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FEDERAL JURISDICTION TO DECIDE MOOT CASES

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Common-law courts have long recognized the strict requirement that permits only cases presenting justiciable controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.

In England, it was held as early as 1736 that an attempt to conduct a fictitious lawsuit on fabricated issues was a contempt of court; the proceedings were stayed and the offending parties committed.[1] An attorney who was found to have presented a fictitious special case for decision was fined forty pounds for contempt in 1824.[2]

In the United States federal courts, this limitation is more than a rule of decision; it is a constitutional requirement. Article III, Section 2 of the Constitution confines the jurisdiction of the federal judicial system to "cases" and "controversies."[3] A lawsuit which is, or has

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1. Coxe v. Phillips, 95 Eng. Rep. R. 152 (1736).

2. Matter of Elsam, 3 B. & C. 597 (K. B. 1824). This decision is not in conflict with the old English practice of trying a "feigned issue," for there the feigned issue (D is indebted to P) was simply a means used to place before the court in more convenient form the real controversy (A is the heir of B), which was alleged incidentally in the declaration. The procedure was thus a method of obtaining a declaratory judgment. Attempting to try a feigned issue without leave of court was a contempt. Hoskins v. Berkeley, 4 T. R. 402 (K. B. 1791).

3. To be precise, the "case and controversy" clause applies only to federal *constitutional* courts as distinguished from *legislative* courts. The Supreme Court, Circuit Courts of Appeals, and District Courts are all constitutional courts; the United States Court of Appeals for the District of Columbia and the District Court for the District of Columbia are both constitutional and legislative; the Court of Customs and Patent Appeals is an example of a legislative court.

become, moot is neither a case nor a controversy in the constitutional sense and no federal court has the power to decide it.[4]

The defect in jurisdiction is so fundamental that a court will dismiss a case at any stage of the proceedings upon determining or being advised that it was either moot when commenced or became moot because of subsequent events. The manner in which the court becomes aware of the facts is of no consequence; dismissal follows promptly. In some cases, disclosure that the case had become moot has been by admissions in open court;[5] even so informal a procedure as a letter from counsel has been sufficient to bring about dismissal.[6] If the parties fail to call to the court's attention facts making a case moot, judicial notice may be taken of them.[7] Of course, the settlement of a civil suit leaves no controversy for determination, so that it must be dismissed as moot.[8] The same result follows the entry of a *nolle prosequi* in a criminal prosecution.[9] The Supreme Court has gone so far as to recall its mandate, vacate a decree of affirmance, and dismiss the appeal after a considerable lapse of time upon being advised of facts indicating that the case was already moot when brought up on appeal.[10]

Intent plays no part in determining whether or not a case is moot. No matter how anxious the parties may be to avoid the effect of mootness, the jurisdiction of the court cannot be enlarged. A stipulation which attempts to keep the controversy alive will be disregarded if the justiciable issue has disappeared, despite a continuing disagreement

4. The enormous number of cases in the field has dictated the advisability of confining this article to federal court decisions. However, the principles to be announced are applicable to proceedings in state courts as well, although some states, unhampered by constitutional limitations as stringent as the federal "case and controversy" clause, have decided moot cases occasionally where the issues were of great public importance. Advisory opinions on state constitutional questions have sometimes been provided for specifically.

5. California v. San Pablo & T. R. R., 149 U. S. 308 (1893); Amador Medean Gold Mining Co. v. South Spring Gold Mining Co., 145 U. S. 300 (1892); Washington Market Co. v. District of Columbia, 137 U. S. 62 (1890); Cover v. Schwartz, 133 F. (2d) 541 (C. C. A. 2d, 1942), *cert. denied*, 319 U. S. 748 (1943).

6. East Tennessee, V. & G. R. R. v. Southern Tel. Co., 125 U. S. 695, 696 (1888).

7. United States v. Chambers, 291 U. S. 217 (1934) (ratification of 21st Amendment to Constitution); Gibbes v. Zimmerman, 290 U. S. 326, 331 (1933) (enactment of statute and issuance of orders pursuant thereto); Abie State Bank v. Bryan, 282 U. S. 765, 777-8 (1931) (enactment of statute pending appeal); United States v. Hamburg-Amerikanische Packetfahrt-A. G., 239 U. S. 466, 475 (1916) (war among European powers); Richardson v. McChesney, 218 U. S. 487, 492 (1910) (service of their terms by specific members of Congress and election of their successors; expiration of term of office of state official); Wilson v. Shaw, 204 U. S. 24, 30 (1907) (specific disbursements from United States Treasury); Tennessee v. Condon, 189 U. S. 64, 69-70 (1903) (provisions of state constitution); Mills v. Green, 159 U. S. 651, 657-8 (1895) (dates of state elections and opening sessions of state legislature and constitutional convention).

8. Hammond Clock Co. v. Schiff, 293 U. S. 529 (1934); Dakota County v. Glidden, 113 U. S. 222 (1885); Gardner v. Goodyear Dental Vulcanite Co., 131 U. S. ciii (1873); *see* United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309 (1897).

9. United States v. Phillips, 6 Pet. 776 (U. S. 1832).

10. Gardner v. Goodyear Dental Vulcanite Co., 131 U. S. ciii (1873).

between the parties on the law.[11] A statute which purports to confer jurisdiction to decide a moot case is unconstitutional.[12]

From the standpoint of the governing principles of law, there is little if any distinction between a case which is found to be moot at the commencement of the litigation and a case which becomes moot pending appeal. Moreover, there is ordinarily no practical difference between the two varieties of situations.[13] Moot cases and moot appeals will accordingly be treated together in the ensuing discussion. Similarly, no distinction will be made between cases where only a single issue is alleged to be moot and those in which the entire case stands or falls on a determination of mootness or its absence.

One sample out of a multitude of judicial definitions will give some indication of the boundaries of the problem:

> ". . . a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy." [14]

It is a relatively simple matter to expand on this definition by deriving a set of rules from the cases. Applying such rules to particular factual situations is, however, a problem of an entirely different order of magnitude. Although certain varieties of mootness are easily recognized, an increasing number of borderline cases reaches the courts. The principal effort throughout the following discussion will therefore be to examine the significant grounds for decision in a number of typical cases, in an attempt to discover the pattern.

One further introductory point remains to be made. We have already seen that the determination of mootness or its absence has a truly fundamental significance. When a court decides that a case before it is moot, it ousts itself of jurisdiction. In judicial technique, there is therefore a great theoretical difference between, "This case is not moot, therefore we *can* decide it," and, "This case is moot, nevertheless we *will* decide it." However, there is obviously no practical distinction between the two, regardless of any doubt concerning the court's actual process of reasoning in a given case. This variety of

11. California v. San Pablo & T. R. R., 149 U. S. 308 (1893) (tax paid under stipulation); San Mateo County v. Southern Pacific R. R., 116 U. S. 138 (1885) (similar facts).

