It is believed that the courts generally have included the District as a state where that was necessary in order to reach a proper result, a result consistent with the spirit of our democratic government. Equality of citizens is a foundation stone of the American government. This may be a situation in which the Supreme Court will include the citizens of the District of Columbia as equals of their fellow citizens in this respect, without deserting the principles of the constitutional Union.

Charles W. Davidson, Jr.

The Power of the District Courts of the United States To Remand or Dismiss as Affected by H. R. 3214

H.R. 3214, the proposed revision of title 28 of the United States Code,[1] omits the present Section 80[2] which reads as follows:

> If in any suit commenced in a district court or removed from a state court to a district court of the United States, it shall appear to the satisfaction of said district court, at any time after such suit has been brought or removed thereto, that such a suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

H.R. 3214 provides that the district court shall "not have jurisdiction of a civil action in which any party . . . has been improperly or collusively . . . joined to invoke the jurisdiction of such court,"[3] but omits the provision that the district court shall dismiss or remand a suit when it appears that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court."[4]

Will this omission affect the power of the district court to dismiss cases coming before it for lack or loss of jurisdiction? The Committee on the Judiciary of the House of Representatives evidently thought not for in referring to this omission it stated:

---

[1] Title 28 of the United States Code is being revised by the Congress of the United States. This bill, which will replace the present title 28 was passed by the House of Representatives as H.R. 3214 on July 7, 1947, and was referred to the Senate Committee on the Judiciary.

[2] 36 STAT. 1090 (1911), 28 U.S.C. §80 (1940).

[3] H.R. 3214 §1359.

[4] 18 STAT. 470 (1875).

> Any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion.[5]

If this be true of the district courts of the United States there is, of course, no problem but it is questionable whether the answer to the proposition may be so easily stated.

Among those who would dissent from the opinion expressed by the House Committee are Chadbourn and Levin who have made a compelling argument for the necessity and utility of section 5 in general and for the part now to be omitted in particular.[6]

The position taken by these writers may be summarized somewhat in this manner: most cases over which the district courts of the United States have jurisdiction involve a federal question, a separable controversy, or diversity of citizenship. When a case containing one of these elements is properly presented the court *must* take jurisdiction.[7] The number of cases which are cognizable by the district courts is thus very great, especially in the field of the federal question cases.[8] Therefore, when in 1875 the Congress for the first time conferred original jurisdiction of federal questions upon the district courts, it inserted in the very act conferring jurisdiction a section which required the courts to dismiss or remand any case which did not really and substantially involve a controversy properly within the court's jurisdiction.[9] There are, by this view, two standards for jurisdiction. The jurisdiction of the court is vested by the allegation of the plaintiff's complaint but later, at any point in the proceedings, the court may dismiss or remand the cause under section 5 when it becomes apparent that the controversy *actually* litigated is not a federal question. Thus jurisdiction vests only to be later ousted by section 5. If this be a correct interpretation of section 5 then the omitted clause should have been retained in the bill.

A different view, but the same conclusion, is expressed by another writer on this subject.[10] This author would declare that section 5 allows the court to dismiss cases over which it took jurisdic-

---

[5] H.R. REP. No. 308, 80th Cong., 1st Sess. A125 (1947).

[6] Chadbourn and Levin, *Original Jurisdiction of a Federal Question*, 90 U. OF PA. L. REV. 639 (1942).

[7] Osborn v. Bank of U. S., 9 Wheat. 738 (U.S. 1824); Morgan's Heirs v. Morgan, 2 Wheat. 290 (U.S. 1817); Kanouse v. Martin, 15 How. 198 (U.S. 1853).

[8] Chadbourn and Levin, *Original Jurisdiction of a Federal Question*, 90 U. OF PA. L. REV. 639, 649 (1942).

[9] 18 STAT. 470, 472 (1875), 28 U.S.C. §80 (1940) is the modern counterpart of §5 and is substantially the same as the original act; the section will be hereinafter referred to as §5.

