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ACTIONS INVOLVING INSURANCE POLICIES

THIS subject involves various types of insurance policies and the claims thereunder. In *New York Life Ins. Co. v. Viglas*,[1] one Viglas held a policy issued by the insurance company for $2,000 payable on his death. The policy also entitled him to monthly benefit payments and suspension of premiums if totally and permanently disabled. While he was in the enjoyment of these rights, upon the assumption that such disability existed, he was notified by the insurance company that it would no longer make the payments or waive premiums, because it appeared to the company that for some time past he had not been continuously totally disabled within the terms of the policy. Upon Viglas' failure to pay a premium on the next due date, the company noted on its records

* This is the second and concluding article by Professor Ilsen and Mr. Sardell on this subject. The first article appeared in the December 1954 issue of the ST. JOHN'S LAW REVIEW.

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[1] 297 U.S. 672 (1936). See Kuhn v. Pacific Mut. Life Ins. Co., 37 F. Supp. 102 (S.D. N.Y. 1941).

that the policy had lapsed, Viglas, however, being entitled to certain limited benefits. Viglas then brought suit for damages in the amount of $15,900 on the theory that the acts of the insurance company constituted an anticipatory breach of the contract of insurance. The sum claimed was the total benefits that would be available during his life expectancy under the American Table of Mortality. The Supreme Court held that under the circumstances the doctrine of anticipatory breach was not applicable, and that the real controversy was only over the amount of disability benefits due at the institution of the suit, which was less than $100. The Court said: "For breach short of repudiation or an intentional abandonment equivalent thereto, the damages under such a policy as this do not exceed the benefits in default at the commencement of the suit." [2]

Two years prior to this holding, the Supreme Court had a quasi insurance case before it for decision. That was *Brotherhood of Locomotive Firemen & Enginemen v. Pinkston* [3] which arose on a bill in equity brought to protect the entire contract giving to plaintiff a monthly pension for the remainder of her life. The protection sought was not merely for herself but for others similarly situated, and involved the entire fund being administered by the Brotherhood, which fund, it was claimed by plaintiff, was being administered to destroy the value of the entire contract. In the trial court, an actuary was allowed to testify that the value of plaintiff's right to receive $35 a month so long as she remained unmarried was $6,000. The entire fund in the pension department was nearly $300,000. The Supreme Court held: "This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction." [4]

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[2] New York Life Ins. Co. v. Viglas, *supra* note 1 at 678; *cf.* Guardian Life Ins. Co. v. Kortz, 151 F.2d 582 (10th Cir. 1945); Columbian Nat. Life Ins. Co. v. Goldberg, 138 F.2d 192 (6th Cir. 1943), *cert. denied*, 321 U.S. 765 (1944); Trainor v. Mutual Life Ins. Co., 131 F.2d 895 (7th Cir. 1942).

[3] 293 U.S. 96 (1934).

[4] *Id.* at 99-100. See Thompson v. Thompson, 226 U.S. 551 (1913); Calhoun v. Lange, 40 F. Supp. 264 (D. Md. 1941), 9 U. OF CHI. L. REV. 339 (1942).

Assume an insured claims against the insurance company on a policy providing for installment payments where permanent disability under the contract of insurance is asserted by the insured and denied by the insurer. The insured brings suit in a federal court for the installments already accrued (which installments do not total the jurisdictional minimum) claiming that the court, in determining the amount in controversy, may consider the payments due in the future if liability under the contract is established—amounts which would be in excess of $3,000, exclusive of interest and costs. Or, similarly, assume the case where the action is brought in a state court and the insurance company makes the same assertion in its petition for the removal of the action from the state court to the federal court. This problem has frequently confronted the federal courts. In *Button v. Mutual Life Ins. Co.*,[5] a case originally filed in a state court and removed by the defendant, the federal court, on granting the plaintiff's motion to remand, held:

> The matter in controversy involves only the liability of the insurance company to make the payments already accrued [in this case, less than the jurisdictional minimum]. No controversy exists in this action as to any disability payments under the contract in the future. The insurance company may or may not decline to pay them, and facts occurring subsequent to the filing of this action may completely justify its refusal to make future monthly payments even though the result of this action obligates it to pay those already accrued; such subsequently occurring facts might lead the insurance company to make such payments in the future irrespective of the result of this action. This action is in no way res judicata as to its liability under the policy in the future. Although the effect of the judgment in this case may result in the insured collecting from the insurance company a total sum far in excess of the jurisdictional amount, yet it is well settled that when federal jurisdiction depends upon the amount in controversy, "it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur." New England Mortgage Security

[5] 48 F. Supp. 168 (W.D. Ky. 1943), 41 MICH. L. REV. 1203, 92 U. OF PA. L. REV. 211.

Co. v. Gay, 145 U.S. 123, 12 S. Ct. 815, 816, 36 L. Ed. 646. The collateral effect of a judgment is not the test of jurisdiction.[6]

It has also been held that where an insured brought suit in a state court to recover accrued disability benefits amounting to $581 under insurance policies totalling $8,000 in amount, defendant insurance company could not remove the case to a federal court on the ground of the diversity of citizenship of the parties and for the reason that, in the event of plaintiff's recovery of judgment, defendant would be required by law to set up a reserve against future disability payments of over $3,000.[7] There is some authority that the reserve required should be taken into account.[8]

Where, however, the insured brought suit in a state court not only to recover the disability benefits, amounting to $600 under a policy of life insurance in the sum of $10,000, but also to have the policy declared in full force and effect, upon an allegation that the defendant had wrongfully declared it lapsed for nonpayment of premiums and had converted it into a policy of extended term insurance under the option features of the contract, the case was properly removed to the federal court since the relief sought to reinstate the policy ". . . would directly determine the validity of a policy involving $10,000 life indemnity in addition to disability benefits. . . ." [9] The court, therefore, held that ". . . it is perfectly clear that it [the action] involves more than $3,000,

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[6] Button v. Mutual Life Ins. Co., *supra* note 5 at 171. The court, at this point, cited the following decisions in support of its final statement: Bruce v. Manchester & Keene R.R., 117 U.S. 514 (1886); Opelika City v. Daniel, 109 U.S. 108 (1883); New Jersey Zinc Co. v. Trotter, 108 U.S. 564 (1883); Elgin v. Marshall, 106 U.S. 578 (1882); Troy v. Evans, 97 U.S. 1 (1877). See Healy v. Ratta, 292 U.S. 263 (1934); Equitable Life Assur. Soc. v. Wilson, 81 F.2d 657 (9th Cir. 1936); Wright v. Mutual Life Ins. Co., 19 F.2d 117 (5th Cir. 1927), *aff'd mem.*, 276 U.S. 602 (1928); Gates v. Union Central Life Ins. Co., 56 F. Supp. 149 (E.D. N.Y. 1944).

[7] Mutual Life Ins. Co. v. Moyle, 116 F.2d 434 (4th Cir. 1940); Mutual Life Ins. Co. v. Temple, 56 F. Supp. 737 (W.D. La. 1944); Gates v. Union Central Life Ins. Co., *supra* note 6; Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E.D. Ky. 1942); Mitchell v. Mutual Life Ins. Co., 31 F. Supp. 441 (W.D. La. 1940).

[8] See Struble v. Connecticut Mut. Life Ins. Co., 20 F. Supp. 779 (S.D. Fla. 1937); Ross v. Travelers Ins. Co., 18 F. Supp. 819 (E.D. S.C. 1936); Enzor v. Jefferson Standard Life Ins. Co., 14 F. Supp. 677 (E.D. S.C. 1936). But see Huey v. Prudential Ins. Co., 23 F. Supp. 708 (N.D. Ala. 1938).

[9] Bell v. Philadelphia Life Ins. Co., 78 F.2d 322, 323 (4th Cir. 1935).

exclusive of interest and costs." [10] In an action by the insured for judgment declaring a policy of insurance containing a double indemnity provision to be in full force and granting insured a recovery of $50 per month under the disability provision of the policy for a period commencing with a specified date, the insurer denied any liability with respect to the double indemnity and disability provisions and contended that, as to the ordinary life provisions, the policy had lapsed. The lower court had dismissed the action for want of jurisdiction on the theory that the unpaid disability installments totalled less than $3,000. The court of appeals in reversing held: "And we think there can be no question but that the requisite jurisdictional amount was involved in the suit. This amount was not merely the unpaid disability installments . . . but also the $5,000 double indemnity feature of the policy which the company had declared void, and the $5,000 ordinary life feature, which the company had declared lapsed. . . ." [11] But where in a declaratory judgment action the court was asked to hold that the insured's rights under the policy were (1) a right to the sum, admittedly less than $3,000, which was due and owing at the time action was commenced and (2) a right to the "future benefits," *i.e.,* benefits based on insured's life expectancy and the assumption that, throughout his life, he would be continuously and totally disabled and prevented from performing any and every duty pertaining to his occupation, the court properly held that it had no jurisdiction saying: "Obviously, no right to such 'future benefits' existed at the time the action was commenced. No one, at that time, knew or could have known whether such a right would ever exist. Therefore, as to such 'future benefits,' there was and could have been, at that time, no controversy." [12]

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[10] *Ibid.* See Ginsburg v. Pacific Mut. Life Ins. Co., 69 F.2d 97 (2d Cir. 1934); Connecticut General Life Ins. Co. v. Cohen, 27 F. Supp. 735 (E.D. N.Y. 1939); Rydstrom v. Massachusetts Accident Co., 25 F. Supp. 359 (D. Md. 1938); Berlin v. Travelers Ins. Co., 18 F. Supp. 126 (D. Md. 1937).

[11] Stephenson v. Equitable Life Assur. Soc., 92 F.2d 406, 410 (4th Cir. 1937). As to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1952), see Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), 108 A.L.R. 1000; Guardian Life Ins. Co. v. Kortz, 151 F.2d 582 (10th Cir. 1945).

[12] Commercial Casualty Ins. Co. v. Fowles, 154 F.2d 884, 886 (9th Cir. 1946), 165 A.L.R. 1068; see New York Life Ins. Co. v. Greenfield, 154 F.2d

But if the insurance company seeks an adjudication voiding a policy by reason of fraud, the face amount of the policy is in controversy and if the policy is for more than $3,000, the jurisdictional amount is present.[12a] Where the insurer sought an adjudication that would relieve it from both matured and future disability payments amounting to $220 per month and the insured had a life expectancy of 11.68 years, it has been held that the amount in controversy exceeded the $3,000 minimum necessary to confer jurisdiction in a diversity case.[12b]

Actions involving liability or indemnity policies may also raise questions. An insurer agreed to indemnify a physician against loss, not exceeding $5,000, resulting from malpractice except where damage resulted from performance of a criminal act. The insurer, however, was not obligated to indemnify the insured until a judgment had been rendered against him. Thereafter the physician committed an act causing his patient's death; the insurer claimed that the act was within the terms of the exception in the policy. For this act the physician was sued in a state court for $10,000. The insurer, refusing to defend the action, brought an action in a federal court against the physician and the administrator of the estate of the deceased patient for a judgment declaring that the policy in question did not cover the claim asserted against the physician. In holding that the jurisdictional minimum existed, the court said:

It is intended to disclose that the Surety Company has no obligation to defend the insured against the claim for $10,000 because he has been guilty of criminal misconduct not covered by the policy. If this is shown, it will be necessarily determined thereby that the Surety Company has no obligation to indemnify him in the event of an ad-

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953 (5th Cir. 1946); Travelers Ins. Co. v. Greenfield, 154 F.2d 950 (5th Cir. 1946); Mutual Life Ins. Co. v. Temple, 56 F. Supp. 737 (W.D. La. 1944).