12. Muskrat v. United States, 219 U. S. 346 (1911).

13. *But cf.* Cover v. Schwartz, 133 F. (2d) 541 (C. C. A. 2d, 1942), *cert. denied*, 319 U. S. 748 (1943), where dismissing the appeal rather than the complaint preserved the effect of a decision by the District Court holding a patent invalid.

14. *Ex parte* Steele, 162 Fed. 694, 701 (N. D. Ala. 1908).

semantic quibble is particularly common in jurisdictional problems. In the present discussion, it will henceforth be ignored.

I. Fictitious Controversies

The classic variety of moot case is a fictitious statement of "facts" dressed in the trappings of a bona fide lawsuit. An attempt to obtain a judicial ruling on a hypothetical question by this method will be dismissed as soon as the collusive character of the proceeding becomes known to the court.[15] In addition to the constitutional requirement, an obvious consideration of public policy dictates this result. It is only in the atmosphere of an honest dispute involving real facts that a court can function with propriety. The adversary character of the proceeding is a "safeguard essential to the integrity of the judicial process." [16]

This principle does not condemn a so-called "test case." The distinction is substantial. The typical test case involves a very lively dispute. Only the manner of conducting the litigation is amicable. Suits of this nature, far from being disapproved, have traditionally been encouraged by the courts.[17]

II. Advisory Opinions

A case may involve actual facts and still be dismissed as moot because it seeks an advisory opinion. Cases in this category most often involve the theoretical invalidity of a statute. The facts may be real enough, and the parties may differ strenuously in their interpretation of the law, but the difficulty is that no justiciable controversy has yet arisen. The case is premature, generally because the rights of the plaintiff have not yet been invaded or threatened with invasion.

An example drawn from litigation on a present-day issue will bring this abstraction into focus. The owner of a patent commenced an action to enjoin its licensee from making payments to the United States Government under the Royalty Adjustment Act of 1942,[18] on the ground that the Act was unconstitutional. The Government intervened and moved to dismiss. The Supreme Court pointed out that the validity of the Act could only be drawn into question if it were interposed as a defense to an action for the recovery of royalties already paid. The factual situation was by no means hypothetical, but it had

15. Lord v. Veazie, 8 How. 251 (U. S. 1849); *see* Amador Medean Gold Mining Co. v. South Spring Gold Mining Co., 145 U. S. 300 (1892).

16. United States v. Johnson, 319 U. S. 302, 305 (1943).

17. *See* Lord v. Veazie, 8 How. 251, 255 (U. S. 1849).

18. 56 Stat. 1013 (1942), 35 U. S. C. §§ 89-96 (Supp. IV, 1945).

not developed far enough to create a justiciable issue. The complaint was therefore dismissed for want of a case or controversy.[19]

The defect in a proceeding of this nature is that there are no "merits" on which a court can pass. The trouble is brewing, but it has not yet reached the stage where the plaintiff's rights are involved. The court will refuse to accommodate the plaintiff with an advisory opinion, if only because his rights may never be invaded. Justice Frank of the Second Circuit, in a characteristically diverting opinion, has called the "dispute" in an advisory opinion case "an unreal entity," and compared it with the smile of the Cheshire cat.[20] When all that the plaintiff can show is a construction under which a statute *might* be enforced in an unconstitutional manner, the court will decline the invitation to conduct a speculative inquiry.[21]

The rule is not limited to questions of constitutionality. A plaintiff who seeks a ruling to guide his future conduct, rather than a decision on a real dispute in which his rights have already been called in question, will find the courts closed to him.[22]

This is not inconsistent with the type of adjudication permitted under the Federal Declaratory Judgment Act, for that statute is specifically limited to "cases of actual controversy." [23] It is a procedural rather than a jurisdictional statute,[24] and a case brought under it "must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [25]

The cases cited thus far have been instances where a plaintiff sought an advisory opinion too early in the development of the fact situation. The same problem may arise, and the same result will follow, if the plaintiff seeks such an opinion too late. This was demonstrated in a recent patent case. The District Court held the plaintiff's patent invalid and not infringed. In his brief on appeal and on oral argument, the plaintiff-appellant stated that he did not challenge the

19. Coffman v. Breeze Corporations, 323 U. S. 316 (1945). *Cf.* Coffman v. Federal Laboratories, 323 U. S. 325 (1945).

20. Cover v. Schwartz, 133 F. (2d) 541, 551 (C. C. A. 2d, 1942), *cert. denied*, 319 U. S. 748 (1943) (citing CARROLL, ALICE IN WONDERLAND, Chapter VI).

21. Anniston Mfg. Co. v. Davis, 301 U. S. 337, 355 (1937); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412 (1937); New Jersey v. Sargent, 269 U. S. 328 (1926); *see* Ashwander v. TVA, 297 U. S. 288, 324 (1936). *Cf.* Muskrat v. United States, 219 U. S. 346 (1911).

22. Willing v. Chicago Auditorium, 277 U. S. 274 (1928); *see* Marye v. Parsons (Virginia Coupon Cases), 114 U. S. 325, 330 (1884).

23. 48 STAT. 955 (1934), 49 STAT. 1027 (1935), 28 U. S. C. § 400 (1940); Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937); *see* Ashwander v. TVA, 297 U. S. 288, 325 (1936).

24. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240 (1937).

25. *Id.* at 241.

finding of no infringement, but attempted to secure a reversal on the finding of invalidity. The Circuit Court of Appeals, faced with a party who no longer claimed the defendant had done him any injury, held that no justiciable dispute remained. The plaintiff-appellant was asking simply for an advisory opinion on the validity of the patent, which the court held it was without power to issue.[26]

III. Adverse Parties

The basic requirement that a lawsuit must be controversial in character is obviously lacking where the "opposing" parties are not truly adverse to one another. This classification subdivides into two groups: cases in which both sides of the litigation are under the control of the same person; and cases in which the plaintiff actually has no interest.

A single person may gain control of both sides of the litigation by a variety of methods. Several cases have presented the extreme situation of an appellant who purchases the appellee's interest in the subject matter of the action and then carries on the appeal for his own benefit. The adversary character of the suit is immediately destroyed under these circumstances, and an order dismissing the action as moot will be made when the court learns the facts.[27] Similarly, where it appears that one party has paid the fees of counsel on both sides, it will be assumed that he has such a degree of control over the entire litigation as to make it indistinguishable from a collusive suit.[28] A World War II case, instituted to test the constitutionality of the "freezing" of rents, is a glaring example of this type of situation. Not until the case reached the Supreme Court (and after the Government had intervened) was it discovered that the plaintiff had had no active participation in the suit, had exercised no control over it, and had borne no part of its expense. He was only nominally represented by counsel who was selected by the defendant's counsel and whom the plaintiff had never even seen. The Supreme Court set aside the adjudication below and dismissed in a blistering per curiam opinion.[29]

Control over both sides of the litigation may come into the same hands without any collusion, but the case is moot nevertheless. For example, pending appeal in a suit between two corporations, the controlling stock interest in each became the property of the same group

26. Cover v. Schwartz, 133 F. (2d) 541 (C. C. A. 2d, 1942), *cert. denied*, 319 U. S. 748 (1943).

27. East Tennessee V. & G. R. R. v. Southern Tel. Co., 125 U. S. 695 (1888); American Wood-Paper Co. v. Heft, 8 Wall. 333 (U. S. 1869); Cleveland v. Chamberlain, 1 Black 419 (U. S. 1861).

