup>10</sup> The circuit courts were also given removal jurisdiction of such cases.

The words used in this act are almost the same as those used in the Constitution; therefore they should be interpreted as giving the circuit courts the power to hear all cases that involved federal issues no matter which party raises these issues. Also, Congress intended to give the circuit courts the full Constitutional power to hear federal question cases. At the time this act was being discussed in the Senate, Senator Carpenter, who was spokesman for the Judiciary Committee on the floor, stated, "This bill gives precisely the power which the

<sup>7</sup> U.S. CONST., Art. III, § 2.

<sup>8</sup> *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821).

<sup>9</sup> *Id.* at 379. The Supreme Court stated in a later case: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution." *New Orleans v. Benjamin*, 153 U.S. 411 at 424, 14 S.Ct. 905 (1894).

<sup>10</sup> 18 Stat. 470, § 1 (1875). The act also contained a jurisdictional minimum of \$500.

Constitution confers—nothing more, nothing less.”<sup>11</sup> This same view was expressed by the Supreme Court in *In re Hohorst* when it stated:

“The intention of Congress is manifest, at least as to cases of which the courts of the several states have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies above mentioned. . . .”<sup>12</sup>

Later, in *Railroad Company v. Mississippi*,<sup>13</sup> the Supreme Court specifically held that the circuit courts had the power to hear a case that involved federal issues even though those issues were raised by the defendant. The dissent held that the circuit courts could not take jurisdiction of such a case because the statute used the word “suit” and a suit does not include the defense.<sup>14</sup> However, this was a removal case so that the federal issues had been raised by the time the case reached the federal court. In a later case the Supreme Court pointed out this fact. It stated:

“It has been often decided by this court that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of that act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal clearly presented a question or questions of a Federal nature.”<sup>15</sup>

A different rule was applied to original jurisdiction cases. Not only must the case arise under the Constitution or the laws of the United States, but also the fact that it contains a federal question must appear at the time the action is brought. Therefore, the federal question must appear in the petition; jurisdiction cannot be based on a federal issue raised by the answer. In *Metcalf v. Watertown* the Supreme Court stated:

<sup>11</sup> 2 CONG. REC. 4987 (1874). See Forrester, “Nature of a Federal Question,” 16 TULANE L. REV. 362 at 375 (1942).

<sup>12</sup> 150 U.S. 653 at 659, 14 S.Ct. 221 (1893).

<sup>13</sup> 102 U.S. 135 (1880).

<sup>14</sup> *Id.* at 142. The dissent held that the statute should be interpreted differently from the Constitution because the statute used the word “suits” and the Constitution used the word “cases.”

<sup>15</sup> *Metcalf v. Watertown*, 128 U.S. 586 at 588, 9 S.Ct. 173 (1888).

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; . . . It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."<sup>16</sup>

The Court is correct in holding that a federal question must exist before the circuit court has power to hear a case, but it is wrong in holding that the federal question must appear in the petition because all jurisdictional requirements do not have to be met at the time the petition is filed.

Jurisdictional requirements have to be satisfied only prior to the time the question of jurisdiction is raised or, if the question is not raised, prior to the rendition of judgment. Jurisdiction of the person seldom exists at the time the complaint is filed. Yet a court has jurisdiction of a case when the defendant is served with process even though the service is made after the complaint is filed. Jurisdiction of the subject matter may be obtained even after the complaint is filed. This has been recognized by the Supreme Court in diversity of citizenship cases. In *Conolly v. Taylor*<sup>17</sup> federal jurisdiction did not exist at the time the action was filed because the necessary diversity did not exist. However, the plaintiff cured this defect by striking out the name of one party. The court then assumed jurisdiction and tried the case on its merits. This action by the trial court was approved by the Supreme Court. In a similar case, *Drumright v. Texas Sugarland Company*, a circuit court of appeals stated: "Though the original bill was not maintainable, because one of the plaintiffs therein was a citizen of the same state of which a defendant was a citizen, the jurisdictional defect could be removed, and the cause be proceeded with, following a dismissal of the bill as to that plaintiff."<sup>18</sup> Even in the *Metcalf* case the Supreme Court recognized that jurisdiction could be obtained after a case was filed, because, in reversing the case, the Court said: "It will be for the court below to determine whether the pleadings

<sup>16</sup> *Id.* at 589.