[12a] Franklin Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946); New York Life Ins. Co. v. Kaufman, 78 F.2d 398 (9th Cir.), *cert. denied*, 296 U.S. 626 (1935). See also Morris v. Franklin Fire Ins. Co., 130 F.2d 553 (9th Cir. 1942) (action to reform fire insurance policy); Ballard v. Mutual Life Ins. Co., 109 F.2d 388 (5th Cir. 1940); Mutual Benefit Health & Accident Ass'n v. Fortenberry, 98 F.2d 570 (5th Cir. 1938).

[12b] Guardian Life Ins. Co. v. Kortz, *supra* note 11.

verse decision; and since its obligation to indemnify, if found to exist, extends to the sum of $5,000, the amount in controversy is sufficient.[13]

In this type of insurance it has been held that, although the amount of the insured's claim had not yet been ascertained, the amount in controversy was the maximum liability for which the insurer could be held legally responsible, and, if that was in excess of $3,000, exclusive of interest and costs, the district court had jurisdiction.[14] Where diversity of citizenship exists, it has also been held that the district court had jurisdiction of insurer's suit against the insured and beneficiary to cancel two life insurance policies for $2,500 and $2,000, respectively. "Neither policy was in principal amount for more than $3,000 . . . ; but the two combined exceed the statutory minimum. In our opinion the requirements of the statute are met in this case." [15]

A recent Supreme Court decision [16] involved a special pension provision under the Workmen's Compensation Law of the State of Tennessee.[17] Pursuant to this law an action had been instituted in a Tennessee court by the employee's widow, a citizen of Tennessee, in her behalf and in behalf of two minor children for statutory relief alleging that the de-

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[13] Aetna Casualty & Surety Co. v. Yeatts, 99 F.2d 665, 668 (4th Cir. 1938); see Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941); American Casualty Co. v. Howard, 173 F.2d 924 (4th Cir. 1949); American General Ins. Co. v. Booze, 146 F.2d 329 (9th Cir. 1944); Home Ins. Co. v. Trotter, 130 F.2d 800 (8th Cir. 1942); C. E. Carnes & Co. v. Employers' Liability Assur. Corp., 101 F.2d 739 (5th Cir. 1939); Lumbermens Mut. Casualty Co. v. C. Y. Thompson Co., 87 F. Supp. 889 (W.D. S.C.), *aff'd*, 183 F.2d 729 (4th Cir. 1950); Trinity Universal Ins. Co. v. Woody, 47 F. Supp. 327 (D. N.J. 1942); Comment, 46 YALE L.J. 286 (1936).

[14] Commercial Casualty Ins. Co. v. Humphrey, 13 F. Supp. 174 (S.D. Tex. 1935); see Security Ins. Co. v. Jay, 109 F. Supp. 87 (D. Minn. 1952); Ohio Casualty Ins. Co. v. Maloney, 44 F. Supp. 312 (E.D. Pa. 1942); New Century Casualty Co. v. Chase, 39 F. Supp. 768 (S.D. W. Va. 1941). But see Hardware Mut. Casualty Co. v. Schantz, 178 F.2d 779 (5th Cir. 1949) (declaratory judgment to determine rights of parties under a public liability policy); United States Fidelity & Guaranty Co. v. Thomson, 32 F. Supp. 15 (S.D. Iowa 1940).

[15] Provident Mut. Life Ins. Co. v. Parsons, 70 F.2d 863, 864 (4th Cir.), *cert. denied*, 293 U.S. 582 (1934); see Jamerson v. Alliance Ins. Co., 87 F.2d 253 (7th Cir.), *cert. denied*, 300 U.S. 683 (1939); American Union Ins. Co. v. Lowman Wine & B. Co., 92 F. Supp. 881 (W.D. Mo. 1950); Oshry v. Mutual Life Ins. Co., 27 F. Supp. 237 (D. Mass. 1939).

[16] Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947); see Note, 36 CALIF. L. REV. 124 (1948).

[17] TENN. CODE ANN. § 6851 *et seq.* (Williams, Supp. 1952).

cedent had died as the result of an accident occurring in the course of his employment. Burial expenses plus benefits in the sum of $5,000, the maximum under the Tennessee statute, were sought on behalf of the widow and her minor children.[18] This action was opposed by the decedent's former employer, a North Carolina corporation, and by Aetna Casualty, the insurance carrier, a Connecticut corporation. On application of the defendants, the action was removed to a federal district court. The plaintiffs sought remand alleging, *inter alia,* that the jurisdictional amount was not involved. The district court dismissed the action on another ground. The court of appeals held that the jurisdictional minimum was not present, and therefore ordered the case remanded to the state court.[19] The Supreme Court granted certiorari because of an apparent conflict with *Brotherhood of Locomotive Firemen & Enginemen v. Pinkston,*[20] as to the jurisdictional minimum requirement. The Supreme Court reversed, holding that the jurisdictional minimum was present.

If this case were one where judgment could be entered only for the installments due at the commencement of the suit . . . ,[21] future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued. . . .[22] But this is not that type of case. For the Tennessee statute which creates liability for the award contemplates a single action for the determination of claimant's right to benefits and a single judgment for the award granted. . . .[23]

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[18] Under the Tennessee statute, death benefits were provided in the sum of 60% of the average weekly wages of the employee [TENN. CODE ANN. § 6852(c) (Williams, Supp. 1952)], but payments might not exceed $18 per week nor continue for more than 400 weeks. TENN. CODE ANN. §§ 6880, 6883(17) (Williams, Supp. 1952). In addition there was a ceiling of $5,000 on total benefits exclusive of burial and certain other expenses. TENN. CODE ANN. § 6881 (Williams, Supp. 1952). See Haynes v. Columbia Pictures Corp., 178 Tenn. 648, 162 S.W.2d 383 (1942) (The complaint alleged that 60% of the average weekly wage for the statutory period would exceed $5,000.).

[19] Flowers v. Aetna Casualty & Surety Co., 154 F.2d 881 (6th Cir. 1946).

[20] 293 U.S. 96 (1934).

[21] See, *e.g.,* New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936).

[22] Wright v. Mutual Life Ins. Co., 19 F.2d 117 (5th Cir. 1927), *aff'd mem.,* 276 U.S. 602 (1928); see Button v. Mutual Life Ins. Co., 48 F. Supp. 168 (W.D. Ky. 1943).

[23] TENN. CODE ANN. §§ 6880, 6881, 6890, 6891, 6893 (Williams, Supp. 1952); see Shockley v. Morristown Produce & Ice Co., 171 Tenn. 591, 106 S.W.2d 562 (1937).

Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction.[24] It has held that a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial if the right to all the payments is in issue. . . .[25] Future payments are not in any proper sense contingent, although they may be decreased or cut off altogether by the operation of conditions subsequent. . . .[26] And there is no suggestion that by reason of life expectancy or law of averages the maximum amount recoverable can be expected to fall below the jurisdictional minimum. . . . Moreover, the computation of the maximum amount recoverable is not complicated by the necessity of determining the life expectancy of respondent.[27]

INSTALLMENT CONTRACTS

When a contract is payable in installments, does the value of the entire contract, when there is an alleged breach, or only the amount already paid or past due, determine the court's jurisdiction? Although most of the cases involving this question are insurance cases which have been previously considered,[28] there are a few decisions in other fields.

It is almost a cliché to say that jurisdiction is measured ". . . by the amount directly involved in the suit and not by any collateral effect the judgment may have." [29]

Illustrative is *Davis v. American Foundry Equipment Co.*[30] Plaintiff had licensed defendant to manufacture and

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[24] Query: Is there a difference as to the monetary minimum between a federal question and a diversity of citizenship case?

[25] Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U.S. 96 (1934); Thompson v. Thompson, 226 U.S. 551 (1913).

[26] In support of this statement, the Court again cited Thompson v. Thompson, *supra* note 25.

[27] Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 467-468 (1947); *cf.* Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, *supra* note 25; Thompson v. Thompson, *supra* note 25; see Milan v. Kausch, 194 F.2d 263, 265 (6th Cir. 1952); Boyd v. R. P. Farnsworth & Co., 105 F. Supp. 113 (E.D. La. 1952); Capps v. New Jellico Coal Co., 87 F. Supp. 369 (E.D. Tenn. 1950); Godfrey v. Brown Paper Mill Co., 52 F. Supp. 926 (W.D. La. 1943); Note, 18 TULANE L. REV. 655 (1944).

[28] See pp. 183-191 *supra*.

[29] See Note, *Federal Jurisdiction: Amount in Controversy in Installment Payment Situation*, 36 CALIF. L. REV. 124 (1948).

[30] 94 F.2d 441 (7th Cir. 1938). See Note, *Developments in the Law — Declaratory Judgments 1941-1949*, 62 HARV. L. REV. 787, 802 (1949).

use certain patented devices for which defendant agreed to pay $500 each year to a total of some $9,500. Some four years after the contract was made, with $2,000 then due, plaintiff brought suit for declaratory judgment on the ground that defendant was asserting the contract to be void under Indiana law. Jurisdiction was invoked on diversity and on the claim that the validity of the entire contract which had value in excess of $3,000 was in issue. The district court dismissed the action for lack of the jurisdictional minimum. On appeal the court reversed and held that the validity of the *entire* contract was in doubt so that the jurisdictional amount was present. "This is a suit not for coercive relief for the damages thus far accrued, but rather for declaratory relief. True it is that plaintiff might not invoke the court's jurisdiction in a suit to recover $2,000 in money, but this suit is for other relief; it is in the nature of a suit to quiet title. . . ." [31]

Citing the *Davis* case is *Landers Frary & Clark v. Vischer Products Co.*[32] This, too, was for a declaratory judgment where the plaintiff sought to obtain a judgment on an installment of a promissory note not yet due or, in the alternative, appropriate equitable relief against loss of equitable security. As was stated by the district court:

The defendants' jurisdictional argument rests upon the theory that the amount in controversy does not exceed $3,000 because the note involved does not come due until July 16, 1953, and hence cannot be in controversy at the present time. This argument cannot be sustained for even if it be held that there is no controversy over the said note, the pleadings, nevertheless, present a controversy involving the alleged fraudulent transfer of corporate assets, the value of which appears upon the face of the complaint. The consequent damage to the plaintiff must be measured by the unpaid balance on the note namely $56,250 for which equitable security has been lost except for this suit. The statutory requirement as to jurisdictional amount is satisfied whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation and is presented by the pleadings

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[31] Davis v. American Foundry Equipment Co., *supra* note 30 at 443.