28. Gardner v. Goodyear Dental Vulcanite Co., 131 U. S. ciii (1873).

29. United States v. Johnson, 319 U. S. 302 (1943).

of individuals. The Supreme Court dismissed on the ground that the litigation had "ceased to be between adverse parties." [30] The United States is a single entity for the purposes of this strict requirement, as demonstrated by a recent admiralty case. The Government had filed a libel for condemnation of a vessel which was claimed by an Italian corporation. After the outbreak of World War II, the United States Alien Property Custodian took title to the vessel on the theory that it was owned by the Italian corporation and subsequently petitioned to be substituted for the claimant. The court pointed out that to grant this petition would result in "a complete absence of adverse interests" and dismissed, not the petition, but the libel.[31]

The second group of cases involves the problem of a plaintiff who lacks sufficient interest in the subject-matter of the action to sustain his right to relief. A party whose status is so ephemeral that he is not entitled to an adjudication from the court cannot in any real sense be an adversary. In this situation, too, the action will be dismissed.

A diversified assortment of cases illustrates this principle. In some instances, the plaintiff never had an interest; in others, his interest was lost or conveyed pending appeal. The basic defect in these cases is that the plaintiff can show no actual or threatened injury to support his cause of action. It is apparent that such cases will generally suffer from other defects as well, and they accordingly are treated at greater length in other portions of this discussion.

To illustrate, a plaintiff who alleges the invalidity of a statute must also allege that the statute has been enforced in a manner that injures him. If he fails to set up such facts, the case will be dismissed as moot both on the ground of lack of interest in the plaintiff and on the ground that it seeks merely an advisory opinion.[32] An action to compel state officials to accept certain bond coupons in payment of taxes fails unless the plaintiff can establish that he is subject to the tax.[33] An action to require the appointment of a receiver for a state bank can no longer be maintained if, pending appeal, the Governor orders liquidation of the bank, for the plaintiff has thus obtained the relief he sought from the court.[34] An action involving the plaintiff's right to construct a building will be dismissed as moot when, pending appeal, the building is constructed and transferred to a third party.[35]

30. Amador Medean Gold Mining Co. v. South Spring Gold Mining Co., 145 U. S. 300 (1892).

31. The Aussa, 52 F. Supp. 927, 930 (D. N. J. 1943) (alternative holding).

32. Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412 (1937); New Jersey v. Sargent, 269 U. S. 328 (1926).

33. Marye v. Parsons (Virginia Coupon Cases), 114 U. S. 325 (1884).

34. Gibbes v. Zimmerman, 290 U. S. 326 (1933).

35. Brownlow v. Schwartz, 261 U. S. 216 (1923).

IV. Change in Controlling Law

When the law that controls a given situation is changed, litigation under the old law generally becomes moot. The change in controlling law may come about by means of statute, treaty, or judicial decision. The basic inquiry to be made is whether the controversy has come to an end. If it has, the suit must be dismissed.

An early case reached this result without any discussion of mootness as such. It was an action for a mandatory injunction requiring the reconstruction of a bridge alleged to be an obstruction to navigation. During the pendency of the suit, Congress enacted a statute declaring that the position and elevation of the bridge were lawful. Clearly, the court could help the plaintiff no longer; the statute had removed the basis for the action. The case was accordingly dismissed.[36] The converse situation is exemplified by an action questioning the validity of a statute which required the affixation of revenue stamps in a specific situation. The plaintiff was an express company, and, pending the appeal, the statute was amended to exempt express companies from its requirements. Here the amended statute granted to the plaintiff all the relief it could have obtained by the litigation. The case therefore became moot.[37] Similarly, an action to enjoin the enforcement of a statute becomes moot when the statute is repealed;[38] and a criminal prosecution must be dismissed as moot if the statute under which it was brought is repealed without a saving clause.[39]

Cases of this nature depend on the principle established in *United States v. Schooner Peggy*,[40] a prize case decided in 1801. While the case was on appeal, the United States entered into a treaty which disposed of the controversy concerning the vessel. Mr. Chief Justice Marshall explained that an appellate court must ordinarily restrict its inquiry to the correctness of the decision below. "But if," he held, "a law intervenes and positively changes the rule which governs," that law must be applied.[41]

Two actions may be so intimately related that a decision or reversal in one will affect the other. The court in the second case will apply the rule of the first just as if there had been a change in a controlling statute. Strictly speaking, such an action may not become moot, but the judicial technique is identical in both instances. For

36. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (U. S. 1855).

37. Dinsmore v. Southern Express Co., 183 U. S. 115 (1901). *Cf.* United States v. Alaska S. S. Co., 253 U. S. 113 (1920).

38. Berry v. Davis, 242 U. S. 468 (1917).

39. United States v. Chambers, 291 U. S. 217, 223 (1934).

40. 1 Cranch 103 (U. S. 1801).

41. *Id.* at 109.

example, in an action brought in the District Court for the Eastern District of Virginia, a plea of *res adjudicata* was interposed on the basis of a judgment of the District Court for the Eastern District of North Carolina. The District Court in Virginia sustained the plea and entered judgment for the defendant. While an appeal was pending in that case, an appeal in the other case (to the same Circuit Court of Appeals) resulted in a reversal of the judgment of the District Court in North Carolina. The Circuit Court of Appeals thereupon reversed the judgment of the District Court in Virginia also, but, as justice obviously required, remanded for a new trial rather than ordering dismissal.[42]

V. Change in Controlling Fact Situation

The fact situation controlling a given case may undergo such a radical change that the relief sought is no longer within the court's power to grant, either because it has been obtained in some other manner or because it has become impossible. This may be the result of the passage of time, the transfer of the property involved in the case, the performance of the act which the suit sought to compel or prevent, or the disappearance of the subject matter of the action. Subject to the exception to be noted below, such a case will be dismissed as moot.