<sup>17</sup> 2 Pet. (27 U.S.) 556 (1829).

<sup>18</sup> (C.C.A. 5th, 1927) 16 F.(2d) 657 at 657-658.

can be so amended as to present a case within its jurisdiction."<sup>19</sup> Since the plaintiff can cure jurisdictional defects after the action has been brought, by amending his petition, the defendant should be able to cure them with his answer because "A case in law or in equity consists of the right of the one party, as well as of the other."<sup>20</sup>

Since all jurisdictional requirements do not have to be met at the time a complaint is filed, it is not necessary for a complaint to show that they have been met. It is sufficient if the record shows that the jurisdictional requirements have been satisfied prior to the time the question of jurisdiction is raised. In diversity cases the Supreme Court holds that the whole record should be examined to determine if the jurisdictional requirements have been met. In *Gordon v. Third National Bank* the Court stated:

"The question of jurisdiction is raised for the first time in this court, and as we are of the opinion that the diverse citizenship of the parties appears affirmatively and with sufficient directness from the record, of which the summons forms a part, we must decline to reverse the judgment on this ground. . . ."<sup>21</sup>

In *Sun Printing and Publishing Assn. v. Edwards* the Supreme Court expressed the same view, stating:

"The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship, is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient."<sup>22</sup>

In federal question cases the court should follow the same procedure. If the whole record shows that federal issues are raised, the court should have the power to hear the case because jurisdiction can vest after the action is filed. Also, neither the Constitution nor the judicial code prevent the assumption of jurisdiction if the case actually contains federal issues.

In his article entitled "Reappraisal of Federal Question Jurisdiction"<sup>23</sup> Mr. Bergman indicates that he agrees with the *Metcalf* case but for a different reason. He stated that Congress did not intend that

<sup>19</sup> 128 U.S. 586 at 590.

<sup>20</sup> 6 Wheat. (19 U.S.) 264 at 379 (1821).

<sup>21</sup> 144 U.S. 97 at 103, 12 S.Ct. 657 (1892).

<sup>22</sup> 194 U.S. 377 at 382, 24 S.Ct. 696 (1904).

<sup>23</sup> 46 MICH. L. REV. 17 (1947).

every federal question case be tried initially in a federal court. "It was the purpose and intent of Congress in 1875 to insure that every federal question case likely to be prejudiced in a state court could find a ready and impartial forum in the federal courts."<sup>24</sup> He then stated that prejudice is more likely to occur when the plaintiff raises a federal question than when the defendant raises one.<sup>25</sup> Therefore, Congress intended that the jurisdiction of the district courts be limited to cases where the federal claim appeared in the plaintiff's petition. This position is indefensible because there is nothing to show that there is more likely to be prejudice if the federal question is raised by the plaintiff than by the defendant. Who is to be prejudiced, the plaintiff? If it is the plaintiff, why can the defendant remove a case to a federal court? Is the defendant the one who is likely to be prejudiced if the plaintiff raises a federal question? If so, why is the plaintiff permitted to bring the case originally in a federal court? Since both parties can have a federal question raised by the plaintiff tried in a federal court, it seems that both are prejudiced when the plaintiff raises a federal question.

Assuming that federal question jurisdiction is based on prejudice, there is nothing to show that there is more likely to be prejudice to a party if a federal question is raised by the plaintiff than if one is raised by the defendant. However, the amendments of 1887-1888 seem to refute the theory that federal question jurisdiction is based on prejudice because these amendments permit any defendant, regardless of residence, to remove a federal question case and only non-resident defendants to remove diversity of citizenship cases. Congress did not intend that every federal question case be tried initially in a federal court, but as previously stated, Congress did intend to make the federal courts available to every case that contained federal issues.