[32] 201 F.2d 319 (7th Cir. 1953). The facts are more fully given in the decision below at 104 F. Supp. 411 (N.D. Ill. 1952). See Empire Box Corp. v. Willard Sulzberger Motor Co., 104 F. Supp. 762 (D. N.J. 1952).

for judicial determination notwithstanding the fact that the sum is not due or payable at the time of commencement of suit.[33]

CIVIL RIGHTS CASES

Section 1331 of the Judicial Code (federal question)[34] with which we are here concerned is based on Section 41(1) of former Title 28. As we have seen, this section requires a minimum monetary amount as a prerequisite to jurisdiction. Does this requirement apply to civil rights cases? The question has attracted law review commentators.[35]

The difficulty arises because some of the cases dealt with under this rubric may also be subsumed under present Section 1343(3) of Title 28,[36] which is based on Section 41(14) of former Title 28.[37] Section 1343, entitled "Civil rights" gives to the district courts original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

In this section there is no express requirement of any monetary minimum as a preliminary to jurisdiction.[38]

A Supreme Court decision which sheds light on the jurisdictional distinction between Section 1331 (federal question) and Section 1343(3) (civil rights) of Title 28, is *Hague v. Committee for Industrial Organization.*[39] In that

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[33] 104 F. Supp. 411, 416 (N.D. Ill. 1952).

[34] 28 U.S.C. § 1331 (1952).

[35] See Comment, *Jurisdiction over Violations of Civil Liberties by State Governments and by Private Individuals,* 39 MICH. L. REV. 284 (1940); Notes, *Section 24(14) of the Judicial Code—The Reappearance of a Neglected Ground of Federal Jurisdiction,* 52 HARV. L. REV. 1136 (1939), *Jurisdictional Amount in Civil Rights Cases,* 9 U. OF CHI. L. REV. 302 (1942).

[36] 62 STAT. 932 (1948).

[37] 36 STAT. 1092 (1911).

[38] Thus, the first paragraph of 28 U.S.C. § 41(1) (1926) ended with the sentence: "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section [for example, Section 41(14)]."

[39] 307 U.S. 496 (1939). See Note, 52 HARV. L. REV. 1136 (1939).

case plaintiffs were individual citizens, unincorporated labor organizations composed of such citizens and a membership corporation. They brought suit in the United States District Court against the Mayor, the Director of Public Safety, the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners (the governing body of the city) alleging that the defendants, acting under color of certain city ordinances, had prevented plaintiffs from remaining in the city, distributing printed matter, or holding public meetings "to explain to workingmen the purposes of the National Labor Relations Act, the benefits to be derived from it, and the aid which the Committee for Industrial Organization would furnish workingmen to that end." The complaint charged that these ordinances were unconstitutional and void, or were being enforced against plaintiffs in an unconstitutional and discriminatory way; that defendants, as officials of the city, purporting to act under the ordinances, had deprived plaintiffs of the privileges of free speech and peaceable assembly, secured to them, as citizens of the United States, by the Fourteenth Amendment of the Constitution. The complaint prayed for an injunction against continuance of defendants' conduct. The complaint further alleged that the cause was of a civil nature, arising under the Constitution and laws of the United States, wherein the amount in controversy exceeded $3,000, exclusive of interest and costs; and was a suit in equity to redress the deprivation, under color of state law, statute and ordinance, of rights, privileges and immunities secured by the Constitution of the United States, and rights secured by the laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

After trial on the merits the district court entered a decree based on findings of fact and conclusions of law in favor of the plaintiffs. The court of appeals concurred in the findings of fact and held that the district court had jurisdiction under Section 24(1) (now Section 1331) and Section 24(14) [now Section 1343(3)] of the Judicial Code; modified the decree in respect of one of its provisions, and, as modified, affirmed it. The Supreme Court granted certiorari.

On the question whether there was jurisdiction, the Supreme Court (through Justice Roberts) held:

The wrongs of which respondents [plaintiffs] complain are tortious invasions of alleged civil rights by persons acting under color of state authority. It is true that if the various plaintiffs had brought actions at law for the redress of such wrongs the amount necessary to jurisdiction under Section 24(1) [Section 1331] would have been determined by the sum claimed in good faith.[40] But it does not follow that in a suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under subsection (1) [Section 1331] a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involves the necessary sum.[41] The record here is bare of any showing of the value of the asserted rights to the respondents individually and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give jurisdiction.[42] We conclude that the District Court lacked jurisdiction under Section 24(1) [Section 1331].[43]

As to jurisdiction under Section 1343(3) of Title 28 [then Section 24(14)], Justice Roberts held:

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgement [44] by § 1 of the Fourteenth Amendment; and whether Rev. Stat. § 1979 and § 24(14) [Section 1343(3)] of the Judicial Code, . . . afford

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[40] Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); *cf.* St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).

[41] McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); *cf.* KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936).

[42] Scott v. Frazier, 253 U.S. 243 (1920); Pinel v. Pinel, 240 U.S. 594 (1916); Wheless v. St. Louis, 180 U.S. 379 (1901).

[43] Hague v. Committee for Industrial Organization, *supra* note 39 at 507-508.

[44] As to what constitutes state action within the meaning of the amendment, see Lovell v. City of Griffin, 303 U.S. 444 (1938); Mooney v. Holohan, 294 U.S. 103 (1935); Home T. & T. Co. v. Los Angeles, 227 U.S. 278 (1913); *Ex parte* Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879).

redress in a federal court for such abridgement. . . . The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgement,[45] it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.

. . .

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. . . . The District Court had jurisdiction under § 24(14) [Section 1343(3)].[46]

The Court concluded that "[n]atural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States.'[47] Only the individual respondents may, therefore, maintain this suit."[48]

Justice Stone, although not doubting that the ultimate judgment was correct, felt ". . . unable to follow the path by which some of my [his] brethren have attained that end . . ."[49] and thereupon stated his thoughts in some detail. "The question remains whether there was jurisdiction in the district court to entertain the suit although the matter in controversy cannot be shown to exceed $3,000 in value be-

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[45] *In re* Kemmler, 136 U.S. 436 (1890); *Ex parte* Virginia, *supra* note 44; Minor v. Happersett, 21 Wall. 162 (U.S. 1874); Slaughter-House Cases, 16 Wall. 36 (U.S. 1872).

[46] Hague v. Committee for Industrial Organization, 307 U.S. 496, 512-513 (1939).

[47] See Selover, Bates & Co. v. Walsh, 226 U.S. 112 (1912); Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907); Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Orient Ins. Co. v. Daggs, 172 U.S. 557 (1899).

[48] Hague v. Committee for Industrial Organization, *supra* note 46 at 514; see Mickey v. Kansas City, 43 F. Supp. 739 (W.D. Mo. 1942).

[49] Hague v. Committee for Industrial Organization, *supra* note 46 at 518 (concurring opinion).

cause the asserted rights, freedom of speech and freedom of assembly, are of such a nature as not to be susceptible of valuation in money." [50] The Justice, after surveying the history of the Civil Rights Act of 1871 and the Federal Question Act of March 3, 1875,[51] held that

. . . since 1875, the jurisdictional acts have contained two parallel provisions, one conferring jurisdiction on the federal courts, district or circuit, to entertain suits "arising under the Constitution or laws of the United States" in which the amount in controversy exceeds a specified value; the other, now § 24(14) [Section 1343(3)] of the Judicial Code, conferring jurisdiction on those courts of suits authorized by the Civil Rights Act of 1871, regardless of the amount in controversy.[52]

Justice Stone then observed that all such suits are actions arising under a statute of the United States to redress deprivation of rights, privileges and immunities secured by the Constitution, and, therefore, are

. . . literally suits "arising under the Constitution or laws of the United States." But it does not follow that in every such suit the plaintiff is required by § 24(1) [Section 1331] of the Judicial Code to allege and prove that the constitutional immunity which he seeks to vindicate has a value in excess of $3,000. There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite. We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them.

. . . Since the two provisions stand and must be read together, it is obvious that neither is to be interpreted as abolishing the other, especially when it is remembered that the 1911 amendment of § 24(1)

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[50] *Id.* at 527.
[51] 18 STAT. 470 (1875).
[52] Hague v. Committee for Industrial Organization, 307 U.S. 496, 529 (1939) (concurring opinion).

provided that the requirement of a jurisdictional amount should not be construed to apply to cases mentioned in § 24(14) [Section 1343(3)]. This must be taken as legislative recognition that there are suits authorized by § 1 of the Act of 1871 which could be brought under § 24(14) [Section 1343(3)] after, as well as before, the amendment of 1875 without compliance with any requirement of jurisdictional amount, and that these at least must be deemed to include suits in which the subject matter is one incapable of valuation. Otherwise we should be forced to reach the absurd conclusion that § 24(14) [Section 1343(3)] is meaningless and that a large proportion of the suits authorized by the Civil Rights Act cannot be maintained in any court, although jurisdiction of them, with no requirement of jurisdictional amount, was carefully preserved by § 24(14) [Section 1343(3)] of the Judicial Code and by the 1911 amendment of § 24(1).[53]

Justice Stone next pointed out that the jurisdiction conferred by Section 24(14) [Section 1343(3)] is only preserved to the extent limited, *i.e.*, to suits alleging deprivation of "civil rights." Thus, where the suit was brought to restrain alleged unconstitutional taxation of patent rights, *i.e.*, a property right, the action was one arising under the Constitution or laws of the United States within the meaning of Section 24(1) [Section 1331] of the Judicial Code and that the United States Circuit Court [now district court] was without jurisdiction because the challenged tax was less than the jurisdictional amount.[54]

The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the District Court under § 24(14) [Section 1343(3)] of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000. As the right is secured to . . . "any person" as well as . . . [to] a citizen, it is certain that resort to the privileges and immunities clause would not support the decree which we now sustain and would

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[53] *Id.* at 529-530.