The passage of time is an inevitable hazard for litigants in modern society. Even if the plaintiff's interest in the controversy disappears solely as the result of the time consumed by the litigation, the court will refuse to proceed further with the case. To illustrate, an action contesting the validity of a state child labor statute must be dismissed if, pending appeal, the child on whose behalf the suit was brought passes the maximum age affected by the statute. The controversy is at an end because the statute, even if valid, can no longer be enforced against him.[43] Similarly, an action to enjoin the revocation of a license becomes moot on the date the license would have expired by its own terms.[44] The same principle requires the dismissal of a pending criminal appeal after the sentence has been fully served.[45]

If the case deals with specific real or personal property, the controlling fact situation obviously undergoes a radical alteration if the property is sold or otherwise disposed of. Thus, a controversy involving a building becomes moot when title is transferred to a third party

42. E. I. Du Pont de Nemours & Co. v. Richmond Guano Co., 297 Fed. 580 (C. C. A. 4th, 1924). *Cf.* Butler v. Eaton, 141 U. S. 240 (1891); Sprague Specialties Co. v. Mershon, 73 F. (2d) 379 (C. C. A. 1st, 1934); Mutual Life Ins. Co. v. Lipp, 28 F. (2d) 863 (C. C. A. 9th, 1928).

43. Atherton Mills v. Johnston, 259 U. S. 13 (1922).

44. Security Mutual Life Ins. Co. v. Prewitt, 200 U. S. 446 (1906). *Cf.* Tennessee v. Condon, 189 U. S. 64 (1903) (plaintiff's term of office expired).

45. St. Pierre v. United States, 319 U. S. 41 (1943). *Cf. Ex parte* Baez, 177 U. S. 378 (1900).

who is not substituted in the litigation.[46] A libel in admiralty for condemnation becomes moot when the vessel is seized by the Government under its war-time powers.[47] An issue concerning the applicability of a regulatory statute to the sale of certain bonds becomes moot when the bonds are redeemed by the obligor.[48]

If the litigation turns on the performance of a specific act, the controversy necessarily loses all substance when that act is done. Suits involving the validity of tax assessments demonstrate this principle with particular clarity. If the disputed tax is paid while the proceeding is pending, the case will be dismissed as moot. Whether the taxpayer is party plaintiff or party defendant is of no consequence. Once payment has been made, an action by the levying body to collect the tax[49] or by the taxpayer to review the assessment[50] is moot. Mandamus proceedings involving building construction meet the same fate if the building is constructed pending appeal, either because the writ was granted in the first instance,[51] or because the permit was voluntarily issued after a denial of the writ below.[52]

A similar line of cases deals with attempts to enjoin elections because of alleged violations of the right of suffrage. If the plaintiff is unlucky enough to receive an adverse decision at any stage prior to final appeal, so that the election has already been held when the case is ready for decision by the next higher court, it is no longer possible to grant any relief. "The thing sought to be prohibited has been done and cannot be undone by any order of court."[53] Whether the plaintiff has brought a suit for an injunction against the state supervisor of registration,[54] an action for a writ of prohibition to halt consideration of the votes,[55] or a suit attacking the validity of the state apportionment statute,[56] once the election is held the case is moot.[57]

Additional examples of cases becoming moot by the performance of the specific act involved in the litigation are *Wilson v. Shaw*,[58] where

46. Brownlow v. Schwartz, 261 U. S. 216 (1923) (alternative holding).
47. The Aussa, 52 F. Supp. 927 (D. N. J. 1943).
48. National Ass'n of Securities Dealers v. SEC, 143 F. (2d) 62, 63 n. 1 (C. C. A. 3d, 1944).
49. California v. San Pablo & T. R. R., 149 U. S. 308 (1893); San Mateo County v. Southern Pacific R. R., 116 U. S. 138 (1885).
50. Little v. Bowers, 134 U. S. 547 (1890).
51. Codlin v. Kohlhausen, 181 U. S. 151 (1901).
52. Brownlow v. Schwartz, 261 U. S. 216 (1923).
53. Jones v. Montague, 194 U. S. 147, 153 (1904).
54. Mills v. Green, 159 U. S. 651 (1895).
55. Jones v. Montague, 194 U. S. 147 (1904).
56. Richardson v. McChesney, 218 U. S. 487 (1910).
57. The unfortunate plaintiff is not completely remediless. In a proper case, he may maintain an action for damages against the judges of elections or equivalent officials, in which his rights will be adjudicated. Nixon v. Condon, 286 U. S. 73 (1932); Nixon v. Herndon, 273 U. S. 536 (1927); *see* Grovey v. Townsend, 295 U. S. 45 (1935).
58. 204 U. S. 24, 30 (1907).

the Secretary of the Treasury had already made the payments the suit was designed to prevent; *Cheong Ah Moy v. United States,*[59] where the individual seeking to avoid deportation was deported pending appeal; and *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission,*[60] where a tariff was fixed by the President while an action was pending to require the disclosure of certain information to the President for his use in determining the same tariff. Miscellaneous instances of cases made moot by the granting of the relief sought are *Washington Market Co. v. District of Columbia,*[61] in which it appeared that tax lien certificates had been cancelled in an action at law to annul the assessment while an appeal was pending in a suit to enjoin a tax sale and cancel the same certificates; and *Gibbes v. Zimmerman,*[62] where the liquidation of a bank was ordered pending an action to require that the conservator of the bank be replaced by a liquidating receiver.

Other cases involving the same general principle are less readily classified. However, they are alike in that the subject matter of the controversies disappeared while the cases were awaiting review. Thus, an action to compel the appointment of an administrator becomes moot when the decedent's will is found and admitted to probate;[63] an action challenging the constitutionality of regulations on the manner of selling raw milk becomes moot when the administrative body determines that no raw milk may be sold in any manner;[64] and an action for patent infringement becomes moot when the plaintiff concedes that there had been no infringement, despite the fact that the validity of the patent has been placed in issue.[65] *Smith v. United States*[66] involved the disappearance of the subject matter of the suit in an unusually literal sense. Pending appeal from a criminal conviction, the defendant escaped from the penitentiary. The Supreme Court refused to decide the case.

Self-Perpetuating Situations

For the first time in this discussion, we come to a group of decisions in which the courts have held that they did have the power to act. Although the controlling fact situation may be so changed that the specific relief sought is no longer possible, if the situation is self-perpetuating the parties are entitled to an adjudication which will apply

59. 113 U. S. 216 (1885).
60. 274 U. S. 106 (1927).
61. 137 U. S. 62 (1890).
62. 290 U. S. 326 (1933).
63. Kimball v. Kimball, 174 U. S. 158 (1899).
64. Natural Milk Ass'n v. San Francisco, 317 U. S. 423 (1943).
65. Cover v. Schwartz, 133 F. (2d) 541 (C. C. A. 2d, 1942), *cert. denied,* 319 U. S. 748 (1943).
66. 94 U. S. 97 (1876).

to the renewed phase of the controversy in existence at the date of decision. Language of this sort takes on meaning only through illustration, and the archetype is the short-term order of a regulatory body like the Interstate Commerce Commission. Such orders, whether they fix rates or establish standards of conduct, usually are made for one or two years. If not replaced at their expiration dates, they ordinarily continue in effect automatically or are regularly renewed. It is apparent that the normal processes of litigation consume too much time to obtain final review of an order like this prior to its technical expiration. But it is equally apparent that the self-perpetuating features of the situation guarantee the continuing virility of every aspect of the situation, *including the effect of the order on the person who challenges it.* Such a case does not become moot merely by the passage of time.