The holding that the district courts can only assume jurisdiction of a federal question case if the federal question is raised in the petition deprives defendants of their right to have federal questions that are raised in the answer tried initially in a federal court. In addition, this holding makes federal jurisdiction depend on which party sues first. In *Tennessee v. Union and Planters' Bank*<sup>26</sup> the state of Tennessee

<sup>24</sup> *Id.* at 45.

<sup>25</sup> "The presumption is that the plaintiff is the principal injured party, and although it is conceivable that prejudice will arise where the federal question is raised in the defendant's answer, it is much more likely to occur where the plaintiff seeks affirmative recovery." *Id.* at 37.

<sup>26</sup> 152 U.S. 454, 14 S.Ct. 654 (1894).

brought suit in a federal court to collect a state tax from the defendant bank. The answer alleged that the collection of this tax was prohibited by a federal statute. Yet the Court held that federal jurisdiction did not exist because the plaintiff did not base his claim on a federal right. If the bank had sued first to enjoin the collection of the tax because it conflicted with the federal statute, federal jurisdiction would have existed.<sup>27</sup> Thus each party does not have an equal right to have a federal question litigated initially in a federal court. The holding that federal jurisdiction exists only if a federal question is raised in the petition also causes unnecessary litigation of cases because it requires a court to reverse and either dismiss or remand a case after it has been tried on its merits, even though it contains a federal question, if the federal question was raised by the defendant.<sup>28</sup> Therefore, the present holding should be changed so that the district courts would have jurisdiction of a case if the answer raised federal issues.

#### A. *Federal Question In Complaint*

When a case is originally brought in a district court, the federal issue test cannot be used to determine if the plaintiff's action arises under the Constitution or the laws of the United States because this test requires the court to consider both the petition and the answer. If the answer were considered, the defendant could deprive the plaintiff of his right to sue in a federal court by raising non-federal issues so that the case would have to be dismissed. In fact, the defendant could safely raise non-federal issues that he could not defend if the action would be dismissed as a result. Therefore, the Supreme Court has held that the answer should not be considered in determining if the plaintiff's action is within the federal question jurisdiction of the federal courts. In *Osborn v. Bank of the United States* the Court stated: "The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action

<sup>27</sup> Also, to see the effects of the present rule, compare *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711 (1917) with *Marshall v. Desert Properties Co.*, (C.C.A. 9th, 1939) 103 F. (2d) 551.

<sup>28</sup> *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894). However, the court will examine the whole record to determine if an exclusive federal question is being removed. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

is brought."<sup>29</sup> In this case the plaintiff based his right to sue on an act of Congress but the defendant raised only non-federal issues for trial. However, the Supreme Court held that federal jurisdiction existed because the complaint showed that federal issues could be raised. Thus a plaintiff may bring an action in a federal district court if his complaint, or at least the essential allegations of his complaint,<sup>30</sup> indicates that it is possible for the defendant to raise federal issues.<sup>31</sup>

It is frequently stated that federal jurisdiction exists if a plaintiff's claim is based on a right created by the Constitution or a federal law. ". . . when the complaint asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction."<sup>32</sup> However, the federal right must be so fundamental to the plaintiff's claim that the defendant will probably dispute it. Jurisdiction cannot be based on a remote federal right. In *Gully v. First National Bank in Meridian*, Mr. Justice Cardozo said: "To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible."<sup>33</sup> This is a difficult test to apply because often it is impossible to determine what questions are necessary and what are merely possible until after the defendant has answered;<sup>34</sup> however, because the plaintiff's right to sue must be determined from only his complaint, this test must be used.

