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Federal Jurisdiction -- Constitutional Law -- Diversity of Citizenship for District of Columbia and Territories

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Federal Jurisdiction—Constitutional Law—Diversity of Citizenship for District of Columbia and Territories

An insurance company, incorporated in the District of Columbia, brought action in the Federal District Court for the District of Maryland. Plaintiff based its claim to federal jurisdiction on a 1940 Act of Congress which amended the JUDICIAL CODE.[1] The District Court, refusing to accept the jurisdiction conferred by Congress in this statute, dismissed the action on the premise that the statute grants judicial power not authorized by the Constitution of the United States.[2] This decision was affirmed by the court of appeals, with Judge John J. Parker dissenting, on essentially the same ground upon which the District Court relied.[3] A divided Supreme Court reversed the decision of the lower courts and held the 1940 Act constitutional.[4]

The Judiciary Article of the Constitution nowhere recites that federal jurisdiction is extended to citizens of the District of Columbia or of the territories by reason of diversity of citizenship.[5] In 1792, the Supreme Court in *Hayburn's* case[6] laid down the proposition that judicial power of federal courts is derived exclusively from the Judiciary

[1] The 1940 Act provided that district courts have original jurisdiction of suits of a civil nature where the matter in controversy is between citizens of different states, "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory . . . ," 54 STAT. 143 (1940). Prior to the 1940 Act the JUDICIAL CODE provided that district courts should have original jurisdiction of suits of a civil nature where the matter in controversy ". . . is between citizens of different states . . . ," and made no mention of either District of Columbia or the territories. The Committee on the Judiciary of the House of Representatives, reporting the 1940 Statute, stated, "It gives to the citizens of the District of Columbia and of Hawaii and Alaska the same right to bring a suit in a Federal district court of any State on the ground of diversity of citizenship as now obtains in the case of a citizen of a state." H. R. REP. No. 1756, 76th Cong., 3rd Sess. (1940).

[2] No opinion filed by District Court which relied upon its former decision in Feely v. Sidney S. Schupper Interstate Hauling System, Inc., 72 F. Supp. 663 (D. Md. 1947). Eleven Federal courts had previously considered the question. Eight held the 1940 Act unconstitutional: Mutual Ben. Health & Acc. Ass'n. v. Dailey, 75 F. Supp. 832 (D. Mass. 1948); Feely v. Sidney S. Schupper Interstate Hauling System, Inc., 72 F. Supp. 663 (D. Md. 1947); Willis v. Dennis, 72 F. Supp. 853 (W. D. Va. 1947); Wilson v. Guggenheim, 70 F. Supp. 417 (E. D. S. C. 1947); Central States Co-op. v. Watson Bros. Transportation Co., 165 F. 2d 392 (7th Cir. 1947) (Judge Evans dissenting); Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D. Mass. 1946); Behlert v. James Foundation, 60 F. Supp. 706 (S. D. N. Y. 1945); McGarry v. Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942). *Contra:* Duze v. Wooley. 72 F. Supp. 422 (D. Hawaii 1947); Glaeser v. Acacia Mut. Life Ass'n., 55 F. Supp. 925 (N. D. Cal. 1944); Winkler v. Daniels, 43 F. Supp. 265 (E. D. Va. 1942).

[3] National Mut. Ins. Co. v. Tidewater Transfer Co., 165 F. 2d 531 (4th Cir. 1947).

[4] National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173 (1949); Siegmund v. General Commodities Corp., 175 F. 2d 952 (9th Cir. 1949).

[5] See U. S. CONST. Art. III, §2. Citizens of the District of Columbia and the territories have always had federal jurisdiction on grounds other than diversity of citizenship. See DOBIE, FEDERAL PROCEDURE 186 n. 43 (1928).

[6] 2 Dall. 409 (U. S. 1792).

Article.[7] In 1804, Mr. Chief Justice Marshall in *Hepburn v. Ellzey*[8] supplemented this proposition with the hypothesis that the term "states," as used within that Article, excludes the District of Columbia and the territories.[9] Messrs. Justices Jackson, Burton and Black in the majority opinion, while affirming the construction placed on the term "states" by Mr. Chief Justice Marshall, reached the conclusion that the Judiciary Article of the Constitution is not the exclusive source of judicial power for federal courts. In direct conflict with the conception stated in *Hayburn's* case, *supra*, they found the requisite authority to sustain the 1940 statute elsewhere in the Constitution. The late Messrs. Justices Rutledge and Murphy, on the other hand, in a concurring opinion affirmed the proposition set forth in *Hayburn's* case; and by defining the term "states" to include the District of Columbia and the territories, they overruled the opposite construction by Chief Justice Marshall in *Hepburn v. Ellzey* and held the 1940 Act valid.[10]

These divergent positions favoring the validity of the 1940 Act are necessarily supported by independent arguments. *First*, the unusual preciseness of terminology of the provisions and the great talent of the drafters emphasize that if the authors had desired Article III of the Constitution to be the exclusive source of federal judicial power, they would have so stated. They did not. On the contrary, in Articles I and IV of the Constitution they conferred blanket power upon Congress over the citizens of the District of Columbia and the territories, including power over the judicial function.[11] From this grant of judicial power it is inferred that Congress may enlarge the jurisdiction of any federal court to that extent necessary to protect the rights of these citi-

[7] Gordon v. United States, 117 U. S. 697 (1864); United States v. Ferreira, 13 How. 40 (U S. 1851); Hodgson and Thompson v. Bowerbank, 5 Cranch 303 (U. S. 1809); *cf.*, Mayor v. Cooper, 6 Wall. 247, 252 (U. S. 1867); Sheldon v. Sill, 8 How. 441, 449 (U. S. 1850); Mossman v. Higginson, 4 Dall. 12, 14 (U. S. 1800).