[54] *Id.* at 530-531. Mr. Justice Stone cited Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900). *Cf.* Crane v. Johnson, 242 U.S. 339 (1917); Truax v. Raich, 239 U.S. 33 (1915).

involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate.[55]

To the opinion of Justice Stone there should be added the obvious fact that Section 1343(3) only applies to an action to redress the deprivation, under color of any *state law, statute, ordinance, regulation, custom or usage,* of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.[56]

As has been indicated, the monetary minimum has been treated somewhat diversely in this situation.[57] In a recent case in the Fifth Circuit, the court apparently without any hesitation reversed itself as to whether the action brought was bottomed on Section 1331 or on Section 1343(3) of Title 28. Originally the court had before it an appeal from a judgment, dismissing the complaint of the plaintiffs, who sought to enjoin the enforcement of certain ordinances of the City of Atlanta, Georgia. The challenged portions of these ordinances provided that no person could operate a taxi, bus or similar vehicle in Atlanta, without having first obtained a permit to do so from specified Atlanta authorities. The lower court had dismissed the action on the merits because the ordinances presented a valid exercise of the police power of the state. On appeal, the court found that it did not appear from the complaint that the amount in controversy exceeded $3,000, exclusive of interest and costs, and *sua sponte,* raised the question of federal jurisdiction. Assuming that juris-

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[55] Hague v. Committee for Industrial Organization, *supra* note 52 at 531-532 (concurring opinion); see City of Manchester v. Leiby, 117 F.2d 661 (1st Cir.), *cert. denied,* 313 U.S. 562 (1941); Barnette v. West Va. State Board of Education, 47 F. Supp. 251 (S.D. W. Va. 1942), *aff'd,* 319 U.S. 624 (1943); Note, *The Proper Scope of Civil Rights Acts,* 66 HARV. L. REV. 1285, 1289-1291 (1953); *cf.* Carroll v. Somervell, 116 F.2d 918 (2d Cir. 1941); Cooney v. Legg, 34 F. Supp. 531 (S.D. Cal. 1940).

[56] *See* Hague v. Committee for Industrial Organization, *supra* note 52 at 525-526 (concurring opinion); see McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951).

[57] See, *e.g.,* City of Manchester v. Leiby, *supra* note 55; Carroll v. Somervell, *supra* note 55; Barnette v. West Va. State Board of Education, *supra* note 55; Cooney v. Legg, *supra* note 55.

diction was based on Section 1331 of Title 28 (the federal question section), requiring a showing that the amount in controversy exceeded the jurisdictional minimum, the court modified the judgment so as to dismiss the complaint for want of jurisdiction, and not on the merits.[58]

The plaintiffs then applied for a rehearing based solely on the ground that they were bringing their suit under Section 1343(3) which, as we have seen, does not require a monetary minimum as a prerequisite to jurisdiction. Without discussing the question, the court said: "Construing the complaint as required by Rule 1 of the Federal Rules of Civil Procedure[59] . . . we accept the . . . interpretation thereof, and uphold federal jurisdiction under Section 1343(3). . . . Therefore, the petition for rehearing is granted and the judgment heretofore entered herein is set aside. This leaves the case pending before us and ready for decision on its merits. . . ." [60]

CASES INVOLVING COUNTERCLAIMS

Circuit Judge Dobie's plaintiff-viewpoint approach has raised questions where the plaintiff, in an action commenced in a federal court, has alleged in his complaint an amount in controversy less than the jurisdictional amount and the defendant, possibly desirous of remaining in the federal court, has asserted a counterclaim in excess of $3,000, exclusive of interest and costs, or a counterclaim which, added to plaintiff's claim, exceeded that amount. Under those circumstances, has the federal court jurisdiction of the action? This problem was concretely presented by Judge Dobie many years ago and persuasively answered in the negative, although admitting that this was "its severest test." [61] The

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[58] Walton v. City of Atlanta, 180 F.2d 143 (5th Cir. 1950).

[59] "They [these Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. *Cf.* Form 2, concerning allegation of jurisdiction, annexed to the Rules.

[60] Walton v. City of Atlanta, 181 F.2d 693 (5th Cir.), *cert. denied,* 340 U.S. 823 (1950). The court thereupon affirmed the lower court on the merits. See Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946).

[61] See Dobie, *Jurisdictional Amount in the United States District Court,* 38 HARV. L. REV. 733 (1925).

Supreme Court has not flatly determined the question, although it has on occasion made remarks which have been interpreted by some lower courts as holding that the amount of the counterclaim may be added to the amount of the plaintiff's claim to make up the needed jurisdictional minimum. Indeed, some lower courts have answered the question in the affirmative. Thus, in *Roberts Mining & Milling Co. v. Schrader,*[62] plaintiff alleged that diversity of citizenship was present but did not state the value of the controversy, ". . . nor did it allege or state any fact from which it might be inferred that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000. In other words, the bill failed to state a cause of action within the jurisdiction of the District Court." [63] The defendant took no advantage of this jurisdictional defect, and filed an answer containing a counterclaim seeking substantially the same relief as did the complaint, and which alleged diversity of citizenship and that the matter in controversy exceeded the sum of $3,000, exclusive of interest and costs. No reply was filed to the counterclaim. The court held that this counterclaim brought the case within the jurisdiction of the federal court, regardless of the lack of the jurisdictional amount appearing in the complaint, saying: "Consequently, from and after the filing of the counterclaim, the District Court had jurisdiction of this case." [64] Another decision which seems to have reached the same conclusion is *Ginsburg v. Pacific Mutual Life Ins. Co.*[65] There plaintiff had brought suit in a federal court to recover damages for alleged breach of an executory accident insurance policy, the plaintiff basing his damages of over $25,000 on his expectancy of life. The actual amount due at the time of suit was $750. Defendant's answer contained a counterclaim seeking judgment setting aside the policy on the ground that plaintiff had misrepresented the condition of his health and that the policy by its terms had

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[62] 95 F.2d 522 (9th Cir. 1938).

[63] *Id.* at 523.

[64] *Id.* at 524. The court relied on the following decisions for its conclusions: Home Life Ins. Co. v. Sipp, 11 F.2d 474 (3d Cir. 1926); American Sheet & Tin Plate Co. v. Winzeler, 227 Fed. 321 (N.D. Ohio 1915); Clarkson v. Manson, 4 Fed. 257 (C.C. S.D. N.Y. 1880).

[65] 69 F.2d 97 (2d Cir. 1934).

no valid legal inception. The lower court had dismissed the action on the theory that the jurisdictional amount was not involved.[66] The court of appeals, in reversing held:

We need not consider the jurisdictional controversy as to the amount the appellant sues to recover because the counterclaim interposed establishes the jurisdiction of the District Court. Merchants' Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 S. Ct. 285, 51 L. Ed. 488; O. J. Lewis Mercantile Co. v. Klepner, 176 F. 343 (C.C.A.2), certiorari denied 216 U.S. 620, 30 S. Ct. 575, 54 L. Ed. 641. It seeks a repudiation and cancellation of a policy of insurance which involves a valuation of more than $3,000.[67]

There are several Supreme Court decisions which have been asserted as tending to support the proposition that the counterclaim may be considered in determining whether the jurisdictional amount is present. An analysis of these cases will show that this assertion is unwarranted. First there is

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[66] 5 F. Supp. 296 (S.D. N.Y. 1933).

[67] Ginsburg v. Pacific Mut. Life Ins. Co., *supra* note 65 at 98. This decision was clarified by the same court in Goldstone v. Payne, 94 F.2d 855 (2d Cir.), *cert. denied,* 304 U.S. 585 (1938). Discussing the *Ginsburg* case, the Second Circuit said: "That was an appeal from a dismissal on the ground that the complaint disclosed that the controversy involved less than the jurisdictional amount. In a per curiam opinion we said that it was unnecessary to consider the jurisdictional controversy as to the amount sued for by the plaintiff because the counterclaim established the jurisdiction of the district court. The only authorities cited were Merchants Co. v. Clow & Sons [204 U.S. 286 (1907)] and the Klepner Case [176 Fed. 343 (2d Cir.), *cert. denied,* 216 U.S. 620 (1910)]. The statement would appear to be a dictum, for the opinion had previously stated that the complaint set forth three causes of action, one of which claimed damages of more than $25,000." *Id.* at 857. [But see the discussion of the insurance cases at pp. 183-191 *supra.*] The *Merchants* case was explained as follows: "In that case it was held that by pleading in recoupment the defendant waived any defect in the service of process upon it. This decision is plainly inapplicable to the facts at bar. Where a court has jurisdiction over the subject matter of an action, a defendant may submit himself to the court and thereby confer upon it jurisdiction over his person. But, where the court lacks jurisdiction over the subject matter of a case, the defect is not cured by getting personal jurisdiction of the defendant. Such a want of jurisdiction cannot be waived by pleading or any other form of consent—not even by going to trial." *Ibid.* The court further observed: ". . . O. J. Lewis Mercantile Co. v. Klepner . . . cites Merchants Co. v. Clow & Sons . . . for the following statement: 'Again, the defendant interposed a counterclaim and, having invoked the jurisdiction of the court for its own benefit, is now estopped from denying it.' If this be construed as meaning that a defendant by filing a counterclaim can give a court jurisdiction of a case over which a statute denies it jurisdiction, the statement is certainly not supported by the authority cited and must be deemed erroneous, as Judge Wooley demonstrated in Home Ins. Co. v. Sipp, 3 Cir., 11 F.2d 474, at page 476." *Ibid.*

the case of *Kirby v. American Soda Fountain Co.*,[68] a removed action. The action, when brought in the state court, was one to recover $1,500 as damages for deceit. Subsequently, plaintiff amended his petition in the state court, setting forth a claim in excess of the jurisdictional minimum. Defendant, thereupon, removed the case to the federal court. In that court defendant asserted a cross complaint for $1,700 and for other relief. Plaintiff then obtained an order dismissing his bill of complaint without prejudice. Some time later, ". . . plaintiff, as defendant in the cross complaint, filed his plea thereto, in which he averred that the original bill filed by him had been dismissed, and that the cross bill was not within the jurisdiction of the court because the amount sought to be recovered did not exceed two thousand dollars, exclusive of interest and costs [then the jurisdictional minimum]." [69] The plea to the jurisdiction was overruled and plaintiff was ordered to file an answer. This he failed to do and a default judgment for $1,700, with interest and for other relief, was entered. On appeal, the Supreme Court held that the lower court was right in rejecting the contention that it had no jurisdiction to proceed on the cross bill because it was below the jurisdictional minimum, saying: ". . . it is the general rule that when the jurisdiction of a Circuit Court of the United States [now district court] has once attached it will not be ousted by subsequent change in the conditions." [70] In other words, before plaintiff obtained an order dismissing his complaint, the federal court had jurisdiction of the cause since that complaint demanded damages in excess of the jurisdictional minimum, and ". . . jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action." [71] Certainly there can be no quarrel with this holding and it is for this proposition that this case is chiefly cited.[72]

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[68] 194 U.S. 141 (1904).
[69] *Id.* at 143.
[70] *Id.* at 145-146.
[71] *Id.* at 146.
[72] *See, e.g.*, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 293 (1938); Grant County Deposit Bank v. McCampbell, 194 F.2d 469, 472 (6th Cir. 1952); Kentucky Home Mut. Life Ins. Co. v. Duling, 190 F.2d 797, 802 (6th Cir. 1951); Haney v. Wilcheck, 38 F. Supp. 345, 349-350 (W.D. Va. 1941).