The fact that federal question jurisdiction exists if the complaint shows that federal issues could be raised does not mean that federal question jurisdiction should not exist if the complaint does not indicate that federal issues are possible because even then the answer could actually raise federal issues. Therefore if the complaint does not raise a federal question, the court should consider the answer to see if it raises federal issues. The reason why the court cannot consider the

<sup>29</sup> 9 Wheat. (22 U.S.) 738 at 824 (1824). Even in this case the dissent held that federal issues must actually exist for the case to arise under the Constitution or laws of the United States. For a discussion of this case see Bergman, "Reappraisal of Federal Question Jurisdiction," 46 MICH. L. REV. 17 at 18-27 (1947).

<sup>30</sup> *Louisville and Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42 (1908); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894).

<sup>31</sup> *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1936); *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

<sup>32</sup> *McGoon v. Northern Pacific Railway Company*, (D.C.N.D. 1913) 204 F. 998 at 1005.

<sup>33</sup> 299 U.S. 109 at 118, 57 S.Ct. 96 (1936).

<sup>34</sup> See Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 670 (1942).

answer when the plaintiff pleads a federal question does not exist when the plaintiff does not plead a federal question. If the plaintiff does not plead a federal question, there is no incentive for the defendant to raise fictitious issues in order to have the case dismissed because he can achieve this result by merely questioning the jurisdiction of the court. However, should the defendant raise federal issues in his answer, he is raising issues that he must be able to defend.

The *Osborn* case does not prevent a court from considering the answer if the plaintiff does not plead a federal question. That case did not determine that a plaintiff has a right not to be sued in a federal court if the complaint does not contain a federal question. It held only that a court cannot look at the answer if the effect would be to deprive a plaintiff of his right to sue in a federal court. A case that holds that the existence of federal jurisdiction cannot be defeated by an answer that raises non-federal issues cannot be cited as authority for the proposition that federal jurisdiction cannot be invoked if the answer raises federal issues.<sup>35</sup> Thus, when a case is originally brought in a federal district court, federal question jurisdiction should exist if either the plaintiff bases his claim on a federal right or the defendant raises federal issues for trial. If a plaintiff does not raise a federal question and the defendant questions the jurisdiction of the court, the case should be dismissed, but if instead of questioning the jurisdiction of the court the defendant files an answer that raises a federal question, jurisdiction should exist.

### B. Removal Cases

In *Railroad Company v. Mississippi* the Supreme Court held that a case could be removed to a federal court if federal issues were raised by the defendant. This case was decided in 1880 under the Act of 1875. This act was amended in 1887-1888.<sup>36</sup> After this amendment the Supreme Court held in *Tennessee v. Union and Planters' Bank*, which was decided in 1894, that a case could not be removed, even though it contained federal issues, unless the federal question was raised in the petition.

<sup>35</sup> In *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894), the Court suggested that the *Osborn* case prevented the court from basing federal jurisdiction on a federal question in the answer. One recent article in commenting on this stated that "Marshall was invoked to defeat himself." Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 654 (1942).

<sup>36</sup> The Act of 1875 was amended in 1887, 24 Stat. 552. Technical errors in this act were corrected by the Act of 1888, 25 Stat. 433.

The removal section of the Act of 1875 was complete in itself. It provided what cases could be removed, who could remove them, and what jurisdictional minimum was needed for removal. No reference was made to the section on original jurisdiction as none was necessary. When this act was amended in 1887-1888, the provisions as to who could remove a case were changed. The Act of 1875 permitted either party to remove diversity and federal question cases, whereas the amended act permitted only the defendant to remove a federal question case and only a non-resident defendant to remove a diversity case. This change made it necessary to re-write the whole removal section. The new section omitted any reference to a jurisdictional minimum and added the phrase that any suit "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section could be removed."<sup>37</sup>