[10] Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943).

tion when the facts alleged are found not to exist. The theory here is *not* that jurisdiction has been ousted but that jurisdiction which had apparently vested did not really vest at all. This view has been criticized[11] but if it is a tenable position then Section 5 is needed as authority to dismiss cases where the facts, by which jurisdiction originally vested, have subsequently disappeared so that the suit no longer involves, in any real sense, a controversy within the jurisdiction of the court; yet without section 5 the court could not dismiss or remand.

Not all writers who have put pen to paper on this subject have found section 5 so essential. G. Merle Bergman is of the opinion that it was enacted by Congress so that the district courts could dismiss or remand a case where jurisdiction had originally vested but where the facts which originally gave jurisdiction no longer exist.[12] That is, it makes possible the ouster of jurisdiction which had previously vested. However, he goes on to say:

> It is more than likely, of course, that the courts would construe this as a fraud upon their jurisdiction and oust the case *of their own accord*, but Congress turned this likelihood into a certainty by imposing the duty on the court.[13] (Emphasis supplied)

Mr. Bergman clearly believes that the district court *could* dismiss without the aid of section 5 but it is important to indicate at this point that he speaks only of fraud upon the jurisdiction of the court. As indicated earlier, the section dealing with jurisdiction improperly or collusively obtained has been retained.[14] But he is not referring to the case where jurisdiction properly vests and then the facts which originally gave jurisdiction disappear. The parties may have acted in utmost good faith and in such a situation the clause now omitted would have permitted the court to remand.

One of the best treatments of the problem of divestment of federal jurisdiction comes to the conclusion that the district courts can dismiss or remand without the aid of section 5.[15] The reasoning is based upon the statutory history of that section.[16]

---

[11] Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 31-32 (1947).

[12] Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1947).

[13] Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 33 (1947).

[14] H.R. 3214 §1359 as passed by the House of Representatives July 7, 1947.

[15] Schlesinger and Strasburger, *Divestment of Federal Jurisdiction*, 39 COL. L. REV. 595 (1939).

[16] Schlesinger and Strasburger, *Divestment of Federal Jurisdiction*, 39 COL. L. REV. 595, 623 (1939).

TREATMENT IN THE CASES

As mentioned earlier in this article, Section 5 was enacted in 1875. A study of the cases since that time may indicate whether it is *necessary* in order for the court to remand or dismiss a case where jurisdiction, once vesting, has subsequently disappeared. The decisions have developed two distinct lines of authority on this problem. One line, headed by *Kirby v. American Soda Fountain Co.*,[17] treats section 5 as applying only in cases where jurisdiction is gained by collusion or bad faith. In the *Kirby* case the plaintiff sued in a district court of Texas to cancel an obligation of $2,025 and for $2,500 damages for fraud in the transaction in which the obligation arose. The defendant, a foreign corporation, obtained removal to the federal court on the ground of diversity of citizenship. Defendant cross claimed for the unpaid balance of the obligation which the plaintiff was seeking to have cancelled. This unpaid balance was less than $2,000 which at that time was the jurisdictional minimum. Plaintiff dismissed his suit against the defendant and pleaded lack of jurisdiction in the federal court to hear the counterclaim. The court held jurisdiction *not* divested and at least one ground of the decision was that jurisdiction is not divested by a subsequent change in conditions which reduces the amount in controversy below the jurisdictional minimum. The court ignored section 5 and based its decision on four cases decided prior to the enactment of that section.[18] Later cases following the *Kirby* case have at least recognized that section 5 exists but would apply it only in cases where collusion or bad faith are present.[19] It follows, under such a view of section 5, that the proposed omission is justified as the elimination of superfluous matter.

The other line of cases stems from *Texas Transportation Co. v. Seeligson*,[20] a case decided a few years before the *Kirby* case but not overruled by it. In the *Seeligson* case *A*, a citizen of Texas, sued *B*, a citizen of New York, and *C*, a citizen of Texas, in a Texas court. *B* had the cause removed to the district court on the ground of a separable controversy. *A* then dismissed his suit against *B*. The court held that federal jurisdiction was lost and remanded the case

---

[17] 194 U.S. 141 (1904).