[8] 2 Cranch 445 (U. S. 1804).

[9] New Orlans v. Winter, 1 Wheat. 91 (U. S. 1816); Barney v. Baltimore, 6 Wall. 280 (U. S. 1868); Hooe v. Jamieson, 166 U. S. 395 (1897); *In re* Massachusetts, 197 U. S. 482 (1905); *cf.*, Watson v. Brooks, 13 F. 540 (C. C. Ore. 1882) (doctrine criticized).

[10] Six of the justices favored the doctrine in *Hayburn's Case*, including Justices Rutledge, Murphy, Frankfurter, Reed, Vinson and Douglas. Seven of the justices favored the construction in *Hepburn v. Ellzey*, including Justices Jackson, Burton, Black, Frankfurter, Reed, Vinson and Douglas. The decisison resulted from the fact that five of the justices, Jackson, Burton, Black, Rutledge and Murphy, concurred in result, though they disagreed on the basis for the result.

[11] U. S. CONST. Art. I, §8, cl. 9 states that Congress shall have power to constitute tribunals inferior to the Supreme Court; U. S. CONST. Art. I, §8, cl. 17 gives Congress power "to exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the government of the United States . . ."; U. S. CONST. Art. IV, §3, cl. 2 gives Congress power "to dispose of and make all needful rules and regulations respecting the territory . . . belonging to the United States . . ."; U. S. CONST. Art. I, §8, cl. 18 gives Congress power to make all laws which shall be necessary and proper for carrying into execution these powers.

zens.[12] The extension of diversity jurisdiction is a valid and reasonable exercise of this power.[13]

Second, by defining "states" to include the District of Columbia and the territories for the purpose of diversity jurisdiction, the source of judicial power remains the Judiciary Article of the Constitution. Further, the changing needs of a growing nation have undermined the foundation of Mr. Chief Justice Marshall's holding in *Hepburn v. Ellzey* that the term "states" does not include the District of Columbia and the territories for diversity purposes. That holding is now supported only by its great age and the prestige of Chief Justice Marshall's name, and it should now be overruled as the simplest way to achieve an admittedly fair objective.

Both of these arguments are bolstered by a practical consideration. If diversity jurisdiction for citizens of states is desirable, which has been questioned,[14] it would seem equally desirable to make that jurisdiction available to citizens of the District and the territories. By the 1940 Act these citizens, when no other basis for federal jurisdiction is available, are made eligible to sue citizens of states in federal courts instead of being compelled to sue in state courts. This is the principal advantage granted by the Act to the citizens in question. Concededly, this result may be accomplished by creation of special statutory courts to hear these cases.[15] Instead, Congress adopted the less expensive and more practical expedient of vesting that jurisdiction in existing federal courts. The means is justified in accomplishing an end admittedly within the power of Congress.

The dissenting justices, Messrs. Frankfurter, Reed, Vinson and Douglas, would continue unimpaired both the proposition of *Hayburn's* case and the construction of the term "states" in *Hepburn v. Ellzey*. Their argument for the invalidity of the Act proceeds on the theory

[12] This construction is not without implied judicial sanction. *E.g.*, judges of courts of the District of Columbia (which were created under U. S. CONST. Art. I, §8) come under the protection of U. S. CONST. Art. III, §1. O'Donoghue v. United States, 289 U. S. 516 (1933). Judgments of the courts of the District are to be accorded "full faith and credit" under U. S. CONST. Art. IV, §1. Embry v. Palmer, 107 U. S. 3 (1882). Congress may impose a direct tax on the District of Columbia, but not an oppressive tax, by reason of U. S. CONST. Art. I, §2. Loughborough v. Blake, 5 Wheat. 317 (U. S. 1820).

[13] C. J. Marshall gave color to this interpretation in a statement in Hepburn v. Ellzey, 2 Cranch 445, 453 (U. S. 1804) made in reference to lack of diversity jurisdiction for citizens of the District: ". . . this is a subject for *legislative*, not for judicial consideration (italics supplied)."

[14] See Mr. Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L. Q. 499, 525 (1928): "The various types of diversity litigation call for concrete scrutiny in the light of present day conditions and the demands upon federal courts by peculiarly federal litigation. The right to remove to the federal court a litigation between two non-residents in a state court will not survive analysis."