The leading case, *Southern Pacific Terminal Co. v. Interstate Commerce Commission,*[67] was an action to enjoin an order requiring the plaintiff to cease granting preferences to a shipper for a period of two years. The Supreme Court held that it had jurisdiction to adjudicate this controversy despite the expiration of the specific order on which issue was joined, explaining that:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." [68]

The same principle has been applied in cases involving rate orders,[69] processing quotas,[70] agricultural marketing orders,[71] and military exclusion orders,[72] but it is not limited to regulatory orders alone. For example, *Securities & Exchange Commission v. Okin*[73] was an action for an injunction against an individual who had allegedly made false and misleading statements in a letter asking stockholders to revoke their proxies for a specific meeting. The evidence indicated that this letter was a preliminary step in the defendant's plan to solicit proxies

67. 219 U. S. 498 (1911).
68. *Id.* at 515. *Cf.* United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 308-9 (1897) (antitrust case).
69. Southern Pacific Co. v. ICC, 219 U. S. 433 (1911); Boise City Irr. & Land Co. v. Clark, 131 Fed. 415 (C. C. A. 9th, 1904).
70. Gay Union Corp. v. Wallace, 112 F. (2d) 192 (App. D. C. 1940), *cert. denied,* 310 U. S. 647 (1940).
71. Yarnell v. Hillsborough Packing Co., 70 F. (2d) 435 (C. C. A. 5th, 1934).
72. Ebel v. Drum, 55 F. Supp. 186 (D. Mass. 1944); for additional facts, *see* s. c., 52 F. Supp. 189 (D. Mass. 1943).
73. 132 F. (2d) 784 (C. C. A. 2d, 1943).

in his own favor in an attempt to become an officer of the corporation. Although the date of that meeting had passed, the court treated the defendant's plan as a continuing whole which survived the specific date, and held that the case was not moot. Other instances include mandamus to compel the issuance of a license granted only on an annual basis, which does not become moot at the end of the year where the plaintiff has established his intention to continue in business;[74] and a proceeding to test the power of a Congressional investigating committee, which does not become moot with the expiration of the particular Congress that created it where the investigation has not been completed and the committee may be revived by motion at any time.[75]

As in other fields of the law, the courts will look through form to substance in an extreme case. The concept of the self-perpetuating situation is helpful in analyzing these cases, although it is apparent that some of them are in a borderline area.

VI. Enjoining Discontinued Acts

A growing body of law—swelled rapidly in recent years as the result of actions brought by agencies of the United States Government to restrain statutory violations—involves suits to enjoin acts which had ceased before the filing of the complaint or were discontinued during the course of the litigation. Since an injunction relates only to the future, it might be anticipated that all these cases would be treated as moot. Actually, the cases held not to have become moot appear to have a numerical advantage.

Several quite definite criteria have been evolved to test the question. The court will examine them all, if necessary, and strike a balance between the affirmative and negative indications of mootness. The fundamental issue is whether the acts sought to be enjoined have been completely abandoned, or whether there is a likelihood of their renewal. As it was put in a recent antitrust case, "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." [76]

In order to understand the judicial process as it functions in cases of this character, the criteria must be segregated and studied in typical fact situations. The manner in which it is possible to exercise jurisdiction despite the discontinuance of the acts sought to be enjoined will appear as the discussion develops.

74. Leonard & Leonard, Co-Partners, v. Earle, 279 U. S. 392 (1929).
75. McGrain v. Daugherty, 273 U. S. 135 (1927).
76. United States v. Aluminum Company of America, 148 F. (2d) 416, 448 (C. C. A. 2d, sitting as court of last resort, 1945). *Cf.* Swift & Co. v. United States, 196 U. S. 375, 396 (1905); United States v. United States Steel Corp., 251 U. S. 417, 444 (1920).

Public Interest

Public interest is a criterion sufficiently anomalous to be disposed of in advance of the main portion of the discussion. Strictly speaking, the fact that the public interest is involved in a lawsuit has no direct bearing on the issue of mootness. It is clear, however, that the courts treat the public interest as one of the negative indications enabling them to exercise jurisdiction in suits to enjoin discontinued acts. This is apparently an outgrowth of the principle of equity jurisprudence which the Supreme Court has expressed in the following language:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." [77]

Theoretically, it might appear that this principle should have no bearing on a jurisdictional issue, but it is often mentioned in the opinions as an added ground for rejecting the contention that a case has become moot. It seems significant, however, that no case relies on public interest as the *sole* basis for exercising jurisdiction, and it is often expressed as a ground for *retaining* a jurisdiction which had properly attached at the commencement of the litigation.

The principle has been applied in cases involving orders of the Interstate Commerce Commission,[78] actions by the Securities and Exchange Commission,[79] Wage-Hour Administration cases,[80] and civil suits brought by the Department of Justice under the antitrust laws.[81] Occasionally, a Circuit Court of Appeals has stated that a case should be decided in order to provide a guide for the public agency to apply in future cases.[82] It may be significant that the Supreme Court appears never to have gone quite so far.

77. Virginian Ry. Co. v. System No. 40, Railway Employees Dep't of the AFL, 300 U. S. 515, 552 (1937).

78. Southern Pac. Terminal Co. v. ICC, 219 U. S. 498, 516 (1911). *Cf.* McGrain v. Daugherty, 273 U. S. 135, 182 (1927).

79. Otis & Co. v. SEC, 106 F. (2d) 579, 584 (C. C. A. 6th, 1939); SEC v. Lawson, 24 F. Supp. 360, 365 (D. Md. 1938); *see* National Ass'n of Securities Dealers v. SEC, 143 F. (2d) 62, 63 n. 1 (C. C. A. 3d, 1944).

80. Walling v. Reuter Co., 321 U. S. 671, 674-5 (1944); Walling v. Haile Gold Mines, 136 F. (2d) 102, 106 (C. C. A. 4th, 1943); Fleming v. Jacksonville Paper Co., 128 F. (2d) 395, 399 (C. C. A. 5th, 1942), *modified,* Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943).

81. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309 (1897); United States v. Vehicular Parking, 52 F. Supp. 749, 751 (D. Del. 1943); United States v. Hartford-Empire Co., 46 F. Supp. 541, 617 (N. D. Ohio 1942), *modified,* Hartford-Empire Co. v. United States, 323 U. S. 386 (1945), 324 U. S. 570 (1945); United States v. Bates Valve Bag Corp., 39 F. (2d) 162, 164 (D. Del. 1930).

82. Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331, 335 (C. C. A. 8th, 1944); Walling v. Haile Gold Mines, 136 F. (2d) 102, 106 (C. C. A. 4th, 1943); Boise City Irr. & Land Co. v. Clark, 131 Fed. 415, 419 (C. C. A. 9th, 1904).