The Supreme Court held that these amendments were made for the purpose of reducing the scope of removal jurisdiction so that it would be the same as the original jurisdiction of the inferior federal courts. Therefore, the Court held that the rule used in original jurisdiction cases—that the circuit courts only had jurisdiction if the federal question was raised in the petition—must be used in removal cases. However, Congress could not have intended this result because at the time the Acts of 1887-1888 were passed it was not known that the rule applicable to removal cases was different from the one that was applicable to cases that were originally filed in a federal court. *Metcalf v. Watertown*, which was decided in 1888, was the first case to hold that a court could look only at the complaint in original jurisdiction cases to determine if a federal question existed even though it could look at the whole record in removal cases. The decision in this case was delivered twenty-one months after the Act of 1887 was passed and four months after the Act of 1888 was passed. In deciding the *Metcalf* case the Court contrasted the procedure used in cases originally filed in federal courts with the procedure used in removal cases. In fact, the Court spoke as if it was still permissible for a court to examine both the complaint and the answer to determine if a removal case contained a federal question. If Congress had changed the method of determining the existence of a federal question in removal cases only a short time before the *Metcalf* case was decided, the Court would probably

<sup>37</sup>The present section reads "of which the district courts of the United States have original jurisdiction." 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) §1441(a).

have mentioned that fact. It seems that what Congress intended by the Acts of 1887-1888 was clearer in 1894 than in 1888!

Changing the statute so that a federal question case could be removed only by a defendant instead of by either party does not indicate that Congress intended to reduce the number of cases in federal courts because after this change was made a plaintiff could bring just as many actions in a federal court as he could before this amendment. The change merely indicates that Congress did not wish to give the plaintiff a second chance to pick his forum. He would have to bring his actions directly in a federal court; he could not bring them in a state court and then remove them to a federal court. If Congress had wished to limit the number of cases that could be removed, it would have chosen a more logical method than one that would make federal jurisdiction depend on pleading.

The Supreme Court did suggest that Congress made this change to prevent removal where the federal question raised by the defendant "[might be a very small part] of the defendant's plea."<sup>38</sup> However, if Congress had wanted to prevent federal jurisdiction from being based on a remote federal question, it would have adopted a method that would have prevented the specific evil feared, not one that would deny jurisdiction in every case where a federal question was raised by a defendant. The phrase "of which the Circuit Courts of the United States are given original jurisdiction" was added so that removal cases would have to contain the same jurisdictional minimum that was required of original jurisdiction cases. This was pointed out in the dissent to the *Union and Planters' Bank* case.<sup>39</sup> Thus no change in the method of determining the existence of a federal question was intended by the Acts of 1887-1888. Therefore the Supreme Court is wrong in holding that under the present statute the existence of a federal question in removal cases must be determined from only the complaint.

Federal question cases should be removed only if the whole record indicates that the decision depends on an interpretation of the Constitution or a law of the United States. Thus, federal issues should actually exist; a case should not be removed just because a federal question is raised in the petition even though this would be sufficient to confer jurisdiction if the case were originally brought in a federal

<sup>38</sup> *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 at 462, 14 S.Ct. 654 (1894).

<sup>39</sup> *Id.* at 471. It has been stated that "Harlan's is one of those dissents of yesterday which deserve to become the law of today." Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 *UNIV. PA. L. REV.* 639 at 673 (1942).

court. The reason that makes it necessary to consider only the petition when an action is brought originally in a federal court does not exist in removal cases because in removal cases no question of depriving a plaintiff of his right to sue in a federal court exists. The plaintiff waived this right when he voluntarily sued in the state court. Also, there is no necessity for the defendant in a removal case to raise fictitious issues to defeat federal jurisdiction. If he does not want the case tried in a federal court, he does not have to remove the case. Moreover, there is no way the defendant can get the case dismissed. Should he remove the case and then raise non-federal issues the case would not be dismissed but would be remanded to the state court for a trial on those issues.

The scope of removal jurisdiction is not broadened by permitting the removal of cases that contain federal issues, even though these issues are raised by the defendant, because these cases do arise under the Constitution or laws of the United States. Also, the number of cases that could be removed to federal courts would not be increased if removal were limited to those cases that actually contain federal issues.

Since federal question cases should be removed only if they actually contain federal issues, Congress should change the procedure for removing cases of this type. They should not be removed until after the answer is filed; then either party should have the same right to remove them.<sup>40</sup> If the defendant can remove a case when the answer raises federal issues, the plaintiff should also be able to remove the case. When it makes these changes, Congress should not change the procedure for removing diversity cases, because it is satisfactory. Also, there is no reason why the procedure should be the same for both types of cases.