[15] U. S. CONST. Art. I, §8, cls. 17 and 18 (District of Columbia); U. S. CONST. Art. IV, §3, cl. 2 (territories).

that (a) the Judiciary Article is the exclusive source of federal jurisdiction, and (b) the Article does not provide for federal diversity jurisdiction over citizens of the District of Columbia and the territories. They contend that the language of Article III is explicit;[16] the authors were distinguished lawyers capable of scrupulously exact draftsmanship; the subject-matter is technical; each facet of judicial power authorized was contested among the framers and distinctly circumscribed;[17] and it is manifest, on the one hand, that Article III was not intended to be one of those sections to which time and experience were to give content, and, on the other hand, that it was to be the sole source of federal judicial power. Article III does not purport to authorize federal diversity jurisdiction for citizens of the District of Columbia or the territories; nor is there any indication that the term "states" means anything other than those component parts forming the union which alone have the power to amend the Constitution.[18] From these premises it follows that an act of Congress attempting to grant federal judicial privileges to the citizens in question violates the Judiciary Article of the Constitution and is invalid. Buttressing the logical argument is the practical consideration that the detriment which will result from holding the Act valid outweighs the advantages which will accrue to citizens of the District and the territories. The already overheavy workload of the federal courts will be increased. More serious is the possibility that Congress might use the precedent now established to further extend federal jurisdiction to include other duties heretofore considered precluded by the Judiciary Article.[19] Though it may be desirable to assure to all citizens access to federal courts on an equal basis, that end would be better achieved by more appropriate means.[20]

Since the Supreme Court has upheld the 1940 Act it is pertinent to consider its wording in conjunction with the 1948 revision of this statute.

[16] The precise phraseology of U. S. CONST. Art. III is in striking contrast with phrases dealing with other vital aspects of government; *e.g.*, "due process of law," "commerce . . . among the several states," "necessary and proper."

[17] See Madison's defense of the Judiciary Article before the Virginia Convention, 5 WRITINGS OF JAMES MADISON 216-225 (Hunt. ed. 1900).

[18] In Hepburn v. Ellzey, 2 Cranch 445, 453 (U. S. 1804), C. J. Marshall in construing the first Judiciary Act to exclude citizens of the District of Columbia said: ". . . members of the American Confederacy only are the states contemplated in the Constitution."

[19] Justice Frankfurter asks: ". . . if the precise enumeration of cases as to which Article III authorized Congress to grant jurisdiction to the United States District Courts does not preclude Congress from vesting these courts with authority which Article III disallows, by what rule of reason is Congress to be precluded from bringing to its aid the advisory opinions of this Court or of the Court of Appeals? . . . Why is not Congress justified in conferring original jurisdiction upon this Court in litigation involving the exercise of its power to make all laws which shall be necessary and proper . . ." National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173, 1196, 1197 (1949).

[20] A constitutional amendment and special statutory courts offer alternative solutions.

The 1940 Act changed the JUDICIAL CODE to provide that district courts have original jurisdiction of all suits of a civil nature where the matter in controversy ". . . is between citizens of different states, *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory. . . .*"[21] Objections have been advanced that the Act is ambiguous and subject to several interpretations.[22] The 1948 revision[23] differs from the 1940 act on the question of federal diversity jurisdiction in two respects.[24] The words, "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory," are omitted. The word "states," as used in the section, is defined to include "the territories and the District of Columbia." The 1948 revision leaves unchanged the basis upon which the Supreme Court reached their decision in the principal case. The Court referred to the 1948 revision as, in substance, re-enacting the 1940 Act.[25]

The result of the 1940 Act as revised and construed is that the citizens of the District of Columbia and the territories, on a showing of diversity of citizenship between the parties, may sue in the federal courts. Nevertheless, by means of a splitting of opinions,[26] the conception of the Judiciary Article as the exclusive source of federal judicial power and the limited construction of the term "states," as used in that Article, considered individually, remain intact. While the basis is as yet unsanctioned by legal principal approved by a majority of the justices, the Court by the purely mechanical device of a split majority accomplished the result they desired without the delay of a constitutional amendment or the complications attendant upon the creation of separate special courts.

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Sales—Technical Cash Transaction—Vendor's Right to Recover Property from Bona Fide Purchaser

Unless a contrary intention appears, promises for an agreed exchange which may be simultaneously performed are concurrently conditional.[1] It follows that, in a contract for the sale of a chattel where

[21] 54 STAT. 143 (1940). Italics supplied.

[22] A literal reading of the 1940 Act would indicate that, contrary to U. S. CONST. AMEND. XI, citizens of the District, Hawaii, and Alaska were authorized to sue any state or territory in the district courts. The Act seemingly authorized suits between two citizens of one territory in the federal courts. See McGarry v. City of Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942).

[23] 28 U. S. C. §1332 (1948).

[24] The revision removes the objection relating to a possible violation to U. S. CONST. AMEND. XI. The revision precludes federal jurisdiction over suits between two citizens of one territory.

[25] National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173, 1174 (1949).

[26] See note 10, *supra*.

[1] RESTATEMENT, CONTRACTS §267 (1931).