Purpose of the Litigation

A preliminary inquiry that must be made is whether the sole purpose of the litigation is to enjoin the acts which the defendant has discontinued. If the relief sought in the suit is something different from, or in addition to, the termination of those acts, a justiciable controversy generally remains. This inquiry is particularly appropriate in an action such as a civil antitrust suit, where the issues are often complicated and the prayer for relief is comprehensive.

For example, *United States v. Trans-Missouri Freight Association* [83] was an antitrust case in which the Government asked, among other things, that the defendant association be dissolved. Pending appeal it was dissolved by its own members, who were also defendants. The Supreme Court held that the case had not become moot, saying:

> "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future." [84]

Similar reasoning was applied in *United States v. Vehicular Parking,*[85] where the defendants moved for summary judgment on the ground that the case had become moot as the result of an order of the War Production Board which prohibited the use of certain essential materials and thus made it impossible for them to continue their business of manufacturing parking meters. The court pointed out that the purpose of the suit was not to prevent the manufacture of parking meters. The basic allegation was that the defendants had abused their privileges under letters patent by setting up an illegal licensing system, and the prayer for relief included a request for an order requiring the defendants to grant licenses under their patents to all applicants. The motion to dismiss as moot was therefore denied.

Claim of Legality

One of the circumstances tending to establish a "reasonable expectation that the wrong will be repeated" is an assertion by the defendant that the discontinued conduct was lawful from its inception. The probability that the conduct will be repeated in the absence of an adjudication of illegality is obviously strong under these conditions, and courts

83. 166 U. S. 290 (1897).
84. *Id.* at 308. *Cf.* United States v. Bates Valve Bag Corp., 39 F. (2d) 162 (D. Del. 1930) (defendant corporation dissolved; other relief sought).
85. 52 F. Supp. 749 (D. Del. 1943).

accordingly tend to give considerable weight to a claim of legality as an indication that the case is not moot.[86]

The argument that the acts never violated the statute is not conclusive on the question of mootness, and the court will investigate the reasons for the discontinuance. However, such an argument more readily permits the inference that the alleged violations will begin again if the case is dismissed. It is this probability that gives the case sufficient body to support jurisdiction.

Time

The likelihood of repetition may also be inferred more readily if the acts complained of were not discontinued until after the litigation was threatened or had commenced. Here again, the evidence is persuasive rather than conclusive. However, the claim of mootness has been rejected in numerous cases in which much weight was placed on the fact of discontinuance under the threat of litigation or after the action had actually begun.[87] Indeed, it has even been held proper in an antitrust case to enjoin an illegal restriction that had *never* been enforced; the potential power to put it into effect creates an active violation of the statute that will support jurisdiction.[88] On the other hand, courts have occasionally held cases moot despite the fact that the acts sought to be enjoined were not discontinued until after the litigation had commenced. If the trial court is satisfied on other grounds that there is no reason to fear their renewal, its order of dismissal will not be disturbed on appeal unless it appears that there has been an abuse of discretion.[89]

86. Walling v. Helmerich & Payne, 323 U. S. 37, 43 (1944); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202, 207-8 (1916); United States v. Aluminum Company of America, 148 F. (2d) 416, 448 (C. C. A. 2d, sitting as court of last resort, 1945); Fleming v. Jacksonville Paper Co., 128 F. (2d) 395, 399 (C. C. A. 5th, 1942), *modified,* Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); Otis & Co. v. SEC, 106 F. (2d) 579, 584 (C. C. A. 6th, 1939); Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 310 (C. C. A. 7th, 1919); United States v. Sugar Institute, 15 F. Supp. 817, 903 (S. D. N. Y. 1934), *modified,* Sugar Institute v. United States, 297 U. S. 553 (1936).

87. Walling v. Helmerich & Payne, 323 U. S. 37, 42-3 (1944); United States v. Masonite Corp., 316 U. S. 265, 282 (1942); FTC v. Goodyear Tire & Rubber Co., 304 U. S. 257, 260 (1938); NLRB v. Pennsylvania Greyhound Lines, 303 U. S. 261, 271 (1938); United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309 (1897); Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331, 334 (C. C. A. 8th, 1944); Walling v. Reid, 139 F. (2d) 323, 327 (C. C. A. 8th, 1943); Walling v. Haile Gold Mines, 136 F. (2d) 102, 106 (C. C. A. 4th, 1943); Perma-Maid Co. v. FTC, 121 F. (2d) 282, 284 (C. C. A. 6th, 1941); United States v. Hartford-Empire Co., 46 F. Supp. 541, 617 (N. D. Ohio 1942), *modified,* Hartford-Empire Co. v. United States, 323 U. S. 386 (1945), 324 U. S. 570 (1945); United States v. Association of American Railroads, 36 F. Supp. 225 (D. D. C. 1940); SEC v. Lawson, 24 F. Supp. 360, 365 (D. Md. 1938); United States v. Bates Valve Bag Corp., 39 F. (2d) 162, 164 (D. Del. 1930); *see* Hecht Co. v. Bowles, 321 U. S. 321, 327 (1944).

88. United Shoe Mach. Corp. v. United States, 258 U. S. 451, 458 (1922).

89. Walling v. Shenandoah-Dives Mining Co., 134 F. (2d) 395, 397-8 (C. C. A. 10th, 1943); Walling v. Fred Wolferman, Inc., 54 F. Supp. 917, 923 (W. D. Mo. 1944), *appeal dismissed,* 144 F. (2d) 354 (C. C. A. 8th, 1944).

When the acts were discontinued before the suit was brought, the time of discontinuance alone is less persuasive. Weight will be given to the length of the period, however, in determining whether the practices complained of were abandoned completely or merely discontinued with a present probability of renewal. If the former, the case will be dismissed as moot; [90] if the latter, jurisdiction will be exercised.[91]

Motive or Intent

It is apparent from what has been said thus far that the defendant's motive or intent in discontinuing the acts sought to be enjoined is a highly important consideration. If it can be determined or inferred that the defendant terminated the practices without retaining an intention to renew them, the court will hold the case moot.[92] This can occasionally be established by evidence of the circumstances surrounding the discontinuance where they bear on the defendant's motive. For example, cases have been held moot for the following reasons: the parties to an alleged combination in restraint of trade had become hostile to one another and abrogated their contract by mutual consent; [93] the allegedly illegal practices had been "abandoned from a conviction of their futility"; [94] the defendant had sought advice concerning a newly-enacted statute and thereafter modified his method of doing business so that the violations ceased; [95] in an action involving a contract, the defendant had entered into a new contract before the trial of the case and was admittedly in full compliance; [96] the defendant, in good faith, had reorganized his business by discontinuing all interstate activities, thus making the statute inapplicable to him; [97] certain con-

90. Industrial Ass'n of San Francisco v. United States, 268 U. S. 64, 84 (1925); United States v. United States Steel Corp., 251 U. S. 417, 444 (1920); SEC v. Torr, 87 F. (2d) 446, 449-450 (C. C. A. 2d, 1937); Fleming v. Phipps, 35 F. Supp. 627, 630 (D. Md. 1940); United States v. Pan-American Commission, 261 Fed. 229 (S. D. N. Y. 1918).