## II

### *Removal of Exclusive Jurisdiction Cases*

Although Congress has provided that cases that could originally be filed in a federal district court may be removed from a state court to a federal court, the Supreme Court does not permit the district courts to assume jurisdiction of such cases if they are within the exclusive jurisdiction of the federal courts.<sup>41</sup> The Court holds that removal jurisdic-

<sup>40</sup> See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 674 (1942).

<sup>41</sup> *Minnesota v. United States*, 305 U.S. 382 at 389, 59 S.Ct. 292 (1939); *General Investment Co. v. Lake Shore and Michigan S. Ry. Co.*, 260 U.S. 261 at 288, 43 S.Ct. 106 (1922); *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 at 382, 42 S.Ct. 349 (1922).

tion is a derivative jurisdiction, and since a state court cannot have jurisdiction of a case that is within the exclusive jurisdiction of the federal courts, a federal court cannot have jurisdiction of such a case after it has been removed. Even though the plaintiff may immediately start the case anew in a federal court, it must be dismissed. In *Lambert Run Coal Company v. Baltimore & Ohio Railroad Company*, the Court stated:

“The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.”<sup>42</sup>

The holding that removal jurisdiction is a derivative jurisdiction is not required by either the Constitution or the judicial code because they do not limit the right of removal to cases that are within the jurisdiction of the court from which the case is removed. The Constitution permits Congress to give the inferior federal courts the power to hear certain classes of cases. A case within one of these classes cannot exist in such a status that Congress cannot authorize the federal courts to hear it. Nothing in the Constitution requires that these cases be commenced in a certain way. They may be filed originally in a federal court, or they may be removed from a state court to a federal court even though the state court has assumed jurisdiction of them. The power to remove a case from a state court is not expressly granted by the Constitution, but cases are removed in order to give full effect to the power of federal courts over certain types of cases. For the same reason the federal courts could be empowered to hear cases that are within these designated classes if they are removed from a state court even though they are not within the jurisdiction of the state court.

Congress has authorized the federal courts to assume jurisdiction over all cases filed in state courts that could have been brought originally in a federal court. This power over cases filed in state courts was not limited to cases that were within the jurisdiction of the state court. Also no distinction was made between concurrent and exclusive jurisdiction cases; the federal courts were given power over both on removal. Congress provided in the judicial code that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States.”<sup>43</sup> The code does provide that a case must

<sup>42</sup> 258 U.S. 377 at 382, 42 S.Ct. 349 (1922).

<sup>43</sup> 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) § 1441(a).

be "brought" in a state court before it can be removed, but this means only that the case must have been filed in a state court.<sup>44</sup> It does not mean that the state court must have the power to proceed to a trial on the merits. The Supreme Court has interpreted the judicial code as if it read "brought in a state court of competent jurisdiction."

The removal section of the Judiciary Act of 1875 provided "that any suit . . . now pending or hereafter brought in any State court . . . and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . either party may remove said suit into the circuit court of the United States for the proper district."<sup>45</sup> In discussing this act the Supreme Court said in *Metcalf v. Watertown* that "the right of removal under the Act of 1875 could not be made to depend upon a preliminary inquiry as to whether the plaintiff had or had not the right to sue in the state court of original jurisdiction from which it was sought to remove the suit."<sup>46</sup> If removal jurisdiction was not a derivative jurisdiction under the Act of 1875 it should not be held to be a derivative jurisdiction under the present act because the provisions of the two acts are so similar.