The Supreme Court, however, in the course of the opinion, made these vague and unnecessary remarks: "In the first place, the whole record being considered, the value of the matter in dispute might well have been held to exceed two thousand dollars, exclusive of interest and costs. . . . Taking the bill, defendant's answer and the cross bill together, the jurisdictional amount was made out." [73] In support of this observation the Supreme Court cited several cases which involved the then monetary requirement with respect to the appellate jurisdiction of the Supreme Court.[74] It should be noted that the amount in controversy in proceedings before appellate courts was somewhat different from the amount in controversy in courts of original jurisdiction and that in the former case a counterclaim might properly be considered in determining whether the required amount in controversy was present.[75]

The next Supreme Court decision which requires some consideration is *Mackay v. Uinta Development Co.*[76] This also was a case originally commenced in a state court. The plaintiff Uinta had sued to recover damages in the sum of $1,950 and the defendant, while still in the state court had set up a counterclaim for $3,000 after the expiration of the time in which he was required to plead. Under the state statute the defendant, if he had brought a separate action on the claim set forth in the counterclaim, would not have been entitled to costs if successful. Without objection on the part of Uinta, the defendant removed the case to a federal court on the theory that the parties were citizens of different states; that the construction of certain federal statutes raised in defendant's answer was necessarily involved, and that the amount in dispute, as disclosed by the counterclaim, exceeded $2,000, the then jurisdictional minimum. Both parties ap-

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[73] Kirby v. American Soda Fountain Co., 194 U.S. 141, 144-145 (1904).

[74] See Shappirio v. Goldberg, 192 U.S. 232 (1904); New England Mortgage Security Co. v. Gay, 145 U.S. 123 (1892); Lovell v. Cragin, 136 U.S. 130 (1890); Stinson v. Dousman, 20 How. 461 (U.S. 1858).

[75] "Thus, a defendant pleading, below, a counterclaim of appellate jurisdictional amount, and defeated below, is entitled (as a matter of Appellate jurisdictional amount) to Appeal or Error (as the case may be), although the claim of the plaintiff below was below that amount." CHAPLIN, PRINCIPLES OF THE FEDERAL LAW § 686 n.31 (1917). See note 74 *supra*.

[76] 229 U.S. 173 (1913).

peared in the federal court and Uinta then filed a reply to Mackay's counterclaim. The case was tried and judgment was entered in favor of Uinta. Mackay appealed but neither party raised any question as to the power of the court to determine the cause. In this posture, the court of appeals *sua sponte* certified to the Supreme Court various questions as to whether Mackay could remove the case to the federal court, among them the following which alone was considered by the Supreme Court:

"Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?" [77]

It would seem that the court of appeals, in certifying this question to the Supreme Court, altered in substance the factual situation in the case. In this question, the defendant Mackay in the state court action, who had asserted a counterclaim in excess of the jurisdictional minimum, was made the plaintiff in an assumed action in a federal court, and the real plaintiff Uinta was made the defendant in that assumed federal court action although the actual facts were that Uinta had brought an action in a state court on a claim insufficient in amount to authorize removal to a federal court. On the basis of this supposititious case, the Supreme Court had really no alternative but to answer this question in the af-

[77] *Id.* at 175.

firmative, which it did, holding, however, that the federal court had obtained jurisdiction by waiver of the parties. The Court was careful to state that, because of its answering that question in the affirmative, it was ". . . unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the right to remove the case to the United States court." [78] But the Court made some other observations which are rather difficult to reconcile with that statement. Thus, the very next sentence in the opinion reads as follows: "The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined." [79] In its obvious desire to aid both parties in their joint endeavor to uphold the jurisdiction of the trial court which had determined the case on the merits, the Supreme Court concluded by saying:

As the court had jurisdiction of the subject-matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper.[80] But if there was any irregularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause.[81]

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[78] *Id.* at 175-176.

[79] *Id.* at 176.

[80] This statement must be considered in conjunction with the holding in Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941), where the Court held that a plaintiff defending against a counterclaim was not a defendant within the removal statute and could not remove. See 29 CALIF. L. REV. 769 (1941); 27 VA. L. REV. 1094 (1941).

[81] Mackay v. Uinta Development Co., 229 U.S. 173, 176-177 (1913). The *Uinta* case was cited in Arizona & New Mexico Ry. v. Clark, 235 U.S. 669, 674 (1915), for the proposition that: "The removal proceedings were in the nature of process to bring the parties before that court [*i.e.* federal court], and the voluntary appearance of the parties there was equivalent to a waiver of any formal defects in such proceedings." See Scroggin Farms Corp. v. McFadden, 165 F.2d 10 (8th Cir. 1948); Fidelity & Deposit Co. of Maryland v. Burden, 53 F.2d 381 (2d Cir. 1931).

Surely this case, although disturbing, does not solve the question.

Another case to be considered is *Yankaus v. Feltenstein*.[82] There the Supreme Court went off on the point that an order of a United States District Court in remanding a case to a state court could not, under the provisions of Title 28 of the Judicial Code, be reviewed on writ of error to a subsequent judgment of the state court. The holding of Judge Hough, quoted in the Supreme Court decision, remanding the case, but not passed upon by the Supreme Court, deserves quotation. It is in part as follows:

"Since no case (irrespective of amount involved) can be removed over which the United States Court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

"In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

"Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

"Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions and (so far as I know) the failure of late years to observe the difference between the Act of 1875 [18 STAT. 470] and that of 1888 [25 STAT. 433],[83] I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that by a preponderance

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[82] 244 U.S. 127 (1917).

[83] The Act of 1875 provided that either plaintiff or defendant had the right to remove the suit. The Act of 1888 confines the right of removal to a nonresident defendant. Furthermore, the Act of 1875 permitted removal ". . . before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court. . . ." 18 STAT. 471. The Act of 1888 limited removal to ". . . the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead. . . ." 25 STAT. 435.

of rulings the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaims shall plead them in a manner which enables his opponent to criticize them, modify them or expunge them as may be proper under the rules of good pleading.

"In this case,—and in any similar case under the Act of 1888 there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counterclaim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff of any sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted." [84]

A possible solution of this problem with respect to actions *originating* in a federal court may be found in the Federal Rules of Civil Procedure. Two types of counterclaims are provided for by these Rules, namely, a compulsory counterclaim and a permissive counterclaim. What is the difference between these counterclaims? A compulsory counterclaim is defined as follows: ". . . any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." [85] Such a counterclaim *must be* pleaded unless its adjudication requires the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. A permissive counterclaim is described as: ". . . any claim against an opposing party *not* arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." [86] A simple example of a compulsory coun-

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[84] Yankaus v. Feltenstein, *supra* note 82 at 131-133.
[85] FED. R. CIV. P. 13(a).
[86] FED. R. CIV. P. 13(b) (emphasis added).

terclaim would be a case where *A* sues *B* for the price of goods sold and delivered and *B* counterclaims for breach of warranty. An example of a permissive counterclaim is an action where *A* sues *B* for breach of contract *X*, and *B* counterclaims for breach of contract *Y*.

Rule 13 includes both legal as well as equitable counterclaims, but, in substance, it embodies former Equity Rule 30.[87] If a defendant suffers an action to proceed to judgment without interposing a compulsory counterclaim, the claim is barred.[88] It should not be overlooked that the cases raising the question of the jurisdictional amount were actions where the counterclaims (which were considered in order to determine whether the requisite jurisdictional amount was present) were claims which arose out of the transaction which was the subject matter of the plaintiff's claim.

So, a plausible argument could be made that if the counterclaim in the federal action is a compulsory one, the federal court, at the option of the defendant, may assume jurisdiction in an action where the plaintiff's claim is less than the jurisdictional minimum as soon as defendant interposes his answer containing a counterclaim which, when added to the plaintiff's claim or by itself, exceeds $3,000, exclusive of interest and costs, although no case has been turned up which actually supports this proposition.[89] In such a case the "matter in controversy" may be said not to be merely the amount which the plaintiff claims, but also that which the

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[87] "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject of the suit, and *may* . . . set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him. . . ." Equity Rule 30, 268 U.S. 709, 710 (1925) (emphasis added).

[88] This was the rule under old Equity Rule 30. See General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932); Moore v. New York Cotton Exch., 270 U.S. 593 (1926); American Mills Co. v. American Surety Co., 260 U.S. 360 (1922). It now applies both to legal and equitable counterclaims of the compulsory type. See Home Ins. Co. v. Trotter, 130 F.2d 800 (8th Cir. 1942); Hancock Oil Co. v. Universal Oil Products Co., 115 F.2d 45 (9th Cir. 1940); Thierfeld v. Postman's Fifth Avenue Corp., 37 F. Supp. 958 (S.D. N.Y. 1941); Aetna Life Ins. Co. v. Little Rock Basket Co., 14 F.R.D. 381 (E.D. Ark. 1953).

[89] *Cf.* Home Life Ins. Co. v. Sipp, 11 F.2d 474 (3d Cir. 1926); Lange v. Chicago, R.I. & P.R.R., 99 F. Supp. 1 (S.D. Iowa 1951); see Comment, *Federal Jurisdiction in Cases Involving Counterclaims*, 45 YALE L.J. 1479 (1936).

defendant, if he desires to litigate the issues in that court, must under necessity assert if he is to resist the plaintiff's demand and enforce his own. Under those circumstances, a federal court should not *sua sponte* divest itself of jurisdiction by dismissing plaintiff's complaint because it failed to allege the jurisdictional minimum where defendant's counterclaim was jurisdictionally sufficient. If plaintiff's action should, however, be dismissed for lack of jurisdiction, the defendant, as plaintiff, could then commence an action in the same federal court, based on the facts previously set out in his counterclaim, against the former plaintiff, who would then as defendant assert the claim, dismissed for lack of jurisdiction, as a compulsory counterclaim. Of course, this presupposes that the plaintiff is within the reach of process of that federal court. It might very well be otherwise, in which event the original defendant would be forced to proceed to another federal court, probably away from his home, to assert his claim.

Where, however, a permissive counterclaim is interposed in an action originating in a federal court, a different situation is presented. Unlike a compulsory counterclaim, a permissive counterclaim, being an independent claim, requires independent jurisdictional grounds to support it.[90] It follows, therefore, that if the original action in the federal court is voluntarily dismissed or abandoned by the plaintiff, such a permissive counterclaim is not affected thereby.[91] But

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[90] Celite Corp. v. Dicalite Co., 96 F.2d 242 (9th Cir.), *cert. denied,* 305 U.S. 633 (1938); Utah Radio Products Co. v. Boudette, 78 F.2d 793 (1st Cir. 1935); United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 234 Fed. 868 (7th Cir. 1916); Hoosier Casualty Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952); Rockwell Mfg. Co. v. Evans Enterprises, Inc., 95 F. Supp. 431 (W.D. N.Y. 1950); Niash Refining Co. v. Sydney Berman Co., 89 F. Supp. 539 (S.D. N.Y. 1950); Frankart, Inc. v. Metal Lamp Corp., 32 F.2d 920 (E.D. N.Y. 1929); Rosenthal v. Fowler, 12 F.R.D. 388 (S.D. N.Y. 1952).