91. United States v. Aluminum Company of America, 148 F. (2d) 416, 448 (C. C. A. 2d, sitting as court of last resort, 1945); Fleming v. Jacksonville Paper Co., 128 F. (2d) 395, 399 (C. C. A. 5th, 1942), *modified*, Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); Chamber of Commerce v. FTC, 13 F. (2d) 673, 686-7 (C. C. A. 8th, 1926); Guarantee Veterinary Co. v. FTC, 285 Fed. 853 (C. C. A. 2d, 1922); Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 310 (C. C. A. 7th, 1919).

92. Industrial Ass'n of San Francisco v. United States, 268 U. S. 64, 84 (1925); Walling v. Todd, 52 F. Supp. 62 (M. D. Pa. 1943), *motion denied*, 3 F. R. D. 490 (M. D. Pa. 1944); Fleming v. Phipps, 35 F. Supp. 627, 630 (D. Md. 1940).

93. United States v. Pan-American Commission, 261 Fed. 229 (S. D. N. Y. 1918).

94. United States v. United States Steel Corp., 251 U. S. 417, 444 (1920).

95. SEC v. Torr, 87 F. (2d) 446 (C. C. A. 2d, 1937).

96. Walling v. Shenandoah-Dives Mining Co., 134 F. (2d) 395 (C. C. A. 10th, 1943).

97. Walling v. Fred Wolferman, Inc., 54 F. Supp. 917 (W. D. Mo. 1944), *appeal dismissed*, 144 F. (2d) 354 (C. C. A. 8th, 1944).

tract provisions were formally and voluntarily cancelled at the suggestion of the trial court.[98]

On the other hand, the evidence may establish that the defendant would resume the allegedly unlawful conduct were it not for the pendency of the very proceeding he claims to be moot. As the court said in an action to set aside an order of the Federal Trade Commission:

> ". . . no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course." [99]

Under such circumstances, the court will draw the inference that there is a reasonable expectation of renewal and refuse to treat the case as moot.[100] Refusal to rule that mootness has been established will come more readily on the defendant's motion for summary judgment [101] or to dismiss the complaint.[102]

The following are specific instances of cases where evidence of the defendant's motive or intent was given weight in determining that the action had not become moot: the "immediate inciting cause" for the allegedly wrongful conduct had become inactive, but the court inferred that it would be renewed if a suitable occasion arose; [103] the defendants "had set their respective houses in order," but apparently only in an attempt to avoid the issuance of a decree to the same effect (which of course might be enforced by contempt proceedings); [104] war had interrupted communications between the parties to a conspiracy and made some of them enemies, but there was evidence that the defendants planned to resume the conspiracy after the war.[105] Similarly, where the allegedly unlawful acts were repeated so frequently prior to their discontinuance as to constitute a regular course of conduct, the court will tend to draw an unfavorable inference concerning the defendant's motive in discontinuing them and hold that the case is not moot.[106]

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98. Standard Oil Co. of Indiana v. United States, 283 U. S. 163, 181 (1931).

99. Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 310 (C. C. A. 7th, 1919).

100. United States v. National Lead Co., 63 F. Supp. 513, 526 (S. D. N. Y. 1945).

101. Walling v. Reid, 139 F. (2d) 323 (C. C. A. 8th, 1943).

102. SEC v. Okin, 132 F. (2d) 784 (C. C. A. 2d, 1943).

103. Chamber of Commerce v. FTC, 13 F. (2d) 673, 686-7 (C. C. A. 8th, 1926).

104. United States v. Hartford-Empire Co., 46 F. Supp. 541, 617 (N. D. Ohio 1942), *modified*, Hartford-Empire Co. v. United States, 323 U. S. 386 (1945), 324 U. S. 570 (1945). *Accord:* United States v. Pullman Co., 50 F. Supp. 123, 136 (E. D. Pa. 1943); United States v. Association of American Railroads, 36 F. Supp. 225 (D. D. C. 1940).

105. United States v. National Lead Co., 63 F. Supp. 513, 526 (S. D. N. Y. 1945).

106. Otis & Co. v. SEC, 106 F. (2d) 579, 584 (C. C. A. 6th, 1939); Snyder v. Gurnsey, 43 F. Supp. 204 (D. N. H. 1942). *Cf.* Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202, 207-8 (1916); Perma-Maid Co. v. FTC, 121 F. (2d) 282, 284 (C. C. A. 6th, 1941); Fairyfoot Products v. FTC, 80 F. (2d) 684, 686 (C. C. A. 7th, 1935); FTC v. Wallace, 75 F. (2d) 733, 738 (C. C. A. 8th, 1935).

Cessation of Business Activities

The problem of enjoining discontinued acts is carried to an extreme in cases where the defendant's business has terminated, the contract involved in the suit is no longer being performed, or a defendant corporation or association has gone out of existence. In such a case, it is important to inquire whether the discontinuance of the business activities, including the conduct sought to be enjoined, was accomplished by the defendant's own act or was the result of a situation that the defendant himself did not create.

It is conceivable that evidence of an intention to remain out of business permanently might be sufficiently strong to require dismissal of the action as moot. However, where the defendant simply goes out of business of his own volition for no apparent reason except that litigation is pending against him, the jurisdiction of the court is not defeated.[107] This conclusion is inevitable, for a contrary rule would permit a perpetual evasion of the consequences of unlawful conduct; the defendant could go out of business, move to dismiss, resume business, wait until another action was commenced, go out of business again, move to dismiss, and so on.

When a business is terminated, or the performance of a contract becomes impossible, because of an event not under the defendant's control, a more complex problem is presented. The principal cases which raise this problem deal with mootness as the result of war.

It is quite well established that a governmental order, although necessitated by the exigencies of war, is too temporary in character to cause a case to become moot despite the fact that its effect may be to force the defendant out of business. For example, a flat prohibition against the mining of gold does not require the dismissal of an injunction suit against a gold-mining company, for the order does not affect the defendant's ownership of the mines and the equipment to operate them, and it is at least a fair inference that the mines will be worked again when the prohibition is removed.[108] Similarly, a case dealing with allegedly unlawful methods of selling sugar does not become moot upon the discontinuance of sugar sales by the defendant, when it appears that the reason for discontinuance was the Government's wartime control of transactions in sugar and its consumption.[109]

107. Walling v. Reuter Co., 321 U. S. 671 (1944); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202 (1916); United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 308-9 (1897); Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C. C. A. 8th, 1944); SEC v. Lawson, 24 F. Supp. 360 (D. Md. 1938); United States v. Bates Valve Bag Corp., 39 F. (2d) 162 (D. Del. 1930).

108. Walling v. Haile Gold Mines, 136 F. (2d) 102 (C. C. A. 4th, 1943). *Cf.* United States v. Vehicular Parking, 52 F. Supp. 749 (D. Del. 1943).

109. Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (C. C. A. 7th, 1919).

War as a cause of mootness is a somewhat different problem when it prevents the performance of an international contract because the contracting parties have become enemies. This question arises typically in antitrust cases alleging combinations in restraint of the foreign commerce of the United States.

During World War I, the problem was treated in a rather cursory manner. *United States v. Hamburg-Amerikanische Packetfahrt-A. G.*,[110] decided in 1916, involved a so-called "conference" of steamship lines, including companies of American, British, and German nationality. The Supreme Court swept aside an argument based on the probability that the parties would resume the unlawful combination upon the cessation of hostilities, pointed out that their business had ceased "by force of events beyond their control," [111] and remanded the case with directions to dismiss. This ruling was followed a few months later in *United States v. American-Asiatic S. S. Co.*,[112] which was on all fours with the *Hamburg-American* case.

During World War II, two antitrust cases involving international cartels were decided. *United States v. Aluminum Company of America* [113] held that war does not make such a case moot when the court is not persuaded by the evidence that the wrong will not be repeated when commercial relations with former enemy countries are resumed.[114] In *United States v. National Lead Co.*,[115] the court found that "the contracting parties regarded the war as a temporary interruption" [116] and accordingly rejected the argument that the case had become moot.

On its facts, the *Hamburg-American* case has been distinguished almost out of existence by several World War II decisions.[117] The principal factual distinction is that the contract in the *Hamburg-American* case expired automatically by its own terms upon the withdrawal of any party, and the outbreak of war between Great Britain and Germany certainly accomplished this. Both the *Aluminum* and the *National Lead* cases point out that the contracts there involved were

110. 239 U. S. 466 (1916).

111. *Id.* at 477.

112. 242 U. S. 537 (1917).

113. 148 F. (2d) 416 (C. C. A. 2d, sitting as court of last resort, 1945).

114. *Id.* at 448.

115. 63 F. Supp. 513 (S. D. N. Y. 1945).

116. *Id.* at 526.

117. *See* United States v. Aluminum Company of America, 148 F. (2d) 416, 448 (C. C. A. 2d, sitting as court of last resort, 1945); Walling v. Haile Gold Mines, 136 F. (2d) 102, 106 (C. C. A. 4th, 1943); United States v. National Lead Co., 63 F. Supp. 513, 526 (S. D. N. Y. 1945); United States v. Vehicular Parking, 52 F. Supp. 749, 751 (D. Del. 1943).

still formally in effect according to their terms despite the outbreak of war.[118] But neither of these cases is limited to the resumption of the allegedly illegal relationship under the identical contract referred to in the complaint. The *Aluminum* opinion, for example, speaks of the likelihood that the defendant would enter into *another* cartel.

The *Hamburg-American* case says that if the unlawful conduct of the defendants has terminated "by force of events beyond their control," the case is moot; the *Aluminum* case says that unless "there is no reasonable expectation that the wrong will be repeated," the case is not moot. It might therefore be concluded that a genuine change has taken place in the law. (The *Aluminum* opinion cites five cases on the proposition that "the mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption"; four of the five were decided more recently than the *Hamburg-American* case.) Actually the apparent conflict can be resolved. The event beyond the control of the defendant may itself be a reason for concluding that the discontinuance of the unlawful conduct is only temporary. Under such circumstances, the case is not moot.

On this basis, perhaps the principal difference between the World War I and World War II cases is the greater general awareness at the present time of the nature of a cartel relationship. (The *National Lead* case cites a magazine article on cartels and two monographs issued by congressional investigating committees on the subject.) However, the principle is the same as that applied in the cases involving war-time orders that affect domestic violations, and at least one such case dates from World War I.[119]

It might be thought that the international contract cases would stand on a different footing because contracts with enemies may be abrogated by the outbreak of war as a matter of law.[120] However, the *Aluminum* and *National Lead* cases both reject this argument as immaterial. One basis for this point of view presumably is the distinction between the rights asserted in a suit for injunctive relief by a stranger to the contract and the rights of the contracting parties as between themselves.

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118. The reader will have discerned a distinction of a different character: the World War I cases were decided by the Supreme Court. It is anticipated that the Supreme Court may be asked to pass upon the *National Lead* case; the *Aluminum* case was transferred to the Second Circuit Court of Appeals for decision by special legislation when it appeared that a quorum of the Supreme Court could not be obtained to hear it.

119. Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (C. C. A. 7th, 1919), cited in note 109 *supra*.

120. *See* Diamond, *The Effect of War on Pre-Existing Contracts Involving Enemy Nationals* (1944) 53 YALE L. J. 700.

It is therefore clear that the sole issue in cases seeking to enjoin discontinued conduct is the expectation of renewal. The pressure that keeps the defendant from performing the unlawful acts may be the pendency of the litigation itself, an unrelated event (such as war), or both; unless the court is persuaded that the defendant would probably not resume the alleged violations of law upon removal of that pressure, a justiciable controversy remains and the case will not be dismissed as moot.

Conclusion

The prerequisites for the exercise of jurisdiction by a federal court can be restated in summary fashion. There must be a real controversy involving actual facts. The case must seek, not an advisory opinion, but a judgment that can operate to grant conclusive and specific relief. The parties to the controversy must be adverse, both in the sense that the plaintiff and defendant represent opposing interests and in the sense that some right of the plaintiff has been invaded or threatened. Neither the controlling law nor the controlling fact situation can have changed to such an extent that the relief sought has already been obtained, or that the court is without power to grant it.

These principles are relatively easy to apply. However, there is a certain conceptual difficulty with cases like those previously discussed under the heading "self-perpetuating situation," and cases where jurisdiction has been exercised to enjoin discontinued acts. For example, there might appear to be a definite difference in approach between the strict requirements laid down in the advisory opinion cases and the willingness of the courts to entertain injunction suits against defendants whose businesses have been liquidated. Yet this is essentially the same problem with which the judicial process has to deal constantly—the problem of the grey area that separates the extremes of black and white.

A so-called self-perpetuating situation may present a justiciable controversy despite the disappearance of the particular factual situation alleged in the pleadings. The passage of time makes it impossible to plead the precise facts which will still be operative when the case is appealed. But if the original factual situation is replaced immediately on its expiration by another which is substantially identical and which continues to affect the rights of the parties in the same manner, the original controversy actually remains. The court can then rescue the litigants from the dilemma of never being able to obtain final adjudication.

The same fundamental approach applies to suits to enjoin discontinued acts. If the conduct sought to be enjoined has not been definitely abandoned, but merely discontinued with reasonable prospects of renewal, the controversy continues to exist. In such a case, the issuance of an injunction is not merely an advisory opinion; it grants effectual relief because it forbids the performance of acts which, by hypothesis, would otherwise be repeated.

It is not often that the determination of whether or not a case is moot is made explicitly. Under our judicial system and our Constitution, however, this question is a fundamental issue in every suit brought in a federal court.