[18] Morgan's Heirs v. Morgan, 2 Wheat. 290 (U.S. 1817); Clark v. Mathewson, 12 Pet. 164 (U.S. 1838); Kanouse v. Martin, 15 How. 198 (U.S. 1853); Cooke v. U.S., 2 Wall. 218 (U.S. 1864).

[19] See, especially, the opinion of Mr. Justice Roberts in St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 295 (1938). Also see Jellison v. Krell Piano Co., 246 Fed. (E.D. Ky. 1917).

[20] 122 U.S. 519 (1887).

to the state court. Section 5 was expressly cited and applied. This decision is also good law and is followed by the courts.[21]

The theory of the *Seeligson* case seems to be followed when the cause is removed because a separable controversy exists and the suit against the party alleging the separable controversy is dismissed.[22] It is followed where diversity of citizenship is lost by the addition of a party plaintiff whose presence at the outset would have prevented jurisdiction from vesting,[23] but it is not followed where diversity of citizenship is lost by the later addition of a party defendant,[24] unless the party added is an indispensable party to the suit.[25] It is not followed where there is a later reduction of the amount in controversy to a sum below the jurisdictional minimum;[26] nor where there is a change in citizenship of a party which, if existing in the beginning of the suit, would have prevented the court from taking jurisdiction.[27]

Jurisdiction, originally acquired in good faith, has, then, been held divested most often in cases where a separable controversy has ceased to exist or where diversity of citizenship has been lost by addition of a party plaintiff. In these two types of cases, alone, is the omission from Section 5 of the words, "really and substantially involve a dispute or controversy within the jurisdiction of the district court," likely to have any effect. In these two situations the courts may be forced to retain jurisdiction over cases which were formerly dismissed or remanded. Such seems to be the weight of opinion among those who have analyzed Section 5. There can be no final answer until H.R. 3214 becomes law and cases are decided under the new statute.

Richard O. Gantz

---

[21] Torrence v. Shedd, 144 U.S. 527 (1891); Henson v. Eichhorn, 24 F. Supp. 842 (E.D. Ill. 1938); Bane v. Keefer, 66 Fed. 610 (D. Ind. 1895); Youtsey v. Hoffman, 108 Fed. 699 (D. Ky. 1901).

[22] Sklarsky v. A. & P. Tea Co., 47 F. 2d 662 (S.D. N.Y. 1931); Roecker v. Railways Express Agency, 63 F. Supp. 65 (W.D. Mo. 1945); Summers and Oppenheim v. Tillinghast Stiles Co., 19 F. Supp. 230 (S.D. N.Y. 1937); Iowa Homestead Co. v. Des Moines Navigation and R.R., 8 Fed. 97 (C.C.S.D. Iowa 1881).

[23] Gaddis v. Junker, 27 F. 2d 156 (E.D. Tex. 1928); Forrest Oil Co. v. Crawford, 101 Fed. 849 (C.C.A. 3d 1900).

[24] Phelps v. Oaks, 117 U.S. 236 (1886).

[25] Fryer v. Weakley, 261 Fed. 509 (C.C.A. 8th 1919).

[26] Indian Refining Co. v. Valvoline Oil Co., 75 F. 2d 797 (C.C.A. 7th 1935); Morrow v. Mutual Casualty Co., 20 F. Supp. 193 (E.D. Ky. 1937); N. Y. Life Insurance Co. v. Kaufman, 78 F. 2d 398 (C.C.A. 9th 1935), *cert. denied,* 296 U.S. 626 (1935); Cohn v. Kramer, 124 F. 2d 791 (C.C.A. 6th 1942).

[27] Houser v. Clayton, 12 Fed. Cas. 600, No. 6739 (C.C.E.D. Tex. 1878).