[91] "On this appeal, three points are argued: (1) That the District Court, having dismissed the complaint for lack of jurisdiction, was without power to hear and determine the counterclaim. . . .

"As to the first, counsel insists that when the bill of complaint was dismissed, '. . . jurisdiction fell and the counterclaim should have been dismissed with the bill.' Moore v. New York Cotton Exch., 270 U.S. 593, 607-609, 46 S. Ct. 367, 70 L. Ed. 750, 45 A.L.R. 1370, and Kelleam et al. v. Maryland Casualty Co., 312 U.S. 377, 61 S. Ct. 595, 85 L. Ed. 899 are cited to sustain this position. In the last named case, Justice Douglas, speaking to the facts in that case, said that once the bill of complaint was dismissed no jurisdiction remained for

where a compulsory counterclaim has been interposed and the original claim is dismissed for lack of jurisdiction, the compulsory counterclaim should likewise fall unless it has independent grounds to support it.[92]

In other words, the amount in controversy asserted in a permissive counterclaim should not be permitted to be considered in order to determine whether the required jurisdictional amount is present. Otherwise the jurisdiction of the federal courts would be extended contrary to the express desire of the Supreme Court to confine its jurisdiction and contrary to the emphasis the Supreme Court has placed on the plaintiff-viewpoint approach.[93]

The problem of the effect of the interposition of a counterclaim on the question whether the jurisdictional amount is present, occurs more frequently when the action *originates* in a *state court* and it is sought to remove the case to a federal court under the removal statute.[94] Suppose a nonresident plaintiff sues in a state court (whether for more or less than the jurisdictional amount) and the resident defendant pleads a counterclaim in excess of that amount, may the plaintiff (now ostensibly a defendant) remove the case? In *Shamrock Oil & Gas Corp. v. Sheets*,[95] Shamrock, a Delaware corporation, brought suit in a Texas state court against the defendants, citizens of Texas, to recover an amount alleged

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any grant of relief under the cross petition. But in that case there was no jurisdictional basis for the counterclaim independent of the main action. In the Moore case, the dismissal of the main bill was not for want of jurisdiction, and the court refused to dismiss the counterclaim. Though it is suggested by Professor Shulman that it is implicit in the case that, if a plaintiff's action is dismissed for want of jurisdiction, the counterclaim falls, he adds that this is so only if there is no independent jurisdictional basis for the counterclaim. 45 Yale L.J. 393, 413. Here there is such independent basis, and the rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint." Isenberg v. Biddle, 125 F.2d 741, 743 (D.C. Cir. 1941).

[92] "But plainly, when jurisdiction is lacking over the primary suit, the defect cannot be cured by a counterclaim of which the court also lacks jurisdiction." Goldstone v. Payne, 94 F.2d 855, 857 (2d Cir.), *cert. denied*, 304 U.S. 585 (1938). See Home Ins. Co. v. Trotter, 130 F.2d 800 (8th Cir. 1942).

[93] "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

[94] 28 U.S.C. §§ 1441-1450 (1952).

[95] 313 U.S. 100 (1941), 29 CALIF. L. REV. 769, 27 VA. L. REV. 1094.

to be due on an open account for the purchase price of certain goods sold by it to the defendants.[96] In addition to a general denial, the defendants also filed, *inter alia,* in the state court what they called a set-off and cross-action, *unrelated* to the account sued upon by the plaintiff, whereby they demanded damages totaling $7,200. Defendants prayed that, on final hearing, the plaintiff take nothing by its suit against them, and that they have judgment against the plaintiff on their cross-action.[97] The plaintiff in the state court then removed the cause to the United States District Court for Northern Texas, which denied the defendant's motion to remand. After a trial on the merits [98] the federal *nisi prius* court gave judgment for the plaintiff both on the cause of action set up on its complaint in the suit and on the counterclaim. The Court of Appeals for the Fifth Circuit reversed [99] and ordered the cause remanded to the state court on the ground that the plaintiff in the state court was not a "defendant" within the meaning of the then existing statute,[100] and, hence, was not entitled to remove the cause under that statute, which in terms authorized the removal of a suit subject to its provisions only "by the defendant or defendants therein." [101] The Supreme Court granted certiorari to resolve a conflict of decisions [102] and emphasized first that although under state procedure judgment could go against the plaintiff on the counterclaim in the full amount demanded therein, this did not turn the plaintiff into a defendant; that the removal statute, being nationwide, was intended to be uniform in its application; and that it must be construed as setting up ". . . its own criteria, irrespective of local law,

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[96] The amount demanded by the plaintiff was in excess of the federal jurisdictional minimum.

[97] Plaintiff argued ". . . that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded." Shamrock Oil & Gas Corp. v. Sheets, *supra* note 95 at 104.

[98] The order denying remand, being interlocutory, is not appealable except on final judgment.

[99] 115 F.2d 880 (5th Cir. 1940).

[100] 28 U.S.C. § 71 (1940).

[101] The same provision is found in the present statute. 28 U.S.C. § 1441(a) (1952).

[102] 312 U.S. 675 (1941).

for determining in what instances suits are to be removed from the state to the federal courts." [103] Thereupon, after examining the removal statute and its legislative history, the Supreme Court found it to authorize removal only by the "defendant or defendants" in the suit.

The cases in the federal courts on which petitioner relies have distinguished the decision in *West v. Aurora City* . . . [6 Wall. 139 (U.S. 1867)] on the ground that it arose under an earlier statute. But we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision is as applicable to one as to the other. In some of those cases it is suggested also that a plaintiff who brings his suit in a state court for less than the jurisdictional amount does not waive his right to remove, upon the filing of a counterclaim against him. And petitioner argues that this is so even when, as in the present case, the plaintiff's demand is in excess of the jurisdictional amount. But we think the amount of the plaintiff's demand in the state court is immaterial, for one does not acquire an asserted right by not waiving it, and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress.[104]

Prior to the holding in the *Shamrock* case, as indicated by the Supreme Court, there had been a sharp and irreconcilable split of authority on this point.[105] The *Shamrock* case reviewed the historical development of the removal statute, pointing out that subsequent to the Judiciary Act of 1789,[106] on which *West v. Aurora City* [107] was based, the practice in favor of removal was extended in 1875 so as to

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[103] 313 U.S. 100, 104 (1941).

[104] *Id.* at 108. See Chicago, R.I. & P.R.R. v. Stude, 204 F.2d 116 (8th Cir. 1953), *aff'd*, 346 U.S. 574 (1954) (In a condemnation proceeding the railroad, designated as "defendant" under Iowa law, appealed to the state court from a sheriff's commission's award and sought removal. The court held that the railroad was not a defendant under the removal statute.); Hoyt v. Sears, Roebuck & Co., 130 F.2d 636 (9th Cir.), *cert. denied*, 317 U.S. 687 (1942); Lee Foods Division, Consol. Grocers Corp. v. Bucy, 105 F. Supp. 402 (W.D. Mo. 1952); Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680 (W.D. Ark. 1951).

[105] See Shamrock Oil & Gas Corp. v. Sheets, *supra* note 103 at 103; Flory, *Federal Removal Jurisdiction*, 1 LA. L. REV. 499, 737 (1939); Evans, *The Removal of Causes*, 33 VA. L. REV. 445, 464 (1947); Note, 28 N.C. L. REV. 414 (1950).

[106] 1 STAT. 73 (1789).

[107] 6 Wall. 139 (U.S. 1867).

permit removal by either plaintiff or defendant,[108] but that in 1887 the phrase "either party" was changed to "defendant or defendants." [109]

When in 1948, Title 28 was enacted and made positive law Section 1441(a)[110] thereof, it retained the words "may be removed by the defendant or the defendants." [111] Furthermore Section 1441(b)[112] makes it clear that the right of removal to a federal court is allowable only to a *nonresident* defendant, not to one being sued in his own state court so far as actions grounded on diversity of citizenship are concerned.

What is the situation when cases are sought to be *removed* to a federal court? Under Subsection (c) of Section 1441 of Title 28, "separate and independent" removable claims, if "joined" with otherwise non-removable claims or causes of action, may justify the removal of the entire case.[113] Are counterclaims within the contemplation of this provision?

Prior to the enactment in 1948 of the present Judicial Code, removal was permitted when there was a ". . . controversy which is wholly between citizens of different States, and which can be fully determined as between them. . . ." [114] It is significant that the word "controversy" is absent from

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[108] 18 STAT. 470 (1875).
[109] 24 STAT. 552 (1887).
[110] 62 STAT. 937 (1948).
[111] "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (1952).
[112] "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (1952).
[113] "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." 28 U.S.C. § 1441(c) (1952). See American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), 19 A.L.R.2d 738.
[114] 28 U.S.C. § 71 (1946).

the present section and joinder of separate and independent claims and causes of action is substituted. Under the former section the courts were in conflict, in removed cases, as to whether a counterclaim interposed by a defendant could be deemed part of the "controversy" between the plaintiff and defendant. For example, in *Lee v. Continental Ins. Co.*,[115] plaintiff had instituted his action in a court of Utah Territory claiming damages for less than the jurisdictional minimum and the defendant had interposed a counterclaim against the plaintiff seeking money damages in excess of that requirement, the counterclaim being of a class which defendant was required by local statute to present in the local action on pain of being forever barred from litigating it. In denying a motion to remand, the federal court said:

> . . . my inclination is to adopt the conclusion that the amount involved in a counterclaim is a part of the subject-matter in dispute, within the meaning of the act of congress conferring jurisdiction upon the federal court, and that inclination is strongly fortified in the case at bar by the terms of the Utah statute. . . . "The matter in dispute," to use the phraseology of the act of congress in question, is not only the $1,000 which the plaintiff sues for, but it is that which, of necessity, under the statute in question, must be litigated in connection with it.[116]

Pertinent here is the last quoted phrase which, it would seem, bases the fusion of the amount of the counterclaim with the amount sought by the plaintiff upon the compulsory nature of the counterclaim. The same construction has been adopted in recent cases which followed the principle of the *Lee* case.[117]

However, some of the earlier cases permitted removal on the basis of a counterclaim even when the counterclaim was not compulsory under the state practice, though permitted by state statute. Illustrative of this line of cases is *Clarkson v. Manson* [118] which was an action brought in a New York state

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[115] 74 Fed. 424 (C.C.D. Utah 1896).