The holding that removal jurisdiction is a derivative jurisdiction is based on a misinterpretation of statements that were previously made by the Supreme Court in a different type of case. When deciding that a defendant did not waive his right to question the service of process by removing a case to a federal court, the Supreme Court stated that the federal court took the case as it stood in the state court.<sup>47</sup> The statement that the federal court took the case as it stood in the state court only means that the filing of the removal petition is not a general appearance so that defects in the service of process are not waived; it does not mean that removal jurisdiction is a derivative jurisdiction. This is indicated by the fact that if there were defects in the service of process the state court could not have had jurisdiction of the case, and therefore, if removal jurisdiction was a derivative jurisdiction, the federal court could never acquire jurisdiction of the case. But the federal court can acquire jurisdiction in spite of the fact that there were defects in the service of process prior to the removal of the case if the defendant

<sup>44</sup> *Mill Creek and Minehill Nav. & R. Co. v. United States*, 246 F. 1013 (1917).

<sup>45</sup> 18 Stat. L. 470, § 2 (1875).

<sup>46</sup> 128 U.S. 586 at 589, 9 S.Ct. 173 (1888).

<sup>47</sup> *Goldey v. Morning News*, 156 U.S. 518, 15 S.Ct. 559 (1895). The Court said (at 525) that the defendant could raise every defense that he could have if the case "had been originally commenced in said circuit court."

appears generally in the federal court. After such an appearance, the defendant cannot question the jurisdiction of the federal court.

The Supreme Court itself has recently cast some doubts on the rule that removal jurisdiction is a derivative jurisdiction. In *Freeman v. Bee Machine Company, Inc.*, it stated, "We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court."<sup>48</sup> Thus the Court states that it is refusing to extend the holding that removal jurisdiction is derivative. However, the facts of the *Freeman* case indicate that the Supreme Court has really overruled this doctrine because the plaintiff was permitted to amend his complaint after removal so as to include a cause of action that he could not have included if the case had remained in the state court.

Since there is no reason for holding that removal jurisdiction is a derivative jurisdiction the Supreme Court should reject the doctrine. At least the Court should permit the removal of cases that are within the exclusive jurisdiction of the federal courts. This may broaden the scope of removal jurisdiction, but it would not increase the number of cases tried by the federal courts. In fact, the work of the federal courts would be reduced because they would not have to dismiss a case that could immediately be brought in a federal court.

The only questions that a person should be permitted to raise in a federal court in a removal case are ones that could have been raised if the case had originally been filed in a federal court. Some of these will be the same as ones that could have been raised in the state court before removal, as the question of jurisdiction over the person, but a party should not be permitted to question the jurisdiction of the state court after a case has been removed. If either party wishes to question the jurisdiction of a state court on a point that would not be a defect if the case were originally filed in the federal court, he should do his questioning in the state court. The state courts are usually as competent as the federal courts to determine the limits of their own jurisdiction. To permit persons to remove cases for the purposes of questioning the jurisdiction of a state court gives the inferior federal courts a supervisory control of state courts that is not authorized by the Constitution or the judicial code.

Neither party is harmed by not being able to question the jurisdiction of the state court after a case has been removed. The plaintiff

<sup>48</sup> 319 U.S. 448 at 451, 63 S.Ct. 1146 (1943).

is not being harmed by having his case moved to the proper forum, and the defendant cannot claim that he is being harmed because he voluntarily removed the case when he could have asked the state court to dismiss it. Also, the plaintiff should not be permitted to question the venue of the court to which an exclusive federal question case is removed if it is the court for the district and division for the place where the action is filed<sup>49</sup> because he selected the geographical place of trial. The defendant should not be able to get the case dismissed because of any venue question. If he wished the case to be tried elsewhere he should have asked the state court to dismiss it. However, the defendant could seek to obtain a change of venue after the case is removed.<sup>50</sup>

If the Supreme Court does not change its present holding but continues to assert that removal jurisdiction is a derivative jurisdiction, it should at least hold that the lack of state jurisdiction could be waived if the parties proceed to trial. Thus if such a case is tried on its merits in a federal court, another trial should not be necessary. The reasoning used by the circuit court of appeals in a diversity case that was improperly removed to a federal court should be applicable. In that case, the jurisdiction of the federal court was upheld because the case could have originally been filed in a federal court and because the question of jurisdiction was not raised prior to the trial. In delivering the opinion of the court Judge Learned Hand stated:

"However, though the action was not removable, the District Court got jurisdiction over it, if both parties agreed, as they did. In such a case the mutual consent, so evidenced, does not confer substantive jurisdiction, as of course it cannot, but the resulting situation is equivalent to initiating an action in the District Court in which the defendant appears. . . . We conclude therefore . . . that when the plaintiff goes to trial without asking for a remand, the cause being one of which the statute gives the court jurisdiction, it may proceed to judgment."<sup>51</sup>

### *Conclusion*

The Supreme Court has limited the jurisdiction of the district courts beyond what is required by the Constitution and the judicial code. These limitations should be removed. The district courts should have original jurisdiction of a case if either party pleads a federal ques-

<sup>49</sup> 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) § 1441(a).

<sup>50</sup> 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) § 1404(a).

<sup>51</sup> *Bailey v. Texas Co.*, (C.C.A. 2d, 1931) 47 F. (2d) 153 at 155; *Baggs v. Martin*, 179 U.S. 206, 21 S.Ct. 109 (1900).

tion. Also, the district courts should have jurisdiction of a case that is removed from a state court if federal issues are to be litigated regardless of whether the federal court has exclusive or concurrent jurisdiction of those issues.

Should the Supreme Court believe that it is unable to change its present holdings because Congress has re-enacted the judicial code without changing them, Congress should make the necessary changes by amending the judicial code. To permit a court to assume jurisdiction of a case if there is a federal question in the answer, section 1331 of the judicial code should be amended to provide that the district courts should have original jurisdiction if the pleadings of either party show that the action arises under the Constitution, laws or treaties of the United States.<sup>52</sup> To permit the removal of cases that involve federal issues, section 1441(b) of the judicial code should be amended so that the phrase "of which the district courts have original jurisdiction" should not apply to federal question cases. Then a jurisdictional minimum would have to be added to that section. Congress should also change the word "brought" to "filed" so that exclusive federal question cases could be removed. In addition Congress should change the removal procedure so that federal question cases could not be removed until after the answer was filed; then either party should have the right to remove a case that contained federal issues. This would necessitate amending sections 1441 and 1446 of the judicial code.<sup>53</sup>

<sup>52</sup> Section 1331 should be amended to read: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, if the pleadings of either party indicates that the action arises under the Constitution, laws or treaties of the United States."

<sup>53</sup> Subsections (a) and (b) of section 1441 should be amended as follows:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action filed in a State court wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interests and costs, may be removed by either party to the district court of the United States for the district and division embracing the place where such action is pending if the pleadings of both parties show that the action arises under the Constitution, laws or treaties of the United States.

"(b) Any other civil action filed in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants to the district court of the United States for the district and division embracing the place where such action is pending if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Subsection (a) of section 1446 should be amended by substituting the phrase "party or parties" for the phrase "defendant or defendants."

Subsection (b) of section 1446 should be amended to read:

"If the action arises under the Constitution, laws or treaties of the United States, the petition for removal must be filed within ten days after the plaintiff receives through service or otherwise the defendant's answer or other pleading setting forth the defense that the defendant will make, or within ten days after the time expires for the defendant to file his answer or other pleading setting forth the defense the defendant will make if such

Even if it is assumed that the Supreme Court is correct in its interpretation of the judicial code, Congress should make these amendments so that the inconsistencies and defects that have appeared under the present law would be removed. Federal jurisdiction should not depend on pleading. The district courts should have jurisdiction of a case that contains a federal question no matter which party brings the action. Also, after federal issues have been litigated in a federal court, a case should not be reversed because the federal issues were raised by the defendant.

pleading is filed in court and is not required to be served on the plaintiff, whichever period is shorter.

"In all other cases the petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Subsections (d) and (e) of section 1446 should be amended by substituting the phrase "party or parties who are removing the action" for the phrase "defendant or defendants."