[116] *Id.* at 425.

[117] See Lange v. Chicago, R.I. & P.R.R., 99 F. Supp. 1 (S.D. Iowa 1951); McLean Trucking Co. v. Carolina Scenic Stages, Inc., 95 F. Supp. 437 (M.D. N.C. 1951); Wheatley v. Martin, 62 F. Supp. 109 (W.D. Ark. 1945).

[118] 4 Fed. 257 (C.C. S.D. N.Y. 1880). See Judge Hough's opinion quoted in Yankaus v. Feltenstein, 244 U.S. 127, 131-133 (1917).

court for less than the jurisdictional minimum (at that time $500). The defendant counterclaimed for $750 damages arising out of the same transaction. The court denied the remand motion, saying: "But there is nothing to prevent a state court from allowing an insufficient amount in dispute to become an adequate amount, under the act of 1875,[119] or prevent such insufficient amount from becoming an adequate amount under that act by the operation of the statute of New York and the lawful acts of the parties to the suit thereunder." [120]

The *Clarkson* case[121] was distinguished, however, in *Haney v. Wilcheck*[122] on the ground that there the underlying theory was that the counterclaim was in effect a separate suit in which the original defendant became the plaintiff, and was removable under the provisions of the then existent removal statute, which allowed *either plaintiff or defendant* to remove, whereas now only a nonresident defendant may remove in a diversity case.[123]

Following the distinction made in the *Lee* case,[124] many of the cases wherein removal was denied, involved actions where the counterclaim was permissive and not compulsory. However, the *rationale* of these cases has generally been that only the claims of the plaintiff may be considered in determining what in fact is the "matter in dispute." [125]

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[119] 18 STAT. 470 (1875).

[120] Clarkson v. Manson, *supra* note 118 at 262. In New York, all counterclaims are still permissive. N.Y. CIV. PRAC. ACT § 266. It should be kept in mind that the petition for removal is now filed in the federal court, and not, as heretofore, in the state court. 28 U.S.C. § 1446 (1952). Other cases permitting removal, though the counterclaim was not compulsory, are: Price & Hart v. T. J. Ellis & Co., 129 Fed. 482 (C.C. E.D. Ark. 1904); Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578 (C.C. E.D. Mo. 1889). See Note, *Suits Removable*, 10 Fed. 692 (1882).

[121] 4 Fed. 257 (C.C. S.D. N.Y. 1880).

[122] 38 F. Supp. 345 (W.D. Va. 1941). Other cases cited therein as supporting the same position are: Hansen v. Pacific Coast Asphalt Cement Co., 243 Fed. 283 (S.D. Cal. 1917); Bennett v. Devine, 45 Fed. 705 (C.C. S.D. Iowa 1891); Falls Wire Mfg. Co. v. Broderick, 6 Fed. 654 (C.C. E.D. Mo. 1881). McKown v. Kansas & T. Coal Co., 105 Fed. 657 (C.C. W.D. Ark. 1901), was cited as denying removal on the ground that the counterclaim was permissive.

[123] See p. 214 *supra*.

[124] 74 Fed. 424 (C.C. D. Utah 1896).

[125] "It seems further to be the rule that it is the claim of the plaintiff, and not the counterclaim of the defendant, which fixes the amount in dispute in determining the right to remove the cause." Enger v. Northern Finance Corp.,

Has the Judicial Code of 1948 settled this question? In *Collins v. Faucett*,[126] plaintiffs—husband and wife—sued defendant in 1949 in a Florida state court for damages of $1,000 and $2,500 respectively. Defendant filed a counterclaim in the state court for $3,500, growing out of the same cause of action and simultaneously filed a petition for removal to the federal district court, asserting the counterclaim as the basis for removal. Plaintiffs moved to remand. The opinion does not indicate that the counterclaim was compulsory either under state or federal law, although under federal law it could be considered compulsory.[127] The district court, in granting the motion, cited no cases and rested its decision solely on the text of the removal statute and its statutory history. It said:

> It seems obvious to this court that the members of Congress, in charge of the revision of Title 28, were fully aware of the conflict in the decisions of the courts on this question and, in fact, they say so in the Reviser's Notes to Section 1441.[128] If Congress had desired to grant to a defendant the right to remove a case from a State Court to a Federal Court based solely upon a counterclaim it could have, and undoubtedly would have, done so in clear unambiguous language. The Section gives no such right to a defendant. . . .[129]

Such an analysis does, in a sense, achieve a cutting of the Gordian knot. Primarily, it would seem to confirm the interpretation which finds in the amendment a congressional purpose to "narrow the federal jurisdiction on removal," [130]

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31 F.2d 136, 139 (D. Minn. 1929). "The question is, to say the least, a doubtful one, and where a substantial doubt exists as to the jurisdiction of the federal court the cause should be remanded." Crane Co. v. Guanica Centrale, 132 Fed. 713 (C.C. S.D. N.Y. 1904). See La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645 (C.C. E.D. Wis. 1891).

[126] 87 F. Supp. 254 (N.D. Fla. 1949), 49 MICH. L. REV. 134 (1950).

[127] FED. R. CIV. P. 13.

[128] The court possibly had in mind the following Reviser's Note: "Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation." 28 U.S.C. § 1441 (1952).

[129] Collins v. Faucett, *supra* note 126 at 255.

[130] *Cf.* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107 (1941). "The Congress, in the revision, carried out its purpose to abridge the right of removal." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 10 (1951), 19 A.L.R.2d 738 (The actual holding was that a separable controversy is no

and which has been endorsed by some writers on the subject.[131] The removal cases which have been concerned with Section 1441(c) have been primarily those involving the question whether a separate and independent claim or cause of action, which would be removable if sued upon alone, may be removed when it is joined with one or more otherwise non-removable claims or causes of action, or whether a defendant's cross complaint may justify removal. The courts were not directly concerned with the monetary minimum.[132]

The difficulty with full acceptance of the holding in *Collins v. Faucett* [133] is that the court, without express analysis, ignored the *Lee* case and other like cases, discussed *supra,* which were bottomed on the compulsory nature of the counterclaim. Furthermore, there are at least two cases following the *Lee* line of reasoning which were decided subsequent to the 1948 enactment of the Judicial Code which did not consider the approach deemed determinative in *Collins v. Faucett.*[134] These are *McLean Trucking Co. v. Carolina Scenic Stages, Inc.*[135] and *Lange v. Chicago, R.I. & P.R.R.*[136] In the *McLean* case, the court held: "It may be conceded in this case that the above authorities sustain the position of the plaintiff generally and in cases where the counter-claim is optional. Those authorities are not controlling, however, where, as here, the cause of action is one and inseparable, where the claim of defendant, if asserted at all, must be

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longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. Query: Is a counterclaim a separate and independent claim or cause of action?).

[131] See MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE (1949); 49 MICH. L. REV. 134 (1950).

[132] See American Fire & Casualty Co. v. Finn, *supra* note 130; Mayflower Industries v. Thor Corp., 184 F.2d 537 (3d Cir. 1950), *cert. denied,* 341 U.S. 903 (1951); Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788 (5th Cir. 1949); Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680 (W.D. Ark. 1951); Doran v. Elgin Cooperative Credit Ass'n, 95 F. Supp. 455 (D. Neb. 1950). *Contra:* President & Directors of Manhattan Co. v. Monogram Assoc., Inc., 81 F. Supp. 739 (E.D. N.Y. 1949).

[133] 87 F. Supp. 254 (N.D. Fla. 1949).

[134] *Ibid.*

[135] 95 F. Supp. 437 (M.D. N.C. 1951).

[136] 99 F. Supp. 1 (S.D. Iowa 1951). See also Trullinger v. Rosenblum, 125 F. Supp. 758 (E.D. Ark. 1954); Rosenblum v. Trullinger, 118 F. Supp. 394 (E.D. Ark. 1954); Wright v. Lupton, 118 F. Supp. 25 (W.D. Mo. 1954).

asserted in the first action." [137] In the *Lange* case, plaintiff in an Iowa state court sued to recover $816. The defendant filed a counterclaim for damages of $3,300 alleged to have been sustained in the same collision, as required by the Iowa Rules of Civil Procedure, and filed a petition for removal to the federal court. In denying a motion to remand, the district court held that the requisite jurisdictional amount was involved so as to authorize removal and that the defendant did not voluntarily submit itself to the jurisdiction of the state court by filing its counterclaim.

> To hold as plaintiff contends that we may look only to the amount stated in the plaintiff's complaint, would be to encourage persons with small claims who might be subject to a claim by a nonresident for a very considerable amount to race to the State court of Iowa, and of states with similar procedural rules as to counterclaims, in order that they might be first to sue and thus deprive the nonresident of his right to resort to the United States district courts.[138]

Thus, it is still uncertain whether the holding in *Collins v. Faucett* is controlling. It has, however, been persuasively suggested that: "The simplest rule, and one which would be in line with the plaintiff's viewpoint theory, as well as the policy of restricting federal jurisdiction, would be a requirement that plaintiff's complaint show that an amount exceeding $3,000 exclusive of interest and costs, be in controversy, and no counterclaim would be considered to make up that amount." [139]

Exclusive of Interest and Costs

Sections 1331 (federal question) and 1332 (diversity of citizenship) of Title 28 both require that the matter in controversy exceed the sum or value of $3,000, exclusive of interest and costs.

Ordinary interest, namely, that sum which is added for the nonpayment of the debt when due, may not be considered

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[137] McLean Trucking Co. v. Carolina Scenic Stages, Inc., *supra* note 135 at 438.
[138] Lange v. Chicago, R.I. & P.R.R., *supra* note 136 at 3.
[139] Note, 28 N.C. L. Rev. 414, 417 (1950).

to determine whether the jurisdictional minimum is present. Thus, in an early case, the Supreme Court dismissed an appeal in a libel action for lack of jurisdiction when the original claim was below the minimal requirement, even though, at the time of appeal, by reason of the addition of interest up to the time of trial, the sum exceeded $2,000, the then minimum.[140] Where, however, the interest was specifically allowed by the decree, it was held that the interest must be included with the principal in order to determine what the sum or value in dispute was at the time the appeal was taken and allowed.[141]

In these cases it should not be overlooked that the former question of monetary minimum for purposes of appeal differed from the present minimum requirement for district court jurisdiction.

In the case of negotiable bonds which have coupons attached denominated "interest," the identity of words has not caused, as it might have, semantic confusion. The Supreme Court pointed out that ". . . when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation," [142] and the face amount of such coupons may be added to the amount of the bond to provide jurisdiction.[143] However, the actual interest on the bonds after maturity, and on the coupons after maturity, cannot be aggregated to the principal amount to provide the jurisdictional requirements.[144]

A similar result has been reached in insurance cases. Thus, where an insured sought to recover the amount of

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[140] Udall v. The Steamship Ohio, 17 How. 17 (U.S. 1854); see Kenholz v. Bache, 184 F.2d 974 (5th Cir. 1950).

[141] Massachusetts Benefit Ass'n v. Miles, 137 U.S. 689 (1891); District of Columbia v. Gannon, 130 U.S. 227 (1889); The Rio Grande, 19 Wall. 178 (U.S. 1873).

[142] Edwards v. Bates County, 163 U.S. 269, 272 (1896).

[143] *Ibid.* See Tyler County v. Town, 23 F.2d 371 (5th Cir.), *cert. denied*, 278 U.S. 601 (1928); Thronateeska Pecan Co. v. Matthews, 277 Fed. 361 (5th Cir. 1921); Glen Investment Co. v. Romero, 254 Fed. 239 (8th Cir. 1918); Comment, 10 TULANE L. REV. 289 (1936).

[144] Kenholz v. Bache, *supra* note 140; City of Pawhuska v. Midland Valley R.R., 33 F.2d 487 (8th Cir. 1929); Greene County v. Kortrecht, 81 Fed. 241 (5th Cir. 1897).

premiums paid ($1,945.80) with interest ($1,412.97) the appellate court dismissed *sua sponte,* holding that in such a case interest was merely "accessory and incidental to the sums thus paid." [145]

Even though, in a suit on a promissory note, interest not paid when due was to be regarded as principal and itself bear interest, it was held that such interest was accessory and not part of the principal demand for the purpose of determining the amount in controversy.[146] But where a supersedeas bond was given covering both the face amount of the judgment and interest which together aggregated the jurisdictional amount, a suit on the bond was within the federal jurisdictional minimum.[147]

Where the action sounds in tort, it is clear that the same criterion applies: Is the interest sought "interest as such" or is it ". . . the use of an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand"? [148]

An interesting example is *Chesbrough v. Woodworth.*[149] There, in an action for damages for fraudulent representation as to the value of stock purchased by plaintiff at the price of $1,450 (jurisdictional minimum then $2,000) the court held that the jury might properly allow plaintiff ". . . an annual percentage, not as collateral interest, but as an element in giving her entire compensation for her loss. Damages of that kind, although computed at a percentage rate and equivalent to contract interest, would not be that 'interest' which the jurisdictional statute . . . says must be excluded." [150]

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[145] Security Mut. Life Ins. Co. v. Harwood, 16 F.2d 250, 251 (1st Cir. 1926); see Athan v. Hartford Fire Ins. Co., 73 F.2d 66 (2d Cir. 1934); Gilliland v. Colorado Life Co., 15 F. Supp. 367 (W.D. Mo. 1936); Voorhees v. Aetna Life Ins. Co., 250 Fed. 484 (D. N.J. 1918). *Contra:* Continental Casualty Co. v. Spradlin, 170 Fed. 322 (4th Cir. 1909); Brush v. World Fire & Marine Ins. Co., 33 F.2d 1007 (S.D. Fla. 1929).

[146] Fritchen v. Mueller, 27 F.2d 167 (D. Kan. 1928).

[147] Fitchner v. American Surety Co., 2 F. Supp. 321 (N.D. Fla. 1933); *cf.* Reynolds v. Reynolds, 65 F. Supp. 916 (W.D. Ark. 1946).

[148] Brown v. Webster, 156 U.S. 328, 329 (1895).

[149] 251 Fed. 881 (6th Cir. 1918), *aff'd,* 252 U.S. 83 (1920).

[150] *Id.* at 883. See York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds,* 326 U.S. 99 (1945); Simecek v. United States Nat. Bank, 91 F.2d 214 (8th Cir. 1937).

By logical extension of this doctrine, when the interest is in the nature of a "penalty" it may be considered in determining the jurisdictional amount.[151]

ATTORNEY'S FEE AS COSTS

Although Sections 1331 and 1332 of Title 28 do not specifically refer to an attorney's fee, the question has arisen at times whether this fee is included in the word "costs," and, therefore, not a part of "the sum or value" for purposes of determining the jurisdictional amount.[152] Taxation of costs is provided for in Title 28, Section 1920 (taxation of costs)[153] and also in Section 1923 (docket fees and costs of briefs).[154]

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[151] See Note, *Interest and Costs in Determining Federal Jurisdiction*, 94 U. OF PA. L. REV. 401, 406 (1946). See, *e.g.*, Cahill v. Hovenden, 132 F.2d 422 (10th Cir. 1942); Kansas City Southern Ry. v. Ogden Levee Dist., 15 F.2d 637 (8th Cir. 1926); American Union Ins. Co. v. Lowman Wine & B. Co., 92 F. Supp. 881 (W.D. Mo. 1950).

[152] See Note, *supra* note 151.

[153] "A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." 28 U.S.C. § 1920 (1952).

[154] "(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing in civil, criminal or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;
$50 in admiralty appeals involving not over $5,000;
$100 in admiralty appeals involving more than $5,000;
$5 on discontinuance of a civil action;
$5 on motion for judgment and other proceedings on recognizances;
$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;
$50 where the amount involved is not over $5,000;
$75 where the amount involved is over $5,000." 28 U.S.C. § 1923 (1952).

It seems fairly obvious that such costs may not be used to compute the requisite jurisdictional sum.[155]

Normally, too, an attorney's fee is itself not part of the "cause of action" or "claim," [156] so as to be added to the principal sum. But exception has been made in certain types of actions. Thus, in what is a leading case in this field, *Springstead v. Crawfordsville State Bank*,[157] the Supreme Court held that, where a promissory note provided for payment of a reasonable attorney's fee if suit was brought, such fee was not costs, but includible to determine the jurisdictional amount. The Court said:

> It may be that the agreement to pay an attorney's fee in the event of suit created only an accessory right (though under *Brown v. Webster*, 156 U.S. 328, this is doubtful), but nevertheless it gave a right to recover and created a legal obligation to pay. It is true its effectiveness was dependent upon suit being brought, yet the moment suit was brought the liability to pay the fee became a "matter in controversy" and as such to be computed in making up the requisite jurisdictional amount. . . .[158]

Such an obligation to pay an attorney's fee, it would seem, is contractual in its nature.

What is the answer, however, where the obligation is statutory, *i.e.*, where a state statute provides that in certain types of cases, attorney's fees are taxable as costs in the state court? Since, by statute, an attorney's fee is only allowable upon entry of judgment, some of the early cases held that such a fee could not be included to make up the requisite jurisdictional amount.[159]

In *People of Sioux County v. National Surety Co.*[160] the Supreme Court clarified the problem by pointing out that

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[155] Cogswell v. Tribune Co., 16 F. Supp. 631 (S.D. N.Y. 1936); Baker v. Howell, 44 Fed. 113 (C.C. D. Nev. 1890).

[156] See FED. R. CIV. P. 8, describing a claim for relief.

[157] 231 U.S. 541 (1913).

[158] *Id.* at 542. See Nathan v. Rock Springs Distilling Co., 10 F.2d 268 (6th Cir. 1926); Alropa Corp. v. Myers, 55 F. Supp. 936 (D. Del. 1944); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); LeRoy v. Hartwick, 229 Fed. 857 (E.D. Ark. 1916).

[159] Peters v. Queen Ins. Co., 182 Fed. 113 (C.C. S.D. Ga. 1910); Swafford v. Cornucopia Mines, 140 Fed. 957 (C.C. D. Ore. 1905).

[160] 276 U.S. 238 (1928).

although a state statute of this type may denominate such additional allowance for an attorney's fee as "costs" to be included in the judgment, such an allowance is not "costs" in the traditional sense. The Court said:

> The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R.S. §§ 823, 824. That the particular mode of enforcing the right provided by the state statute—i.e., by taxing the allowance as costs—is not available to the federal courts under R.S. §§ 823, 824 does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.[161]

The rationale appears to be that where the state policy makes the inclusion of such fees mandatory in the state court judgment for costs, removal should not thwart the policy.[162]

The problem was even more explicitly presented by the Supreme Court in *Missouri State Life Ins. Co. v. Jones*.[163] As stated by the Court: "In a removal proceeding based upon diversity of citizenship, is it proper to treat attorneys' fees imposed by the Arkansas statute and claimed by the plaintiff, as part of the sum necessary for jurisdiction in the federal court?" [164] The Court, citing the *Sioux County* case,[165] answered its question in the affirmative, saying: "In the state court the present respondent sought to enforce the liability imposed by statute for his benefit—to collect something to which the law gave him a right. The amount so demanded became part of the matter put in controversy by the complaint, and not mere 'costs' excluded from the reckoning by the jurisdictional and removal statutes." [166]

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[161] *Id.* at 244.

[162] Fidelity-Phenix Fire Ins. Co. v. Cortez Cigar Co., 92 F.2d 882 (5th Cir. 1937), *cert. denied*, 303 U.S. 636 (1938); New York Underwriters' Fire Ins. Co. v. Malham & Co., 25 F.2d 415 (8th Cir. 1928); Orlando Candy Co. v. New Hampshire Fire Ins. Co., 51 F.2d 392 (S.D. Fla. 1931); Kellems v. California CIO Council, 6 F.R.D. 358 (N.D. Cal. 1946); see Prudential Ins. Co. v. Carlson, 126 F.2d 607 (10th Cir. 1942).

[163] 290 U.S. 199 (1933), 12 TEXAS L. REV. 363 (1934).

[164] Missouri State Life Ins. Co. v. Jones, *supra* note 163 at 200.

[165] People of Sioux County v. National Surety Co., 276 U.S. 238 (1928).

[166] Missouri State Life Ins. Co. v. Jones, *supra* note 163 at 202. See Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Merrigan v. Metropolitan Life Ins. Co., 43 F. Supp. 209 (E.D. La. 1942); Ray v. New York Life Ins. Co., 20 F. Supp. 497 (W.D. La. 1937).

While the attorney's fee may be included to determine the amount in controversy, it should be noted that there is a limit of reasonableness on the amount of the fee which may be included. Thus, where an action was brought by an insured on an insurance policy for unpaid disability benefits amounting to no more than $1,300, which sum, when added to $500 hospital expenses and 12 per cent statutory penalty, totalled only $2,016, necessitating a sum in excess of $984 as an attorney's fee to make up the requisite jurisdictional amount, the court held that the claimed attorney's fee was so unreasonable as to preclude federal jurisdiction.[167]

The purpose of this rather extensive discussion has been to point up some of the problems which are present in various cases when the monetary minimum is a prerequisite to federal jurisdiction. As indicated, a number of these problems have not been conclusively resolved. It is hoped that this paper may be of some help to their solution.

[167] Colorado Life Co. v. Steele, 95 F.2d 535 (8th Cir. 1938); see New York Life Ins. Co. v. Greenfield, 154 F.2d 953 (5th Cir. 1946) (The disability claim was only for $1,250 so that the attorney's fee would have had to be over $1,750.).